Health Law I
Professor Pope
Class 20: Nov. 1, 2011

Alternative Theories
Vicarious Liability

Direct

Direct
Vicarious

Respondeat superior
Actual agency
Employer-employee
Mater-servant
Choose when, where and how they perform services

Provide facilities, equipment, tools and supplies

Directly supervise the services

Set the hours of work

Require exclusive services (individual cannot work for your competitors while working for you.)

Set the rate of pay

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Employee/employer relationship

Control over work

The employee has the right to direct the manner in which the work is performed. However, the employer retains the right to require work to be performed in a high level of independence.

Power to delegate

The employee usually provides labour services for one person. The employee would reasonably be expected to perform work personally.

Tools and equipment

Ordinarily provided by the employer except where specifically agreed otherwise.

Independence

Employees have a duty to perform work for the employer as directed or in accordance with an employment contract.

Mode of payment

Worker receives payment irrespective of output. For example hourly rates or commission. Payments for work are made directly to the employee, not to an intermediary such as a company, partnership or trust.

Worker accrues paid leave entitlements.

Legal liability

The employee is legally liable for the work.

Commercial risk

The employee is not liable for costs arising out of injury or death in carrying out the work.

Independent contractor

Typically the contractor has a higher level of independence in the way the work is performed, within the terms of the contract for the work.

Freely to work for others. May arrange for some or all of the work to be done by others without the approval of the principal (legation rights).

Provides significant tools and equipment that are integral to business.

The contractor may perform duties in accordance with the contract, but not in other ways except by agreement.

Submission of invoices.

Business rates, etc.

Not paid leave entitlements.

The contractor bears the risk and is able to benefit from good management.

The contractor is responsible for remediating any defective work at their own expense.
Master is liable for the torts of:

1. **Servants**
   - Agents over whom master has right to control physical conduct (e.g. "employees")
   - Contrast "independent contractors"

2. Acting in **scope of employment**

**EXCEPTION:** Master is **NOT** liable for torts of servant acting in scope of employment **IF**:

Servant is “borrowed” by another master and under the control of that other master

**Apparent agency**

**Ostensible agency**
Even if actor is not an actual agent, the principal could still be liable where the patient had **reasonable belief** that the actor was acting as principal’s agent.

Regardless of actual, specific arrangement

From perspective of reasonable patient
Reliance by patient not required

Affirmative misrepresentation not required

Franklin v. Gupta

Theories to hold surgeon liable for negligent acts of others

Captain of the ship (status)

Borrowed servant (actual control)

Agency through business entity
Hospital Vicarious Liability

Introduction

Independence of physicians and hospitals

Hospitals do not pay physicians
Physicians bill separate from hospital
E.g. Medicare Part A vs. Part B
Physicians practice in more than 1 hospital

**BUT** hospitals sometimes employ:
- Certain specialties
- Staff in teaching and government hospitals

Interdependence and symbiosis of physicians and hospitals
Physicians
Get to use hospitals
“Medical staff” -- those physicians that have admitting privileges

Hospitals
Get a source of patients

3 vicarious theories
Respondeat superior
Ostensible agency
Nondelegable duty
Apparent agency

Ostensible agency

Yes, I'm a radiologist. And yes I work at the hospital. And yes I'm the only choice the hospital offers. But why would you think I work for the hospital?

Restatement Torts § 429

1. Hospital held out services
2. Plaintiff looked to hospital, not individual physician for care
3. Person would reasonably believe physician was hospital employee
Nondelegable Duty Rule
Statutes and regulations evidence important public policy considerations

These cannot be “delegated” to independent contractors

Hospital duties for public policy reasons

E.g. statutes require hospital ER
E.g. regulations require ER procedures
E.g. JC requires ER plans & policies
E.g. hospital bylaws require supervise
Hospital
Patient
Nurse
Hospitalist
malpractice
Hospital
Vicarious Liability Cases

What are the legal bases for the hospital’s “charitable immunity doctrine” defense
Health Law I
Professor Pope
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Recapping Hospital Liability
Charitable immunity - gone


Is HCP employee

Yes: Hospital vicariously liable under respondeat superior
No

Is HCP ostensible agent

Yes: Hospital vicariously liable under ostensible agency
No
Is HCP ED HCP

Yes: Hospital vicariously liable under non-delegable duty doctrine

No: no vicarious liability

Hospital → Patient
Negligent selection
Negligent retention
Negligent supervision
Equipment, facilities

Hospital

Nurse
ER doc

Patient
In a patient's lawsuit for damages, a hospital CAN be found [CLICK ALL THAT APPLY]:

- Vicariously liable for the negligence of an employed nurse
- Vicariously liable for the negligence of a non-employed emergency room physician
- Directly liable for granting staff privileges to an incompetent physician
- Liable for violating EMTALA

A large object fell on Plaintiff and he was rushed to the Hospital, which was just a few blocks away. 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 delay in treatment caused Plaintiff injuries. Plaintiff has sued Hospital. But Hospital argues that the radiologist who reviewed the initial X-rays was not its employee and that while the X-ray laboratory occupied the ground floor of the Hospital, it was leased out and not part of the Hospital.
[SELECT ALL THAT ARE TRUE]
Plaintiff can hold hospital vicariously liable for the negligence of radiologist under respondeat superior

Plaintiff can hold hospital vicariously liable for the negligence of radiologist under ostensible agency

Plaintiff can hold hospital vicariously liable for the negligence of radiologist under the non-delegable duty doctrine

Nursing homes too

Scampone v. Grane
(Pa. Super. 2010)

Direct liability theories

Managed Care
Restrict patient choice
Utilization review
Prior authorization
Financial incentives through capitation & risk sharing pools

Direct
Negligent selection
Negligent retention
Negligent supervision
Negligent (UR)

Vicarious
Direct agency
Ostensible agency
MCO Vicarious Liability

Staff / group model
Docs work exclusively for HMO in centralized clinic
Strongest case for showing master-servant
HMO

IPAs

No centralized office – docs have own offices

Probably will fail to show master-servant

Can still show other vicarious liability theories

Baum & Baum

HMO
Boyd v. Albert

MCO Direct Liability

Direct
- Negligent selection
- Negligent retention
- Negligent supervision
- Negligent (UR)
  - Negligent reimbursement

Vicarious
- Direct agency
- Ostensible agency
MCO Direct Liability for UR
"Sorry, folks, but your insurance doesn't pay over more than one day in the mangos."
These are claims arising from a **coverage** decision.

We are **not** talking about other forms of direct and vicarious liability (e.g. malpractice).

Wickline

v.

California
1. Public
   a. Medicare
   b. Medicaid
   c. Other

2. Private
   a. Individual
   b. Employer

August 1976
Lois Wickline is treated by Dr. Daniels.

October 1976
Dr. Polonsky diagnoses Leriche syndrome.

January 6, 1977
Wickline is admitted.
Medi-Cal authorizes 10 days.
January 7, 1977
Dr. Polonsky repairs artery in leg

January 12, 1977
Complications
Lois needs follow-up surgery

January 16, 1977
Dr. Polonsky determines Lois needs 8 more days

January 16, 1977
Medi-Cal authorizes 4 more days

January 21, 1977
Dr. Polonsky discharges Wickline

January 23, 1977
Complications at home

January 25, 1977
Dr. Polonsky’s requested discharge date

February 8, 1977
Amputate leg
What theory of direct liability applies
Malpractice case against Medi-Cal
Why does Wickline lose
If Medi-Cal were liable, would Dr. Polonsky be off the hook?

- What about financial incentives
- Hold doc responsible if HMO not pay
ERISA Preemption
Introduction
WHY

- Combat fraud -- ERISA has a framework to guarantee beneficiaries the benefits they were promised by their employers
- Provide uniform regulation -- encourage national employers to provide employee benefits

Purpose 1 -- ensure that workers get promised benefits

Purpose 2 -- preemption, so interstate employers not have varying administration rules

This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land;

and the judges in every State shall be bound thereby,

anything in the Constitution or Laws of any State to the Contrary notwithstanding.
Effect of preemption

Deregulatory – bumps out the state law controls and remedies

“Virtually all state law remedies are preempted but very few federal substitutes are provided”

(Ginsburg, J.)

29 U.S.C. 1003(a)

[T]his subchapter shall apply to any employee benefit plan if it is established or maintained—

(1) by any employer engaged in commerce . . .

29 U.S.C. 1003(b)

[T]his subchapter shall not apply to any employee benefit plan if—

(1) plan is a governmental plan [Medicare] . .

(2) plan is a church plan . . .
Employer provided:
- State/local/fed gov. 14%
- Private employers 46%
- Privately purchased 10%
- Medicaid 12%
- Medicare 14%


Not just health insurance

Any plan, fund, program that provides medical, disability, death, unemployment, vacation, and other benefits

2 preemption provisions

Section 502
29 U.S.C. § 1132

Section 514
29 U.S.C. § 1144
Section 502

- Implied / complete preemption
- Gives federal jurisdiction
- Primarily affects tort & contract actions

Section 514

- Express / conflict preemption
- Primarily affects regulatory measures (but tort too)

514(a) – Express Preemption

“Except as provided in subsection (b) of this section, the provisions of [ERISA] shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . .”
A civil action may be brought . . . to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.
**Contractual**: recover plan benefits owed

**Injunctive**: enforce plan benefits

**Declaratory**: clarify future rights under plan

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(a) A civil action may be brought

(1) . . . (B) to **recover** benefits due to him under the terms of his plan, to **enforce** his rights under the terms of the plan, or to **clarify** his rights to future benefits under the **terms of the plan**;

(3) . . . (A) to **enjoin** any act or practice . . . obtain other appropriate **equitable relief** . . . **terms of the plan**

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**Value of the insurance benefit denied**
- No compensatory damages
  - No lost wages
  - No pain & suffering
  - No medical expenses
- No punitive damages
- No jury trial
502 remedies are **exclusive** (excluding state law)

If the gravamen of Complaint concerns denial of benefits, you **must** proceed under 502.

If claim is, at bottom, just about getting benefits owed

You **must** use ERISA.
ERISA claims can be litigated in either state or federal court.

28 U.S.C. 1441(a)

“[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant . . . to the district court . . . where such action is pending.
Problem: You did not get benefit entitled to under benefit plan

Is your health insurance provided by your employer?

No: ERISA does not apply

Sue under state contract law ex ante or ex post to get coverage

If denied and forgo recommended intervention, may be able to sue in tort for injuries
Problem: You did not get benefit entitled to under benefit plan

Is your health insurance provided by your employer?

Yes: Must analyze ERISA

Could this claim have been brought under 502 (i.e., is this claim about getting owed benefits)

No: not preempted by 502

No: ERISA does not apply

Sue under state contract law ex ante or ex post to get coverage

If denied and forgo recommended intervention, may be able to sue in tort for injuries
Could this claim have been brought under 502 (i.e. is this claim about getting owed benefits)?

Yes: preempted by 502

If PTF made tort claim in state court:

DEF can remove to US DCT

DEF can move to dismiss as preempted

PTF can amend to state claim under 502 – otherwise state law claims will be dismissed.
Patient sues HMO on direct and vicarious liability theories

HMO removes to federal court and argues ERISA preempts

Preempted: If successful, plaintiff gets ERISA remedies

Not preempted: If successful, plaintiff gets tort remedies

Could this claim have been brought under 502 (i.e. is this claim about getting owed benefits)

Preempted
- Negligent UR

Not preempted
- Vicarious liability for negligent treatment
- Negligent selection & retention
Preempted
- Coverage
- Quantity of benefits
- Eligibility
- Administrative

NOT Preempted
- Treatment
- Medical appropriateness
- Quality of care

Aetna v. Davila

Aetna

CIGNA

MCO conduct

Result
MCO conduct
Davila
- Aetna denies coverage for Vioxx
- D takes covered cheaper alternative
- Side effect intestinal bleeding

Calad
- Cigna denies coverage for extended hospital stay
- Post-surgery complications

Injured patients (e.g. Davila, Calad) do not want preemption
- Contractual damages (benefits owed under plan)
- No compensatory damages
- No punitive damages
- No jury trial

5th Cir. – not preempted
- These are tort claims
- They are not duplicative of 502 remedies

Why does SCOTUS reverse
- 5th Cir. – not preempted
  - These are tort claims
  - They are not duplicative of 502 remedies
- Why does SCOTUS reverse

Gallagher v. CIGNA
MCO - Case 1

MCO denied approval of hospitalization for pregnant high-risk woman.

During hours when nurse was not present at her home, the fetus went into distress and died. Mother brought a Wickline claim.

MCO - Case 2

Man family history of heart disease has with chest pain.

MCO telephone triage nurse says that it is just gastric upset.

Wrong.
MCO - Case 3
Snafu at the MCO delayed a pregnant woman’s ultrasound appointment for three days.
Before the appointment, she delivered a very large baby with shoulder dystocia.
MD would have done a c-section if ultrasound had been done.

MCO - Case 4
Man with paralysis in extremities is told he needs spinal surgery immediately.
Small hospital transfers him to University Hospital, but MCO won’t approve surgery there.
Eventually, another hospital is found, but only after surgery is delayed.
He never recovers use of his limbs.

Gallagher v. CIGNA
Maine Health Improvement Act
Breach of contract
IIED
NIED