

Health Law: Quality & Liability

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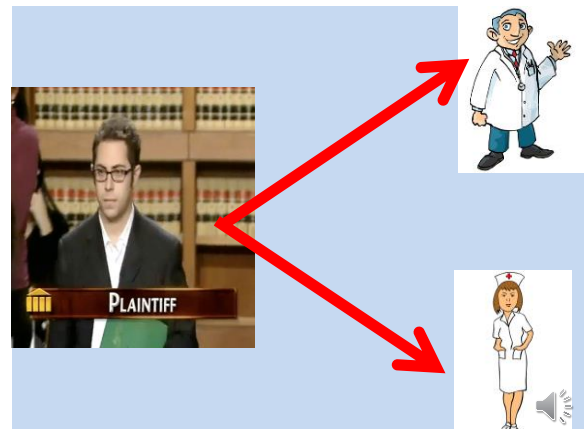
Hospital Liability -
Vicarious



Hospital Liability



We have been
focusing on
individual clinician
malpractice



2 categories of
hospital liability:

1. Vicarious
2. Direct



Can be **both**
at the same
time



Can be **multiple theories** of both at the same time



3 vicarious theories



Respondeat superior
Ostensible agency
Nondelegable duty



4 direct theories



Negligent selection
Negligent retention
Negligent P & P
Equipment, facilities



Vicarious Liability



Malpractice is that of
the individual
clinician

But H responsible



2 stages of analysis

(each with sub-
elements)



First, establish
liability against the
individual clinician
(even if not a DEF)

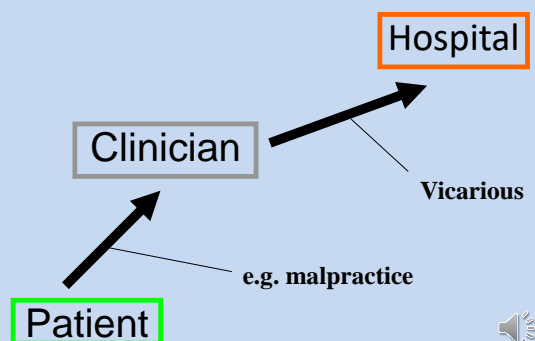


Then establish
relationship between
clinician & hospital
(that justifies vicarious
liability)



Hospital **not** at fault

But **responsible** for
paying for its agent's
torts



OPTION 1

Sue **only** the hospital



OPTION 2

Sue **both** hospital
and individual
clinician



Only **one** recovery
(up to 100% of
damages for injury)



**3 vicarious
theories**



Respondeat superior
 Ostensible agency
 Nondelegable duty



1

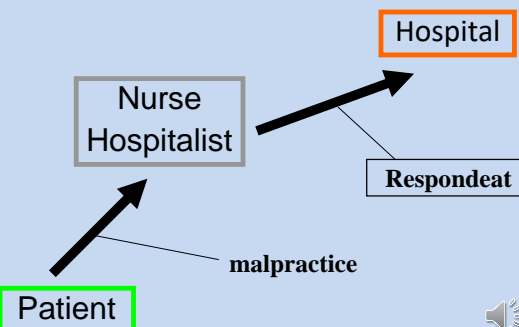


**Respondeat
 superior**




Respondeat superior

aka Actual agency
 aka Employer-employee
 aka Master-servant



Respondeat
 should be **lead
 theory** of
 vicarious liability
 – if have facts





Nurses






Table 1 - Personnel Expense and Contract Labor By Type of Facility During 2003 (\$millions)

Type of Facility	Number Facilities	Salary Expense	Contract Labor	Fringe Benefits	Operating Revenue	Personnel Expense ²	Contract Labor ³
Childrens	51	\$4,668	\$11	\$433	\$10,208	50.1%	0.2%
Critical Access	770	\$2,881	\$10	\$519	\$6,408	53.2%	0.3%
Long Term	295	\$2,310	\$57	\$371	\$5,323	51.4%	2.1%
Other	16	\$17	\$0	\$1	\$17	108.4%	0.0%
Psychiatric	345	\$3,854	\$4	\$447	\$5,086	84.7%	0.1%
Rehabilitation	218	\$1,714	\$26	\$290	\$3,872	52.4%	1.3%

Physicians

Physicians as employees

1983 < 20%

2017 > 50%

55+	40%
40-54	50%
30-40	60%

Master liable for torts of:

- Servants
- In scope of employment

Scope of employment

When clinician acting as clinician

Not when physician doing own thing



Employment not always black & white



If HCP is called an “employee” → they probably are



If HCP is **called** an “independent contractor” → they may still be an employee



	Employer/employee relationship	Independent contractor
Control over work	The employer has the right to direct the manner in which the work is performed. However, skilled workers may be extended a high level of independence.	Typically the contractor has a higher level of independence in the way the work is performed, within the limits of the contract for the work.
Power to delegate	The employee usually provides labour/services for one payer. The employee would reasonably be expected to perform work personally.	Free to work for others. May arrange for some or all of the work to be done by others without the approval of the principal (delegation rights).
Tools and equipment	Ordinarily provided by the payer except when specifically agreed otherwise.	Provides significant tools and equipment that are integral to business.
Independence	Employees have a duty to perform work for the employer as directed or in accordance with an employment contract.	The contractor must perform duties in accordance with the contract, but not in other roles except by agreement.
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.	Payment based on results not the time taken. Submission of invoices. Business name used. Not paid leave entitlements.
Legal liability	The employer is legally liable for the work.	The contractor is legally liable for the work performed under the contract.
Commercial risk	The employee is not liable for costs arising out of injury or defect in carrying out the work.	The contractor bears the risk and is able to benefit from good management. The contractor is responsible for remedying defective work at their own expense.



Employer - Employee

Look at amount of employer **control**



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



2



Ostensible agency



~50%
physicians are
not employees



Independence
of physicians &
hospitals



Physicians

Get to use hospitals

“Medical staff” -- those physicians that have admitting privileges



Hospitals

Get a source of patients

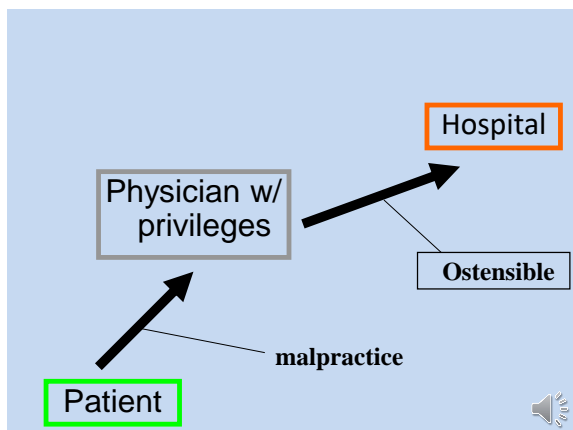


Apparent agency

Ostensible agency



Can argue if physician not employee **or** if not sure (as backup)



Even if actor is not an actual agent, the H could still be liable where patient had **reasonable belief** that the actor was acting as H's agent



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?



Regardless of actual, specific arrangement

From perspective of reasonable patient

Many (but not all) ostensible agency cases are ED cases

Not required

Reliance by patient

Affirmative representation by 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



What would RPP think → jury question



How can H
"dispel"
apparent
agency



- About Us
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- Locations
- Careers
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About Us

Methodist Healthcare is a healthcare delivery system based in Memphis, Tennessee, serving the communities of Eastern Arkansas, West Tennessee and North Mississippi. Methodist Healthcare operates seven hospitals, several general health clinics and a home health agency with approximately 10,249 Associates and 1,805 licensed beds.

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Mission Statement

Methodist Healthcare, in partnership with its medical staffs, will be the leader in providing high quality, cost-effective healthcare to benefit the communities we serve. Services will be provided in a manner which supports the health ministerial and Social Principles of the United Methodist Church.



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**Non-delegable
duty doctrine**



Certain **duties** imposed
on hospitals
Cannot be "delegated"
to independent
contractors



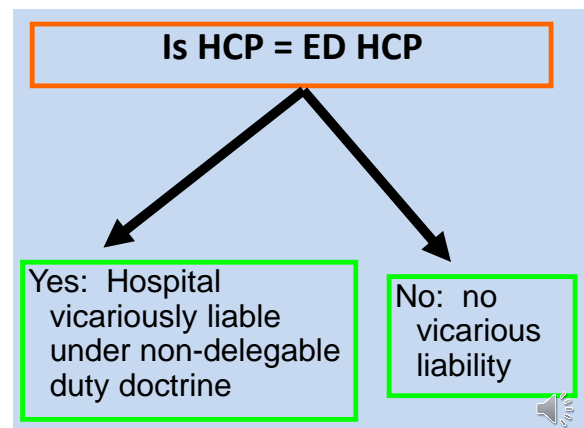
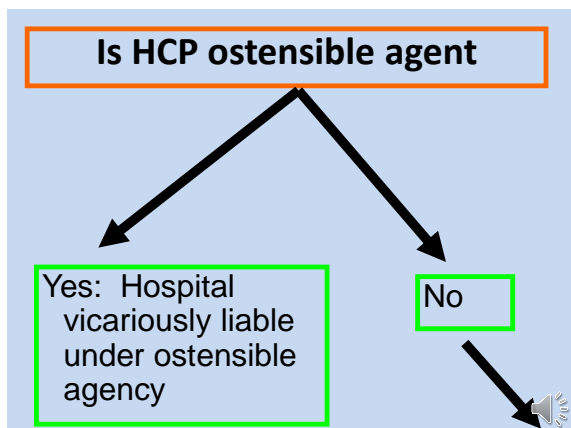
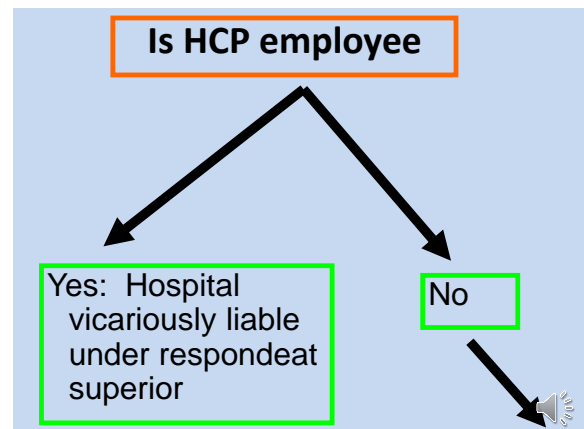
Statutes and regulations
evidence important
public policy
considerations



Statutes require hospital
have an ER
Regulations require
certain ER procedures
TJC requires ER plans &
policies



Recap & Summary



Hospital vicariously liable **ONLY IF BOTH**

1. Individual healthcare provider liable
2. Any 1 (or more) of 3 theories of vicarious liability established



Hospital vicariously liable for nurse/doc tort if

Nurse/doc is an **employee** of hospital (and tort committed in scope of employment)



Nurses almost always are employees

Is doc an employee? Make argument using **control** factors



Hospital vicariously liable for doc tort even if not employee, if

Doc is an **ostensible agent** of hospital



Usually easy for ED docs – because not chosen by Pt

Pt looks to H for treatment

Make argument for why reasonable for Pt to **think** doc is employee



Hospital vicariously liable for doc tort if

Doc fulfilling **non-delegable duty** of hospital (e.g. ED services)

