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# Liability Issues Arising From Hospitals' Use of Temporary Supplemental Staff Nurses

*Diana L. Nolte Huff\**

## I. INTRODUCTION

Hospital nursing shortages have been commonplace in the United States since 1946.<sup>1</sup> The current nursing shortage is disturbing to many people because of unknown short- and long-term effects of nursing staff deficits. The health care industry increasingly is becoming concerned about decreasing numbers of employed registered nurses ("R.N.s") and a possible corresponding decline in the quality of patient care.<sup>2</sup> In addition, poor quality of care creates potential liability problems for hospitals and nurses because they can be held accountable for acts of medical malpractice primarily attributable to the inadequate number of workers.<sup>3</sup> When a hospital is unable to staff units adequately with full-time R.N.s, it may resort to supplemental staffing means. Hospitals may obtain temporary nurses through private, independent agencies that either employ or refer supplemental nurses. Hospitals typically request the staffing agencies to find skilled nurses to satisfy specialized vacant shift requirements. The dispatching agency also is at risk for potential medical malpractice liability in instances of nursing negligence.<sup>4</sup>

This Article will discuss the liability issues arising from hospitals' use of temporary, supplemental staff nurses to fill current nursing care vacancies. First, the impact of the nursing shortage

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1. Buerhaus, *Not Just Another Nursing Shortage*, 5 NURSING ECONOMICS, 267 (1987). For two brief periods from 1968 to 1972 and 1980 to 1986, there was a sufficient supply of nurses. *Id.*

2. *Id.*

3. Boston, *Will the Nursing Shortage Lead to Liability Suits?*, HOSPITALS, November 20, 1987, at 64.

4. *Id.* at 67.

will be addressed.<sup>5</sup> Second, the Article will examine the professional responsibilities of the registered professional nurse.<sup>6</sup> Third, the agency's legal duty to screen and verify a professional nurse's qualifications and abilities before allowing that nurse to practice within a hospital setting will be discussed.<sup>7</sup> The Article continues with a review of the duty a hospital owes to individual patients for the health care rendered by nursing and medical practitioners within its boundaries.<sup>8</sup> Finally, the Article will address the interrelationship between the registered professional nurse, the employing agency, and the hospital that solicits supplemental staffing resources.<sup>9</sup>

## II. THE NURSING SHORTAGE

Current hospital nursing shortages exist even though the number of employed nurses has increased at a substantially greater rate than the general population in the last ten years.<sup>10</sup> This disparity is due primarily to advancing medical technology and increasing demand for skilled nursing professionals to provide detailed technical care.<sup>11</sup> Additional nursing responsibilities have increased since the onset of prospective payment methods for hospitalized Medicare patients.<sup>12</sup> Consequently, the nurse to patient ratio has risen from 50 nurses per 100 patients in 1975, to 85 nurses per 100 patients in 1985.<sup>13</sup> The current scarcity is consid-

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5. See *infra* notes 10-28 and accompanying text.

6. See *infra* notes 46-63 and accompanying text.

7. See *infra* notes 68-130 and accompanying text.

8. See *infra* notes 131-216 and accompanying text.

9. See *infra* notes 217-27 and accompanying text.

10. Aiken, *Nurses for the Future: Breaking the Shortage Cycle*, 87 A. J. OF NURSING, 1616 (1987). The number of R.N.s has increased by 49%, while the general population has increased by only 10%. *Id.*

11. N. MILLER, *THE NURSING SHORTAGE: FACTS, FIGURES, AND FEELINGS* 30 (1987).

12. The Health Care Financing Administration instituted a prospective payment mechanism for the reimbursement of Medicare patients that compensates hospitals according to the diagnosis of the patient. FURROW, JOHNSON, JOST & SCHWARTZ, *HEALTH LAW* 456 (1987). This system was instituted in an attempt to keep Medicare costs from continually rising and to prevent Medicare trust fund insolvency. *Id.* at 455. Briefly, the system is designed to categorize a patient's diagnosis into one of the 467 Diagnosis Related Groups (DRGs). The hospital is then reimbursed a fixed and predetermined amount of money based upon the DRG status. The amount reimbursed has nothing to do with the actual cost of treating the patient. Thus, the incentive of the hospital is to treat and discharge the patient quickly so the treatment cost is not in excess of reimbursement. *Id.* at 456-60.

13. *Nurse Shortages: Hearing Before the Subcomm. on Health of the Senate Comm. on Finance*, 100th Cong., 1st Sess. 61 (1987) (prepared statement of Charles Jenkins for the American Hospital Association).

ered unusual because it is so widespread. It involves all nursing specialties, all types of hospitals, and all regions of the country.<sup>14</sup> The average vacancy rate for R.N.s in hospitals jumped from 6.3% in 1985 to 13.6%.<sup>15</sup>

For a variety of reasons, nurses typically stay in the profession for an average of only three to four years.<sup>16</sup> If one considers the historical remedies to the nursing shortage, it should be of little surprise that nurses leave the nursing field. Efforts to relieve nursing shortages in the past have focused on short-term solutions. For example, in the 1950s and 1960s, hospitals substituted licensed practical nurses ("L.P.N.s") for R.N.s in order to provide adequate patient care.<sup>17</sup> By expanding the number of positions available for L.P.N.s, hospitals were able to fill R.N. vacancies without determining why nurses were leaving the field.<sup>18</sup> Hospitals also have resorted to "quick fix" methods such as recruiting foreign nursing graduates at a lower salary rate.<sup>19</sup> All of these methods kept nursing salaries low in spite of the increasing responsibility of the professional nurse.<sup>20</sup>

Other methods of alleviating nursing shortages were tried as well. During a shortage in 1964, Congress appropriated federal funds to educate more nurses,<sup>21</sup> resulting in an increase in the number of nursing degrees awarded. The American Nurses Asso-

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14. *Id.* (statement of the American Hospital Association); N. MILLER, *supra* note 11, at 30.

15. N. MILLER, *supra* note 11 at 37; Mann, "National Nurse Recruitment Campaign Launched," American Hospital Association news release (Aug. 20, 1987).

16. Powells, *Nurses: A Sound Investment for Financial Stability*, HOSPITALS, May 5, 1988 at 46, 47. According to one author, the number of years that a nurse delivers bedside nursing care varies according to education background: "R.N.s with master's or higher degrees have the highest participation rates as well as the highest number of years of expected employment; non-baccalaureate degree R.N.s have the second highest in both areas; and baccalaureate R.N.s have the lowest participation rates and years of expected employment." Buerhaus, *supra* note 1, at 267-70.

17. Buerhaus, *supra* note 1, at 267-68.

18. Prescott, *Vacancy, Stability, and Turnover of Registered Nurses in Hospitals*, RESEARCH IN NURSING AND HEALTH, March 1986, at 9, 51, 52.

19. Buerhaus, *supra* note 1, at 272.

20. Even though nursing positions require increasing skill levels, the pay schedules for nurses remain significantly lower when compared to typical male-dominated professions that carry the same degree of responsibility. Moskowitz, *Pay Equity and American Nurses: A Legal Analysis*, 27 ST. LOUIS U.L.J. 801, 803 (1983). Nursing shortages occur cyclically when wages fall behind the income of other professional women. Aiken, *supra* note 10 at 1617. For in depth discussions of other factors contributing to the nursing shortage see, e.g., Buerhaus, *supra* note 1; Fagin & Ginsberg, NURSES FOR THE FUTURE, 87 AM. J. OF NURSING, 1593 (1987).

21. Buerhaus, *supra* note 1, at 267, 272.

ciation ("A.N.A.")<sup>22</sup> believed this change would increase nursing professionalism. Rather, the effect was to promote enrollment in associate degree nursing programs.<sup>23</sup> Today, the greatest percentage of nursing students enroll in these programs, the simple reason being that the pay differential between baccalaureate ("B.S.N.") and associate degree nurses amounts to only a few cents more per hour.<sup>24</sup> In addition, associate degree programs allow their students to graduate twice as fast as those enrolled in a B.S.N. program, thereby rapidly increasing the supply of nurses.

Hospitals may turn to an in-house program or policy to cover a shortfall.<sup>25</sup> One example is the hospital "float" policy in which a nurse is pulled from a regular assignment and placed in an understaffed unit.<sup>26</sup> Another common strategy is to establish a "float pool" or in-house registry of nurses who are called to fill vacant nursing positions within the hospital.<sup>27</sup> The advantage to this method is that these employees already are oriented to the hospital's policies and procedures.<sup>28</sup>

### III. THE USE OF AGENCY NURSES

A current approach to filling vacant R.N. positions is the use of temporary nurses obtained through private, independent agencies. Studies have found that 30% of our nation's hospitals currently use temporary staffing agencies,<sup>29</sup> with the average number of shifts filled by temporary or contract R.N.s increasing from 6.7 in September 1985 to 10.8 in April 1987.<sup>30</sup> Hospitals using temporary nursing service agencies allot more vacancies for all nursing posi-

22. See *infra* notes 54, 58-63, 124-30, 184-99 and accompanying text for further discussion of A.N.A. standards for the nursing profession.

23. In 1985, of 1,473 basic R.N. programs, 53% were associate degree programs (776), 33% were B.S.N. degree programs (441), and 17% were diploma programs (256). N. MILLER, *supra* note 11 at 40.

24. Buerhaus, *supra* note 1, at 272. A survey questioning 6,000 directors of acute care hospitals revealed that these directors were willing to pay the B.S.N. nurse an extra 70 cents per hour over the A.D.N. nurse's salary. This compensation is for two added years of education. Ginzberg, *Nurses for the Future: Facing the Facts and Figures*, 87 AM. J. OF NURSING 1596, 1599 (1987).

25. Kehrer & Szapiro, *Temporary Nursing Services: Size, Scope, Significance*, 22 MEDICAL CARE 573 (1984).

26. Prescott, *Supplemental Nursing Services: How Much Do Hospitals Really Pay?*, 82 AM. J. OF NURSING 1208 (1982).

27. Kehrer & Szapiro, *supra* note 25, at 573.

28. See, e.g., Robertson, *infra* note 32, at 573; Bower, *infra* note 32, at 62-63.

29. This study was completed by the American Organization for Nurse Executives. Moss & Curran, *The Nursing Shortage Becomes a Growing Human Resource Priority*, TRUSTEE, May, 1987 at 13, 14.

30. NURSE SHORTAGES: HEARING BEFORE THE SUBCOMMITTEE ON HEALTH OF

tions compared to those that do not rely on temporary staffing agencies.<sup>31</sup>

Some hospitals use agency nurses as a last resort because they are a short-term and expensive solution to the nursing shortage.<sup>32</sup> Supplemental staffing agencies now compete with hospitals for R.N.s<sup>33</sup> by paying higher salaries;<sup>34</sup> offering health care coverage, bonuses, and vacation time;<sup>35</sup> and allowing flexible and autonomous scheduling.<sup>36</sup> On the other hand, many hospital administrators believe they are saving money by filling temporary intervals with agency nurses by keeping down the salaries of permanent employees down.<sup>37</sup>

This increasingly widespread practice gives rise to a number of liability issues when an agency nurse negligently injures a patient while working in a hospital as a temporary, supplemental staff member. The injured plaintiff potentially can recover damage awards from the agency nurse, the hospital, and the employing agency.<sup>38</sup> Each of these potential defendants owes separate and distinct duties to patients.

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THE SENATE COMMITTEE ON FINANCE, 100th Cong., 1st Sess. 60-61 (1987) (prepared statement of Charles Jenkins for the American Hospital Association).

31. Moss & Curran, *supra* note 29, at 13, 14.

32. See, e.g., Robertson, *Temporary Staffing: A Positive Approach*, 18 NURSING MANAGEMENT 80-82 (July 1987); Bower, *Evaluating Float Staff*, 18 NURSING MANAGEMENT 62-63 (December 1987).

33. News Section, *Agencies Engaging Hospitals in Salary Wars, Bidding Up Per-Diem Rates in Shortage Areas*, 87 AM. J. OF NURSING, 369 (1987).

34. News Section, *Where Salary Wars Are Hot, Agencies Play a Key Role*, 87 AM. J. OF NURSING 371, 373 (1987); News Section, *Bigger, Better Benefits Attract R.N.s to Agencies*, 87 AM. J. OF NURSING 370, 375 (1987).

35. *Where Salary Wars Are Hot, Agencies Play A Key Role*, 87 AM. J. OF NURSING at 378.

36. News Section, *Agencies Engaging Hospitals in Salary Wars, Bidding Up Per-Diem Rates in Shortage Areas*, 87 AM. J. OF NURSING at 369. Some agencies offer quarterly bonuses based upon the agencies' revenues and on the number of hours that the nurse worked. Some benefit plans include dental insurance, time and one-half pay on the nurse's birthday, licensure renewal reimbursement, referral bonuses, and Nurse of the Month awards. *Bigger, Better Benefits Attract R.N.s to Agencies*, 87 AM. J. OF NURSING at 375.

37. *Agencies Engaging Hospitals in Salary Wars, Bidding Up Per-Diem Rates in Shortage Areas*, 87 AM. J. OF NURSING at 380.

38. The author recognizes that, under certain circumstances, the plaintiff potentially can recover from the physician for the negligent acts of a nurse under the borrowed servant or the "captain-of-the-ship" doctrine. The scope of this Article, however, extends only to the three mentioned defendants.

## IV. LIABILITY ISSUES

A. *General Principles of Negligence*

The essential elements of a negligence complaint in a medical setting are no different from those in any other case. The defendant owes a duty to the plaintiff, and the subsequent breach of that duty must be the cause of injury to the plaintiff.<sup>39</sup> There are two components to the element of duty: first, it must be shown that a duty was owed to the person harmed; second, the extent of that duty must be demonstrated through an established standard of care.<sup>40</sup> The defendant's conduct "is a question of the standard of conduct required to satisfy the duty."<sup>41</sup> Whether a duty exists is a question of law to be determined by the judge, and the duty differs depending upon the task and qualification of each health professional.<sup>42</sup> A seminal case, *Darling v. Charleston Community Memorial Hospital*,<sup>43</sup> led the way in expanding hospital corporate responsibilities. Prior to the decision, hospitals had been found immune from tort liability on the grounds of charitable immunity.<sup>44</sup> In *Darling*, a teenage boy entered a hospital with a broken leg. Owing to a doctor's negligent treatment of the fracture, and the nurses' failure to observe for signs of gangrene, amputation was required to save the boy's life. The Illinois Supreme Court affirmed a sizable judgment in favor of the plaintiff partly on the grounds that the hospital had a duty to the patient to provide proper nursing care and consultation by specialists. *Darling* continues to stand for the proposition that hospitals have a duty to supervise the care given by employees as well as independent contracting physicians.<sup>45</sup> Moreover, because the decision opened a new area of liability, it serves as a guidepost for other states struggling with hospital liability issues.

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39. RESTATEMENT (SECOND) OF TORTS § 281 (1977).

40. *Kirk v. Michael Reese Hosp. and Med. Center*, 117 Ill. 2d 507, 524-26, 513 N.E.2d, 387, 397 (1987), *cert. denied*, 485 U.S. 905 (1988).

41. *Darling v. Charleston Community Hosp.*, 33 Ill. 2d 326, 332, 211 N.E.2d 253, 257 (1965), *cert. denied*, 383 U.S. 946 (1966)

42. *Kirk v. Michael Reese Hosp.*, 117 Ill. 2d at 525, 513 N.E.2d at 397 (1987) (citing *Wimmer v. Koenigseder*, 108 Ill. 2d 435, 484 N.E.2d 1088 (1985)); *Pelham v. Griesheimer*, 92 Ill. 2d 13, 444 N.E.2d 96 (1982).

43. 33 Ill. 2d 326, 211 N.E.2d 253 (1965), *cert. denied*, 383 U.S. 946 (1966).

44. *See, e.g., Molitor v. Kaneland Comm. Unit Dist.*, 18 Ill.2d 11, 163 N.E.2d 89 (1959).

45. *Id.* at 332, 211 N.E.2d at 257.

### B. *The Professional Nurse*

Registered nurses serve primarily under the authorization of independent physicians.<sup>46</sup> At the same time, they are considered professionals whom hospitals employ to exercise a significant amount of responsibility<sup>47</sup> for patients in their care.<sup>48</sup> One court succinctly placed nurses with "physicians and surgeons and not with chambermaids and cooks."<sup>49</sup> Nurses have a duty to exercise reasonable care as practiced by members of their profession under similar circumstances,<sup>50</sup> that is, a duty to render services according to established norms of care within the same specialty.<sup>51</sup> At trial, expert witnesses are used to fix the standard when a professional possesses a unique body of knowledge beyond that of the lay population.<sup>52</sup>

#### 1. Nursing Standards of Care

Professional registered nursing standards are defined by state nurse practice acts<sup>53</sup> and professional organizations.<sup>54</sup> They can be quite detailed and may include entry requirements, rules of con-

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46. M. STANHOPE & J. LANCASTER, *COMMUNITY HEALTH NURSING*, 39 (1988). Nurse practice acts in forty states have modernized and expanded nursing practice laws. The expansion of nursing duties corresponds with increasing educational levels of some nurses. *Id.* at 38-39.

47. *Tankersley v. Insurance Co. of North Am.*, 216 So.2d 333, 335 (La. App. 1968).

48. *Utter v. United Hosp. Center, Inc.*, 160 W. Va. 703, 236 S.E.2d 213 (1977).

49. *Tankersley*, 216 So.2d at 335.

50. *Fraijo v. Hartland Hosp.*, 99 Cal. App. 3d 331, 340, 160 Cal. Rptr. 246, 251 n.7 (1979).

51. The general rule is that a practitioner is held to the standard of care of the practitioner's school of practice. *See, e.g., Dolan v. Galluzzo*, 77 Ill. 2d 279, 396 N.E.2d 13 (1979). The modern trend of the courts is to accept a national standard of nursing care. *See, e.g., Shilkret v. Annapolis Emergency Hosp. Assn.*, 349 A.2d 245 (1975); *Hall v. Hibun*, 466 So. 2d 856 (Miss. 1985).

52. *Walski v. Tiesenga*, 72 Ill. 2d 249, 381 N.E.2d 279 (1978).

53. For example, the Florida legislature enacted a statute whose legislative "is to insure that nurses meet minimum requirements for safe practice and that those falling below minimum competency will be prohibited from practicing. This legislative purpose and intent is generally implemented through the disciplinary power and procedures conferred on [state regulatory agencies]." *Northwest Fla. Home Health Agency v. Merrill*, 469 So. 2d 893, 898 (Fla. Dist. Ct. App. 1985) (citing FLA. STAT. § 464.002 (1981)). Nurses meeting the state licensing requirements imposed by the state where they plan to practice are entitled to use the R.N. designation. A. RHODES & R. MILLER, *NURSING AND THE LAW* 21-2 (1984).

54. For example, The National League for Nursing examines and accredits schools of nursing, thereby establishing educational standards for nurses. M. STANHOPE & J. LANCASTER, *COMMUNITY HEALTH NURSING: PROCESS AND PRACTICE FOR PROMOTING HEALTH* 20 (1988). A major standard-setting organization is the American Nurses Association, a professional organization with the primary objective of controlling and defining the nursing profession. Bullough, *The Current Phase in the Development of Nurse Prac-*



duct, and descriptions of the practice of nursing. Nurses are required to be licensed in each state in which they practice and to perform their nursing duties according to the nursing practice act in the state where they are licensed and practice.<sup>55</sup> The licensure method is used to ensure minimal competence levels of practice within the state.<sup>56</sup> Most states' licensure laws require certain educational qualifications as well as passing a standardized examination in order to practice nursing.<sup>57</sup>

The A.N.A. also has developed standards of practice for nurses who are employed by supplemental staffing agencies and utilized by hospitals.<sup>58</sup> These standards require nurses to be responsible for selecting reputable employers,<sup>59</sup> maintain skills required for competent practice, and familiarize themselves with a facility in order

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*tice Acts*, 28 ST. LOUIS U. L. J. 365, 368 (1984). In 1955, the Association's board of directors approved a model definition of "professional nursing":

The practice of professional nursing means the performance for compensation of any acts in the observation, care, and counsel of the ill, injured, or infirm, or in the maintenance of health or prevention of illness of others, or in the supervision and teaching of other personnel, or the administration of medications and treatments as prescribed by a licensed physician or dentist; requiring substantial specialized judgement and skill and based on knowledge and application of the principles of biological, physical, and social science. The foregoing shall not be deemed to include acts of diagnosis or prescription of therapeutic or corrective measures.

*Id.* (citing *A.N.A. Board Approves a Definition of Nursing Practice*, 55 AM. J. NURSING 1474 (1955)). This definition is the model for current nurse practice acts in most states. *See, e.g.*, The Illinois Nursing Act of 1987, ILL. REV. STAT. ch. 111, paras. 3501-3549 (1988).

In 1973, the A.N.A. added standards applicable to any nursing setting. AMERICAN NURSES ASSOCIATION, STANDARDS OF NURSING PRACTICE (1973). These eight basic standards of care apply to all nurses notwithstanding their clinical specialty or geographic location. They were developed by the Congress for Nursing Practice under the auspices of the A.N.A.. *Id.* To summarize, every nurse is expected to collect, communicate, update, and record pertinent health information regarding each patient and assign nursing diagnoses. Nurses are expected to develop a nursing care plan according to the diagnosis, initiate goals, assign priorities, and establish nursing measures to achieve those goals. *Id.* Nurses should allow their patients to participate in the plan of care in order to promote, maintain and restore health and to maximize the patient's health potential. *Id.* The nurse continually should evaluate the patient's progress toward established goals and update the nursing plan of care according to realistic health achievements. *Id.* A.N.A. standards are more extensively discussed *infra* notes 58-63, 124-30, 184-99 and accompanying text. *See also* AMERICAN NURSES ASSOCIATION, NURSING: A SOCIAL POLICY STATEMENT (1980).

55. A. RHODES & R. MILLER, *supra* note 53, at 22.

56. *SEE, E.G.*, The Illinois Nursing Act, ILL. REV. STAT. ch. 111, § 3504 (1987).

57. *Id.* at 21-22.

58. AMERICAN NURSES ASSOCIATION COMMISSION ON NURSING SERVICES., GUIDELINES FOR USE OF SUPPLEMENTAL NURSING SERVICES, No. NS-25 3M (December 1979).

59. *Id.* at 4.

to give adequate nursing care in accordance with job descriptions of the employer and of the utilizer.<sup>60</sup> Furthermore, nurse are expected to rate their own performance against the standards of practice, and to refuse any assignment beyond their expertise or education capabilities.<sup>61</sup> The "reasonable" nurse is expected to adhere to these established nursing practice standards<sup>62</sup> in addition to each hospital's established internal policies and procedures.<sup>63</sup>

## 2. The Shift from Individual to Corporate Liability

Liability issues arise in a hospital and supplemental staffing agency setting when temporary agency nurses fill vacant positions.<sup>64</sup> These nurses require more supervision than a regular employee because they are not familiar with the hospital's layout or its established policies and procedures.<sup>65</sup> Temporary agency nurses may be liable under a theory of negligence, but it is estimated that only fifty percent of all nurses actually carry medical malpractice liability insurance.<sup>66</sup> Consequently, their "deep pocket" employers—the supplemental staffing agency or the utilizing hospital or both—are likely targets for malpractice claims arising from nurses' negligent conduct. Current public policy suggests that whenever one of two innocent parties (patient and hospital employer) suffers from an injury caused by a third party (nurse), the loss should be compensated for by the principal (employer) rather than leaving the injured plaintiff uncompensated.<sup>67</sup> Therefore, the working rela-

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60. *Id.* at 4-5.

61. *Id.* at 6-7.

62. M. CUSHING, *NURSING JURISPRUDENCE* 32-34 (1988).

63. *See, e.g., Santa Rosa Medical Center v. Robinson*, 560 S.W.2d 751 (Tex. Civ. App. 1977); *Burks v. The Christ Hosp.*, 19 Ohio St. 2d 128, 249 N.E.2d 829, 48 Ohio Op. 2d 117 (1969).

64. Nurses increasingly are concerned about quality of care and liability. Some believe that even if they are working in an inadequately staffed hospital, they still will be held to "a professional standard of judgment with respect to accepting responsibility and delegating nursing activities to others." Comment, *Nurses' Legal Dilemma: When Hospital Staffing Compromises Professional Standards*, 18 U.S.F.L. REV. 109, 122-23 (1983). There are several factors a registered nurse must consider when evaluating the adequacy of patient staffing levels in a hospital. The nurse must assess each patient's physical and emotional condition, as well as the amount of direct nursing care needed. *Id.* at 116. The nurse must analyze this information to determine the number of staff members appropriate to the work load for each shift. *Id.* at 117. Finally, the nurse must evaluate the experience and educational level of each nurse assigned to work on the unit and the availability of other professional staff members. *Id.* at 117.

65. Prescott, *Use of Nurses from Supplemental Services: Implications for Hospitals*, *NURSE ADMIN. Q.* 81, 86 (1986).

66. Speyer, *Liability Insurance Crisis Hits Nursing Industry*, *HOSPITALS*, October 20, 1987, at 20, 36.

67. Combs, *Hospital Vicarious Liability for the Negligence of Independent Contractors*

tionship between hospitals and staffing agencies must be considered from the standpoint of liability.

### C. *The Agency's Role in Placing a Supplemental Nurse*

Supplemental staffing or temporary service agencies typically employ nurses or function as "personnel agencies," contracting professional nurse services out to hospitals or other requesting institutions on a per diem basis.<sup>68</sup> If such a relationship is deemed to be a master-servant relationship, then the agency may be held responsible for the negligent acts of its nurses under the doctrine of respondeat superior,<sup>69</sup> that is, the employer legally is responsible for the nurses' negligent acts so long as the nurses are acting within the scope of employment.<sup>70</sup> Thus, it is important to determine whether a nurse from a supplemental staffing agency is an employee or independent contractor.

#### 1. Temporary Nurse: "Employee" or "Servant?"

An employee or servant is a person who is employed to "perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control."<sup>71</sup> The following list is used to differentiate between employees and independent contractors and includes the following factors:

- (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business;
- (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) the skill required in the particular occupation;
- (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (f) the length of time for which the person is employed;
- (g) the method of payment, whether by the time or by the job;

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*and Staff Physicians: Criticisms of Ostensible Agency Doctrine in Ohio*, 56 CIN. L. REV. 711, 716 (1987).

68. THE NURSE'S ALMANAC 179 (H. Rowland ed., 2d ed. 1984).

69. See AM. JUR. 2D *Master and Servant* § 417 (1970). The doctrine is discussed *infra* notes 131-33.

70. RESTATEMENT (SECOND) OF AGENCY § 219(1) (1958).

71. *Id.* at § 220(1).

- (h) whether or not the work is a part of the regular business of the employer;
- (i) whether or not the parties believe they are creating the relation of master and servant; and
- (j) whether the principal is or is not in business.<sup>72</sup>

A principal-employer is vicariously liable for the negligent acts of its employees primarily on the basis of the amount of actual control it exercises over them.<sup>73</sup> Accordingly, the amount of supervision that a supplemental staffing agency and the utilizing hospital have over a nurse assumes enormous importance when that nurse is negligent.

## 2. *Brock v. Superior Care, Inc.* : The "Economic Reality" Test for Determining Employee v. Independent Contractor Status

In another context, the Court of Appeals for the Second Circuit applied its own factors to distinguish between "employee" and "independent contractor," and held that nurses working for a health care service agency providing nursing services to hospitals were "employees." At issue in *Brock v. Superior Care, Inc.*<sup>74</sup> was whether several hundred nurses were protected by the overtime provisions of the Fair Labor Standards Act.<sup>75</sup> Defendant Superior Care did not withdraw taxes from the nurses' paychecks and paid straight-time wages for overtime hours.<sup>76</sup> Superior Care "unilaterally dictated the nurses' hourly wage, limited working hours to 40 per week where nurses claimed they were owed overtime, and supervised the nurses by monitoring their patient care notes and by visiting job sites."<sup>77</sup> Superior Care argued that its control over the nurses was minimal because its visits to the job sites occurred only once or twice per month.<sup>78</sup> The court applied an "economic reality" test, and concluded that the workers were controlled as in an employment circumstance. The court considered the following factors to determine the nurses' status:

- (1) the degree of control exercised by the employer over the workers, (2) the workers' opportunity for profit or loss and their investment in the business, (3) the degree of skill and independ-

72. *Id.* at § 220(2).

73. Combs, *supra* note 67, at 717.

74. 840 F.2d 1054 (2d Cir.), *recalled and modified to include prejudgment interest*, 1988 U.S. App. Lexis 4338 (1988).

75. 29 U.S.C. §§ 201-219 (1938) ("FLSA").

76. 840 F.2d at 1058.

77. *Id.* at 1060.

78. *Id.*

ent initiative required to perform the work, (4) the permanence or duration of the working relationship, and (5) the extent to which the work is an integral part of the employer's business.<sup>79</sup>

The court observed that "[a]n employer does not need to look over his workers' shoulders every day in order to exercise control."<sup>80</sup> Superior Care had an absolute, express right to supervise the nurse's work. In addition, the nurses knew of the company's right to supervise.<sup>81</sup>

With regard to the other factors in the "economic reality" test, the court found that the nurses' investment in the business was insignificant. They did not stand to profit or lose because of their association with the business.<sup>82</sup> In addition, the nurses' work was an integral part of the employer's business. Nursing services were at the core of Superior Care's business of providing health care personnel on request.<sup>83</sup> As to the use of independent judgment, the appellate court concluded that although nurses are considered skilled workers with specialized and technical education,<sup>84</sup> their background did not permit them to use their skills in an independent manner. Superior Care had total control over referrals for job assignments, and thereby regulated the terms and conditions of the employment relationship.<sup>85</sup> Furthermore, the court found that a nurse need not affiliate with only one employer in order to be considered an "employee." Employees "may work for more than one employer without losing their benefits under the FLSA."<sup>86</sup> The transient nature of nursing "reflects the nature of their profession and not their success in marketing their skills independently."<sup>87</sup>

### 3. Independent Contractor Status and the Issue of Control

Although an employer is liable for the acts of its employees, and a principal is liable for the acts of its agents, neither is responsible for the acts of independent contractors.<sup>88</sup> An independent contractor has discretionary judgment, thus eliminating the need for con-

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79. *Id.* at 1058-59.

80. *Id.* at 1060.

81. *Id.*

82. *Id.* at 1059.

83. *Id.*

84. *Id.* at 1060.

85. *Id.*

86. *Id.*

87. *Id.* at 1061.

88. *Yuhas v. Allis-Chalmers Distrib. Serv. Corp.*, 12 Ill. App. 3d 814, 821, 299 N.E.2d 166, 170 (1st Dist. 1973).

stant supervision and guidance required of by an employee.<sup>89</sup> The employer's right to control or terminate the relationship—even if unexercised—is a critical factor in determining the relationship.<sup>90</sup> An independent contractor renders services and represents the will of the employer only with regard to the work results and not to the method of their accomplishment.<sup>91</sup> These general principles aside, the primary issue concerning the supplemental staffing agency's role in referring a nurse to a hospital is whether the agency has enough control over the nurse to be considered the nurse's "employer. Although not involving nurse malpractice, two cases addressing the relationship between a supplemental staffing agency and its nurses prove instructive.

In *Avchen v. Kiddoo*,<sup>92</sup> the California Court of Appeal held that a nursing registry was not an "employer" for the purposes of unemployment taxation when the registry merely acted as a middleman informing nurses of hospitals that had temporary shift openings. In *Avchen*, the company referred nurses to hospitals requesting temporary professional services, and the nurses in turn would contact hospitals to negotiate their rates of pay.<sup>93</sup> The hospital paid the registry directly for the nurse's services rendered.<sup>94</sup> The monies were then deposited by the registry into a trust account, and the nurse was paid biweekly, minus the commission.<sup>95</sup> The owner of this registry did not control the nurses' work in any way nor did she believe she had the authority to do so: she had no educational background in nursing.<sup>96</sup> She did not consider the nurses to be "employees," and the nurses never believed themselves to be "employees."<sup>97</sup>

The owner never checked on or supervised a nurse during job placement, nor did she fire a nurse for inadequate performance.<sup>98</sup> She terminated her relationship with one or two nurses only when the nurse was fired by a hospital for using drugs.<sup>99</sup> The owner had

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89. *Id.*

90. *Id.* at 821, 299 N.E.2d at 170 ("the right or duty to supervise and control, and not the exercise of the right, determines the relationship" (citing *Hartley v. Red Ball Transit Co.*, 344 Ill. 534, 176 N.E. 751 (1931))). For convenience, the author will refer to the utilizing company or individual as the "employer."

91. 56 C.J.S. *Master and Servant* § 3(1) (1948).

92. 200 Cal. App. 3d 532, 246 Cal.Rptr. 152 (1988).

93. *Id.* at 534, 246 Cal. Rptr. at 153.

94. *Id.*

95. *Id.*

96. *Id.* at 534-35, 246 Cal. Rptr. at 154.

97. *Id.* at 535, 246 Cal. Rptr. at 154.

98. *Id.*

99. *Id.*

no way of determining whether an affiliated nurse was competent<sup>100</sup> because she relied only on references and on the fact that the nurse was professionally licensed by the state.<sup>101</sup> The registry owner never supplied the nurses with equipment or uniforms.<sup>102</sup> The court characterized the registry as merely a "matchmaker" of professional nursing services to requesting hospitals and concluded that no employment relationship existed.<sup>103</sup> Moreover, in California, the legislature has provided that, in the case of labor brokers in the nursing field, the registries are a nurse's agent rather than an "employer."<sup>104</sup>

In an employment discrimination case brought by a nurse against a nursing referral agency, the Seventh Circuit Court of Appeals similarly held that the agency was not an "employer" within the meaning of Title VII of the Civil Rights Act of 1964.<sup>105</sup> In *Shrock v. Altru Nurses Registry*,<sup>106</sup> a male nurse filed a sex discrimination on the grounds that the nurse referral agency refused to refer male nurses to female patients. Without much explanation, the court stated that Shrock "clearly" was an independent contractor. To decide whether Altru was an "employment agency" under

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 537, 246 Cal. Rptr. at 155.

104. CAL. BUSINESS AND PROFESSIONS CODE, § 2732.05 (West 1990). The relevant provision states:

Every employer of a registered nurse, and every person acting as an agent for such a nurse in obtaining employment, shall ascertain that such nurse is currently authorized to practice as a registered professional nurse within the provisions of this chapter. As used in this section, the term "agent" includes, but is not limited to, a nurses' registry.

*Id.*

Section 9958 regulates the relationship between private duty nurses and nursing registries:

The Legislature defines a nurses' registry as a person who obtains and fills commitments for nursing service and makes referral for other nursing employment. Nursing service is defined as "the assignment of a nurse, as a private duty, self-employed, licensed registered nurse, licensed vocational nurse, or practical nurse to render service to a patient under the direction or supervision of a physician or surgeon registered to practice in this state." A private duty nurse is further defined as "a self employed nurse rendering service in the care of the patient . . . under the direction of a physician or surgeon, but who is paid by either the patient or the designated agent of the patient and who accepts the responsibilities of a self-employed private contractor."

*Id.*

105. 42 U.S.C. 2000e- to 2000h-5 (1964). An entity cannot be liable under Title VII unless it is an employer, an employment agency, or a labor union. *Id.* at §§ 2000e-2, 2000e-3.

106. 810 F.2d 658 (7th Cir. 1987).

Title VII, the court relied on the statutory definition of the term: “[an employment agency] regularly undertakes . . . to procure employees *for an employer* or to procure for employees opportunities to work *for an employer*.”<sup>107</sup> The case was decided below on a motion for summary judgment. Shrock, unfortunately, failed to rebut Altru’s evidence that it made referrals only to individual patients and doctors acting on behalf of individual patients. Because neither are considered “employers” under the Act, the court affirmed the grant of summary judgment in Altru’s favor.<sup>108</sup> Had Shrock presented affidavits showing that the agency provided nurses to hospitals, the outcome might have been different. Although the holding in *Shrock* will not have wide-reaching implications because of the procedural facts, it probably is safe to say that a nurse registry is not an “employment agency” for purposes of Title VII if it does no more than make referrals.

Once it is determined that an individual is an “employee” rather than an independent contractor, the employer’s duty becomes clear: the employer has the duty to control the conduct of its employees and must exercise reasonable care in controlling an employee to prevent intentional harm or an unreasonable risk of bodily harm to others.<sup>109</sup> There are two primary elements in determining when an employer has a duty to control an employee. First, there exists a duty to control when the employee is on the employer’s premises and acting as the employer’s servant or is using the employer’s property.<sup>110</sup> Second, there is a duty when the employer “knows or has reason to know that he has the ability to control his servant, and knows or should know of the necessity and opportunity for exercising such control.”<sup>111</sup>

The control issue was in the forefront of an Internal Revenue Service Letter Ruling responding to a query as to whether a home health agency could treat some of its nurses as employees and other, per diem nurses as independent contractors for federal employment tax purposes.<sup>112</sup> The matter focused primarily on intermittent per diem home health care visits, and not specifically with per diem supplemental staff nurses referred by an agency to hospitals. In either case, many of the same factors are considered to

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107. *Id.* (citing 42 U.S.C. § 2000e(c) (emphasis added)).

108. *Id.* at 661.

109. RESTATEMENT (SECOND) OF TORTS § 317 (1965).

110. *Id.* at § 317(a)(i), (ii).

111. *Id.* at § 317(b)(i), (ii).

112. Priv. Ltr. Rul. 8,749,001 (Feb. 10, 1987).



determine whether a person is an "employee" for purposes of federal employment tax regulations.

The IRS deems individuals "independent contractors" if they are subject to the control or direction of another person only with regard to work result, but not as to the method or means of achieving the work result.<sup>113</sup> Specifically, when temporary nurses are sent to hospitals by an agency, they are considered "employees" when their rendered services periodically are checked by the company, when work instructions are given, when payment for services is on a weekly basis, and when the company has the right to terminate services.<sup>114</sup> According to the IRS, however, the most important factors in determining whether a worker is a common law employee are whether the worker has been assimilated into the taxpayer's business operation, whether the worker risks financial loss by providing services, and whether the employer has the right to exercise control over the worker (as opposed to the actual exercise of that right).<sup>115</sup> In the Private Letter Ruling, the IRS found the nurses to be employees of the home health agency rather than independent contractors. They were a significant part of the company's business, there was no potential for individual financial loss by the nurses, and the company retained the right to control the nurse's professional services.<sup>116</sup>

#### 4. Duties of a Staffing Agency

There are external regulating bodies in the health care industry that place separate duties upon hospitals and supplemental staffing agencies, and that can directly affect the care rendered by professionals. For example, Illinois requires every supplemental nursing service to submit an application prior to sending a nurse to render nursing services. The application is required to list name and address; whether the applicant holds a license to practice as an R.N.; qualifications, including the place where the applicant studied or received a degree; prior work experience; all training and experience in nursing; and names and addresses of persons who can attest to the applicant's work experience and training.<sup>117</sup> The State also demands that employment agencies require all of their employees to receive an annual physical examination.<sup>118</sup>

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113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. Nurses' Registry, ILL. REV. STAT. ch. 111, para. 909 (Supp. 1988).

118. Domestic Service Employees, ILL. REV. STAT. ch. 111, para. 909.1 (1987).

Illinois expects every staffing agency to verify the applicant's information by contacting past employers and other references and by keeping all obtained information in an agency file.<sup>119</sup> All applicants must show the staffing agency their nursing licenses for verification.<sup>120</sup> The interviewer must also note that the applicant's license was inspected.<sup>121</sup> Every supplemental nursing agency sending out a nurse to provide nursing service must, within twenty-four hours, mail a referral slip to the utilizing employer.<sup>122</sup> The slip must include the name, address, and telephone number of the agency, the date of the referral, and the name and nursing classification of the applicant. A staffing agency never should send out a nurse without first verifying the applicant's information, unless the agency clearly states that "the qualifications claimed by this nurse have not been verified by this agency."<sup>123</sup> Conceivably, this elaborate data collection and verification process could give rise to a legal duty on the part of the staffing agency to send out only qualified personnel.

The A.N.A. has set additional standards. An employing agency personally must interview candidates prior to sending them out to render professional nursing care,<sup>124</sup> review education and experience, and never place a nurse with less than one year's experience.<sup>125</sup> In addition, an agency should request a skills determination inventory upon hiring and periodically update the information obtained.<sup>126</sup> Competency tests should be administered and proof of certification, continuing education, or special preparation for the area in which the nurse is placed to practice should be obtained by the agency.<sup>127</sup>

There is a downside to this verification process. One source on nursing services opined that the one year's experience requirement virtually eliminates new graduates and nurses who wish to come out of retirement.<sup>128</sup> Also, the competency tests most services administer to their applicants may be inaccurate because they focus

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119. Nurses' Registry, ILL. REV. STAT. ch. 111, para. 909 (Supp. 1988).

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. GUIDELINES FOR USE OF SUPPLEMENTAL NURSING SERVICES, *supra* note 58, at 4-5). A.N.A. standards also are discussed *supra* notes 22, 54, 58-63, and *infra* notes 184-99 and accompanying text.

125. *Id.*

126. *Id.* at 4-7.

127. *Id.*

128. THE NURSE'S ALMANAC, *supra* note 68, at 179.

on vocabulary quizzes that match lists of definitions to lists of clinical terms.<sup>129</sup> The tests are incapable of measuring the nurse's ability to learn policy and procedure, job description, or the employer's philosophy of care.<sup>130</sup> Thus, despite the additional standards established by the A.N.A., it could be argued that the minimal requirements fail to identify whether a referred nurse is qualified to fill the requested assignment. If an agency verifies the qualifications of a nurse using only minimal standards, then the utilizing hospital could be primarily responsible for the actions of the nurse, depending upon the degree or right of control it has.

*D. The Hospital's Authority Over Nurse Employees or Agents*

A hospital, like the supplemental staffing agency, may be liable for torts committed by its agents or employees on its premises under the theory of respondeat superior.<sup>131</sup> As previously discussed, to prevail under this theory, the plaintiff must prove that the employee-tortfeasor is an employee or agent of the hospital.<sup>132</sup> Of the primary common law elements used to determine whether an employment relationship exists, the most significant element is the right of the employer to supervise and control the performance of the employee's work.<sup>133</sup> Despite the importance of the control factor in determining liability, it is important to keep in mind that "in determining whether the employer will be held liable for the employee's negligence on a vicarious liability theory, the absence of direct control does not, ipso facto, negate liability."<sup>134</sup>

The hospital also may be liable under a theory of apparent agency, which is based upon equitable estoppel.<sup>135</sup> Estoppel prevents a person by his own prior actions from asserting a right against another individual who has reasonably trusted those prior actions.<sup>136</sup> It thus is a doctrine designed to prevent fraud. The estoppel rule may be applied "in favor of a third person, even

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129. *Id.*

130. GUIDELINES FOR USE OF SUPPLEMENTAL NURSING SERVICES, *supra* note 58, at 4-5.

131. *Johnson v. St. Bernard Hosp.*, 79 Ill. App. 3d 709, 399 N.E.2d 198 (1st Dist. 1979).

132. *Id.* at 714, 399 N.E.2d at 203. See *Bost v. Riley*, 44 N.C. App. 638, 262 S.E.2d 391, *cert. denied*, 300 N.C. 194, 269 S.E.2d 621 (1980).

133. For an extended discussion of these elements, see *supra* notes 67-116 and accompanying text.

134. *Holda v. County of Kane*, 88 Ill. App. 3d 522, 410 N.E.2d 552 (2d Dist. 1980).

135. *Id.* at 278, 522 N.E.2d at 704 (citing *Crittendon v. State Oil Co.*, 78 Ill. App. 2d 112, 115, 222 N.E.2d 561, 563-4 (1966)).

136. ORAN'S DICTIONARY OF THE LAW 154 (1983).

though, as between the persons charged with the consequences of the relation, it does not in fact exist."<sup>137</sup> Traditionally, a hospital is not legally responsible for medical care rendered by independent agents who are not under the control of the hospital.<sup>138</sup> A hospital may be liable, however, if the independent agents have been given ostensible or apparent agency to act in a certain manner.<sup>139</sup> For example, a hospital may be liable for the acts of an agency nurse if a patient believes the negligent nurse is an employee or agent working in behalf of the hospital. If plaintiff files a complaint against the hospital alleging negligence of an employee or independent contractor, then agency is presumed if it is shown that medical treatment was rendered on the defendant hospital's premises.<sup>140</sup>

The plaintiff must establish three elements to prove apparent agency. First, the plaintiff must show that the principle consented to, or knowingly acquiesced, in the agent's exercise of authority. Next, the plaintiff must demonstrate that the third person had knowledge of the facts and a good-faith belief that the agent possessed authority. Finally, the plaintiff must prove that the third person detrimentally relied on the agent's apparent authority.<sup>141</sup> For our purposes, a patient must prove that the hospital permitted the agency nurse to operate under its control, the patient believed the nurse was given this authority by the hospital, and the patient's reliance on the authority given to the agency nurse was detrimental. It is not sufficient that the apparent master is liable only because the negligent actor is believed by the injured party to be the defendant's servant. Rather, "[t]here must be such reliance upon the manifestation as exposes the plaintiff to the negligent conduct."<sup>142</sup>

It is hard enough for a patient to prove that an apparent agency

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137. 2A C.J.S. *Agency* § 29 (1972).

138. *Johnson v. St. Bernard Hosp.* 79 Ill. App. 3d 709, 714, 399 N.E.2d 198, 203 (1st Dist. 1979).

139. The RESTATEMENT (SECOND) OF AGENCY explains:

[o]ne who represents that another is his servant or other agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant or other agent as if he were such.

RESTATEMENT (SECOND) OF AGENCY § 267 (1958).

140. *Holton v. Resurrection Hosp.*, 88 Ill. App. 3d 655, 410 N.E.2d 969 (1st Dist. 1980).

141. *Northern Trust Co. v. St. Francis Hosp.*, 168 Ill. App. 3d 270, 522 N.E.2d 699 (1st Dist.), *appeal denied*, 121 Ill. 2d 572, 526 N.E.2d 833 (1988), discussed *infra* notes 145-47 and accompanying text.

142. RESTATEMENT (SECOND) OF AGENCY § 267 comment a (1958).

relationship existed between a hospital and a professional corporation providing medical services. A plaintiff also must prove that the hospital's representation of an agency relationship caused the patient to change positions to the patient's detriment.<sup>143</sup> This is a difficult point to prove. The patient must establish that knowledge that the care giver was not an agent or employee working on behalf of the hospital would have caused the patient to object to the care or take alternative actions to obtain health care.<sup>144</sup>

*Northern Trust Co. v. St. Francis Hosp.*,<sup>145</sup> illustrates the problem. A patient's estate brought suit against a hospital for an emergency room doctor's negligence on theories of respondeat superior and apparent agency. A company called Medical Emergency Service Associates ("MESA") employed, trained, scheduled, and paid the doctor. The court ruled that the hospital was not liable for the emergency room physician's actions because there was no showing of detrimental reliance. Explaining that "Illinois courts do not infer detrimental reliance,"<sup>146</sup> the court rejected plaintiff's argument that it should infer reliance from the fact that hospitals generally "hold themselves out" as offering emergency room services.<sup>147</sup>

Other courts have accepted the "holding out" or "totality of the circumstances" theory.<sup>148</sup> They may be willing to infer detrimental reliance because hospitals now heavily advertise their services. The general public commonly chooses a hospital for treatment based upon the reputation of the institution,<sup>149</sup> and thus "[i]t follows that

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143. *Gasbarra v. St. James Hosp.*, 85 Ill. App. 3d 32, 44-45, 406 N.E.2d 544, 554-55 (1st Dist. 1979).

144. *Id.* at 45, 406 N.E.2d at 555.

145. *Northern Trust Co. v. St. Francis Hosp.*, 168 Ill. App. 3d 270, 522 N.E.2d 699 (1st Dist.), *appeal denied*, 121 Ill. 2d 572, 526 N.E.2d 833 (1988).

146. *Id.* at 279, 522 N.E.2d at 705.

147. The court also held that the doctor was not an agent of the hospital. There was a contract for services between the hospital and MESA that expressly stated that the physicians rendering emergency services were independent contractors. *Id.*

148. *Jackson v. Power*, 743 P.2d 1376 (Alaska 1987). The plaintiff sought hospital emergency room care after he was seriously injured from a fall from a cliff. The emergency room physician was employed by an independent company that agreed to provide emergency treatment services for the hospital. Although there was a sign near the entrance of the emergency department indicating that the physician emergency services were provided by the independent company, there was no evidence the plaintiff saw or relied upon this information. The plaintiff sought care in the emergency room because of the hospital and not specifically from the emergency service. The court stated testimony regarding reliance was not necessary when there was no evidence that a patient knew or should have known that the treating physician was not an employee at the time of the treatment. *Id.* at 1382, n.10.

149. *Kirk v. Michael Reese Hosp. and Med. Center*, 136 Ill. App. 3d 945, 955, 483 N.E.2d 906, 913 (1st Dist. 1985), *rev'd* 117 Ill. 2d 507, 513 N.E.2d 387 (1987), *cert. denied*, 485 U.S. 905 (1988).

hospitals must assume certain responsibilities for the care and treatment of their patients."<sup>150</sup> Unlike Illinois, other states will infer a patient's detrimental reliance by evaluating the circumstances involving the choice of medical treatment and the relationship between the negligent practitioner and the hospital.<sup>151</sup> For example, in another case, a negligent emergency room physician provided services in a hospital as an independent contractor.<sup>152</sup> There, the court stated that it was an unreasonable burden for a patient to inquire as to the status of each individual health care provider.<sup>153</sup>

### *E. Corporate Negligence*

Agency or respondeat superior liability is not the only theory a plaintiff may use against a hospital. A hospital may be primarily, rather than derivatively, liable under the theory of corporate negligence. The corporate negligence doctrine states that a hospital owes its patients an independent duty to review and supervise the care it gives them,<sup>154</sup> the theory being that

hospitals do far more than furnish facilities for treatment. They regularly employ on a salary basis a large staff of physicians, nurses and interns, as well as administrative and manual workers, and they charge patients for medical care and treatment, collecting for such services, if necessary, by legal action. Certainly, the person who avails himself of "hospital facilities" expects that the hospital will attempt to cure him, not that its nurses or other employees will act on their own responsibility.<sup>155</sup>

Thus, a hospital can be liable for the acts of independent contractors practicing on their premises.<sup>156</sup> Although courts specifically have not addressed the issue in terms of supplemental staffing nurses in a hospital, they have been faced with similar cases involving the acts of other independent contractors on hospital premises. These situations primarily involve independent physicians practicing within a hospital setting.

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150. *Id.* at 955, 483 N.E.2d at 913.

151. *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985).

152. *Arthur v. St. Peters Hosp.*, 169 N.J.Super. 575, 405 A.2d 443 (1979).

153. *Id.* at 583, 405 A.2d at 447 ("people who seek medical help through the emergency room facilities of modern day hospitals are unaware of the status of the various professionals working there").

154. *Hansbrough v. Kosyak and Hoopston Comm. Mem. Hosp.*, 141 Ill. App. 3d 538, 550, 490 N.E.2d 181, 189 (4th Dist. 1986).

155. *Darling v. Charleston Comm. Hosp.*, 33 Ill. 2d 326, 332, 211 N.E.2d 253, 257 (1965), *cert. denied*, 383 U.S. 946 (1966) (citing *Bing v. Thunig*, 2 N.Y.2d 656, 163 N.Y.S.2d 3, 143 N.E.2d 3 (1957)).

156. *Sztorc v. Northwest Hosp.*, 146 Ill. App. 3d 275, 496 N.E.2d 1200 (1st Dist. 1986).

A hospital breaches its duty of due care if it allows physicians to render treatment on its premises before adequately investigating their individual credentials.<sup>157</sup> If a hospital permits individuals to practice their trade when it knew, or should have known, they were not qualified, then the hospital has breached its duty of due care and can be held liable for negligently allowing unqualified persons to practice.<sup>158</sup> In addition, a hospital is negligent when it fails to review and supervise the care rendered by its staff.<sup>159</sup>

### F. State Licensing Regulations

A hospital can be directly liable for its own negligence if the quality of health care given within its confines falls below established standards.<sup>160</sup> State licensing regulations, the Joint Commission of Accreditation of Healthcare Organizations ("JCAHO"),<sup>161</sup> and hospital bylaws reflect an honest desire to insure that hospitals assume certain responsibilities toward their patients.<sup>162</sup>

Supplemental staffing agencies in Illinois are subject to regulation of home health care services, but only if they are reimbursed under Medicare<sup>163</sup> or Hospice<sup>164</sup> programs. Therefore, a hospital utilizing supplemental staffing agencies must conduct its own review of the agency as well as the nurse's performance capabilities. The agency must rely primarily on state licensing regulations and work references of professional nurses to estimate their capabilities. The hospital is required by the state, JCAHO, and its own bylaws

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157. See, e.g., *Pickle v. Curns*, 106 Ill. App. 3d 734, 739, 435 N.E.2d 877, 881 (2d Dist. 1982) (hospital owed a patient an independent duty apart from the physician's own duty to know the qualifications and the standard of performance of the physicians practicing on its premises). See also *Johnson v. Misericordia Community Hosp.*, 99 Wis. 2d 708, 301 N.W.2d 156 (1981).

158. *Pickle*, 106 Ill. App. 3d at 739, 435 N.E.2d at 881 (citing *Holton v. Resurrection Hosp.*, 88 Ill. App. 3d 655, 659, 410 N.E.2d 969, 971 (1st Dist. 1980)).

159. *Id.*

160. *Darling v. Charleston Community Hosp.*, 33 Ill. 2d 326, 211 N.E.2d 253 (1965), cert. denied, 383 U.S. 946 (1966).

161. The Joint Commission of Accreditation for Healthcare Organizations is a private organization accrediting many hospitals. R. MILLER, PROBLEMS IN HOSPITAL LAW 41 (5th ed. 1986). Several states allow JCAHO accreditation to fully or partially satisfy state licensure requirements without further state inspection. *Id.* at 42. Hospitals treating Medicare beneficiaries also are required to comply with JCAHO standards in order to receive payment for program services. *Id.* at 42. For further discussion of JCAHO, see *infra* notes 176-83 and accompanying text.

162. See *Darling*, 33 Ill. 2d at 332, 211 N.E.2d at 257.

163. Home Health Agency Licensing Act, ILL. REV. STAT. ch. 111 1/2, paras. 2801-2814 (1987).

164. Hospice Program Licensing Act, ILL. REV. STAT. ch. 111 1/2, paras. 6101-6114 (1987).

to exercise a certain amount of control over the professional nurse in order to render proper and continuous nursing care.<sup>165</sup>

Illinois requires hospitals to obtain licenses for operation.<sup>166</sup> A permit to operate cannot be issued unless the applicant agrees to provide appropriate standards of hospital services for the community it services.<sup>167</sup> The Illinois Administrative Code<sup>168</sup> sets standards of care for hospital nursing services. Every hospital must have an organized nursing service with an adequate staff to care for its patients.<sup>169</sup> Hospitals are required to employ an adequate number of professional nurses to be on duty at all times to assess patient status, devise care plans, supervise the care given, and evaluate the care provided according to nursing standards.<sup>170</sup> The number of nurses assigned to provide nursing care should be commensurate with the type of patient care needed and the level of skill demonstrated by the staff.<sup>171</sup> Hospital staffing patterns must reflect patient needs, standards of nursing care, and established nursing goals.<sup>172</sup> The State requires nursing care plans to be completed for every patient and revised periodically to provide continuity of patient care.<sup>173</sup> The license and credentials of agency nurses must be verified prior to unit assignment.<sup>174</sup> All agency nurses must have adequate supervision to ensure compliance with hospital policies, procedures and standards of nursing care.<sup>175</sup>

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165. Control issues are discussed *supra* notes 88-116 and accompanying text.

166. Hospital Licensing Act, ILL. REV. STAT. ch. 111 1/2, para. 145 (1987).

167. *Id.* at para. 147.

168. Nursing Service and Administration, ILL. ADMIN. CODE, tit. 77 §§ 250.910-250.1100 (1985).

169. *Id.* at § 250.910.

170. *Id.* at § 250.910(e)(1).

171. *Id.* at § 250.910(e)(3).

172. *Id.* at § 250.910(f)(1).

173. *Id.* at §§ 250.970, 250.980.

174. *Id.* at § 250.1020(b).

175. *Id.* [Author's Note: Since this Article was written, the picture in Illinois has changed significantly with the enactment of the "The Nurse Licensing Act," ILL. REV. STAT. ch. 111, paras. 951-65 (1989), which sets forth specific rules for supplemental staffing agencies that employ, assign, or refer registered nurses to health care facilities. To summarize, the Act provides that an agency has the responsibility to review a nurse's credentials; failure to do so could result in a negligent hiring charge. *Id.* para. 962 § 12. The health care facility has an indemnification right against the agency if it is found liable for negligent hiring. *Id.* Prior to licensure, an agency must obtain a certificate of insurance for professional liability coverage of at least \$500,000 per incident and \$1,000,000 in the aggregate. *Id.* para. 962 § 5(8). Before placing a nurse, the staffing agency must do the following: (1) Determine from the Department of Professional Regulation whether the nurse is licensed and in good standing, *id.* para. 963 § 13 (a)(4); (2) unless the applicant has no work experience, check at least two recent references and the dates of prior employment, *id.* para. 963 § 13 (c); (3) verify CPR certification, 14 Ill. Admin. Reg.



### G. Joint Commission Requirements

The Joint Commission of Accreditation of Healthcare Organizations requires a hospital to organize a nursing department so as to take "reasonable steps to provide quality nursing care."<sup>176</sup> That department should provide an optimal and consistent level of nursing care throughout the hospital.<sup>177</sup> It is responsible for establishing nursing care standards and evaluating all nursing care to determine quality and appropriateness.<sup>178</sup> A hospital's duty to provide quality nursing care extends to its use of temporary nursing services obtained through outside agencies to meet nurse staffing needs.<sup>179</sup> Nursing personnel from outside sources commonly are evaluated by the hospital's nursing department through internal mechanisms.<sup>180</sup> If the hospital does not have an internal review mechanism for temporary staff nurses because the staffing agency performs this role, then the agency's method of review must be accepted by the hospital.<sup>181</sup> The hospital must limit an agency nurse's temporary assignment to units supervised by an experienced R.N. if the hospital has not yet evaluated the nurse's capabilities properly.<sup>182</sup> The hospital nursing department has the duty to furnish an adequate orientation for all temporary agency nurses

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12516 (1990). In addition, the applicant must be interviewed by an R.N. or supervised by one. *Id.*

Once the nurse is placed, there must be proper supervision and orientation. *Id.* The utilizing health care facility is responsible for supervision once the nurse is assigned and practicing within the facility, ILL. REV. STAT. ch. 111, para. 962 § 12, but it is the staffing agency which is responsible for developing and maintaining written policies and procedures for the nurses. 14 Ill. Admin. Reg. 12516. Such documents must be available at all locations. *Id.* The agency must mail a performance evaluation form to the utilizing facility to ascertain whether the nurse was qualified to perform the assigned job. *Id.*

176. JOINT COMMISSION ON THE ACCREDITATION OF HOSPITALS, ACCREDITATION MANUAL FOR HOSPITALS NR.1.1 (1988). "New Nursing Care Standards," effective January 1, 1991, will replace NR 1.1 with NC 4 and NC 5.2. The new standards provide that the hospital's nurse executive will participate with the governing body in areas of nurse development.

177. *Id.* at NR.2.3. To be replaced by NC 5.1.1 (nurse executive shall provide leadership).

178. *Id.* at NR.3.3.1.2, NR.3.3.1.2.1. To be replaced by NC 3.1, NC 4.1, and NC 6 (hospital policies and procedures should be developed to serve as a guide for nursing practice; policies should be reviewed annually).

179. *Id.* at NR.3.9.

180. *Id.* To be replaced by NC 2.4 (hospital must orient all supplemental agency nurses prior to their giving care on the premises).

181. *Id.* at NR.3.9.1. The "New Nursing Care Standards" in NC 2.4.1.1.1 state that there must be a hospital policy to evaluate nursing care from outside agencies. *See* note 176.

182. *Id.* at NR.3.9.1.1. This section will be expanded in new standard NC 2.4.1 (prior to any actual patient care activities, hospital must document evidence of licensure and current clinical competence when supplemental nurse is placed).

providing care in patient care areas.<sup>183</sup>

#### *H. American Nurses Association Guidelines*

The A.N.A. has established guidelines for hospitals utilizing supplemental staff nurses.<sup>184</sup> Under A.N.A. standards, a hospital should be aware of the process of selection of a nurse used by the employer.<sup>185</sup> The hospital should provide the agency with job descriptions and notices of its distinctive practices for the nurse's review,<sup>186</sup> and should specify the required nursing skills for the available vacancy to match the skill of the supplemental nurse to the patient's needs.<sup>187</sup> Critical care nurses should provide objective proof of education and experience comparable to the need.<sup>188</sup> The unit nurses should be aware that an agency nurse is going to render care and instructed as to proper utilization.<sup>189</sup> The supplemental staff nurse should have on-site orientation, including information about nursing philosophy, standard operating nursing procedures, emergency procedures, patient identification systems, location of equipment and supplies, medication procedures, documentation procedures, incident reporting mechanisms, and supervision.<sup>190</sup> The supplemental nurse never should be placed in a supervisory position unless the institution is aware of the nurse's competence.<sup>191</sup> The immediate supervisor over the supplemental nurse should observe the nurse's performance and compare it to established standards of care and provide recommendations when necessary.<sup>192</sup>

Loyola University Medical Center in Maywood, Illinois provides a model example of compliance with A.N.A. standards. First, the hospital demands that each agency nurse provide proof of licensure issued by the State, recent cardiopulmonary resuscitation (CPR) certification, and individual malpractice insurance.<sup>193</sup>

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183. *Id.* at NR.6.5.3. New standard NC 2.4 states that a hospital must provide orientation to agency nurses prior to rendering of patient care).

184. GUIDELINES FOR USE OF SUPPLEMENTAL NURSING SERVICES, *supra* note 58, 4-5. See *supra* notes 22, 54, 58-63, 125-31 and accompanying text (A.N.A. standards discussed).

185. *Id.* at 4.

186. *Id.*

187. *Id.* at 6.

188. *Id.*

189. *Id.* at 5.

190. *Id.*

191. *Id.* at 6.

192. *Id.* at 7.

193. Discussion with Barbara Feldman, Acting Director of Nursing at Loyola University Medical Center, Maywood, Illinois (June, 1988).

Second, there is an Agency Interview Report that the providing agency must complete regarding the employment of nurses. This inquiry asks the following information: whether the nurses are independent subcontractors or employees of the agency; whether the agency provides liability insurance coverage for malpractice and the name of the carrier and the specified limits; whether there is a procedure for verification of licensure for the R.N.s; whether the nurses are certified for CPR and required frequency for recertification; whether the agency would notify the hospital if the nurse is scheduled over forty hours per week; whether there is a discipline policy regarding unsatisfactory performance; and whether critical care nurses' references are checked and if they are given aptitude examinations.<sup>194</sup> The application also asks for health certificates for TB, VDRL, Rubella titer, stool and physical examination requirements; and scheduling allowances.<sup>195</sup>

Every agency nurse is reviewed by a supervisory nurse after each shift regardless of the number of times the nurse has worked at the institution.<sup>196</sup> This includes an assessment of the nurse's basic nursing knowledge, ability to prioritize duties and responsibilities, whether nursing skills are in accordance with hospital policies and procedures, adherence to safety policies, communication skills, ability to request assistance, and professional accountability.<sup>197</sup> These evaluations are collected by the nursing care administrators and reviewed to determine whether the particular nurse would be allowed to practice in the hospital again.<sup>198</sup> If an agency nurse performs in an unsatisfactory manner, then the hospital typically calls the referring agency and requests that the nurse not be referred again.<sup>199</sup>

## *I. Other Theories of Hospital Liability*

### *1. The Borrowed Servant*

The "borrowed servant" rule is related to the doctrine of respondeat superior. It is based on the right to control and supervise.<sup>200</sup>

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194. "Agency Interview Report" form, courtesy of Barbara Feldman, Acting Director of Nursing at Loyola University Medical Center, Maywood, Illinois.

195. *Id.*

196. "Agency Nurse Performance Appraisal" form.

197. *Id.*

198. Discussion with Barbara Feldman, Acting Director of Nursing at Loyola University Medical Center, Maywood (June 1988).

199. *Id.*

200. *Danks v. Maher*, 177 So. 2d 412, 418 (La. Ct. App. 1965). See BLACK'S LAW DICTIONARY 185 (6th ed. 1990) ("if one to whom an employee is lent is a master of

Historically, the rule was used by the hospital as a defense to liability when a nurse or technician acted negligently and was found to be temporary or "borrowed" from an independent medical practitioner.<sup>201</sup> The typical case involved surgical nurses or other hospital employees who directly assisted physicians and were under their control and supervision at the time of the negligent act.<sup>202</sup> Thus, a chief surgeon could be held responsible for the negligence of surgical assistants, nurses, anesthesiologists, and other persons on the surgical team.<sup>203</sup> As the number of positions within the surgical team grew over the years, courts have come to realize that each member of the surgical team has separate and distinct functions that they perform independently; thus, the borrowed servant rule was not legally sound.<sup>204</sup> The gradual erosion of this rule has left hospitals with one less defense.<sup>205</sup> Nevertheless, the rule continues to be used.

For example, in *Brickner v. Normandy Osteopathic Hosp.*,<sup>206</sup> a second-year resident made an improper diagnosis after exploratory surgery. The hospital's guidelines for the residency program allowed the resident to perform such operations, but only under supervision by an attending physician.<sup>207</sup> The court explained that the borrowed servant doctrine may be used as defense by a general employer, such as a hospital, when certain elements are present. First, the employee must consent to work for the special employer. Second, the employee must perform the work of the special master according to an actual or implied contract. Last, the special employer must control the details of the employee's work, such as how the work should be completed, and when the relationship should be terminated or continued.<sup>208</sup> The hospital must prove, not only these elements, but also that there was a "total relinquishment of any right of control over the conduct of the employee insofar as the particular work is concerned."<sup>209</sup> Further, an employee is not a servant of a temporary employer just because the employee

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servant at very time negligent act occurs, it is upon him, as a special employer, that liability rests. . . .").

201. HOSPITAL LIABILITY: LAW AND PRACTICE 248 (M. Bertolet & L. Goldsmith eds. 1988).

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. 746 S.W.2d 108 (Mo. Ct. App. 1988).

207. *Id.* at 112.

208. *Id.* at 108.

209. *Id.* at 112.

acts according to the request of the short-term supervisor.<sup>210</sup> As long as the act is within the scope of the employee's general employment, the general employer is responsible for the act.<sup>211</sup>

Applying these principles, the *Brickner* court ruled that the hospital was not isolated from liability under the borrowed servant defense.<sup>212</sup> The hospital hired the resident and allowed him to practice medicine.<sup>213</sup> He was controlled by the hospital's resident training program, which set forth very specific duties.<sup>214</sup> His hours were scheduled by the hospital, and he was required to log his surgical experiences, question the orders of attending physicians, and dictate reports.<sup>215</sup> Thus, the hospital did not abandon its right of control over the resident's practice of medicine.<sup>216</sup>

The continued viability of the borrowed servant defense suggests that it could be successful if raised by a supplemental staffing agency when a nurse employee acts negligently on a client hospital's premises. The nurse employee is not scheduled by an agency and, in most instances, the agency relinquishes its right of control over the nurse once the assignment referral is made. The agency, however, still is subject to liability if it exercises poor hiring standards. A hospital and an agency, therefore, could be held jointly and severally liable for an agency nurse's negligent actions.

## 2. Joint and Several Liability

Because a hospital exercises a certain amount of control over the nurses working on its premises, it can be held jointly and severally liable with an agency for the negligent actions of a supplemental staffing nurse. *Johns v. Medical Personnel Pool of Northeast Florida*<sup>217</sup> is a perfect example of how communication between a hospital and an agency concerning a temporary nurse's qualifications could have prevented both from being found liable for the nurse's negligence. The agency, Medical Personnel Pool, sent one of its

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210. *Id.* at 113. *But see* RESTATEMENT (SECOND) OF AGENCY § 227 comment b, c (1958) (if "the temporary employer exercises such control over the conduct of the employee as would make the employee his servant were it not for this general employment, the employee . . . becomes a servant of the temporary employer.")

211. *Brickner v. Normandy Osteopathic Hosp.*, 746 S.W.2d 108, 113 (Mo. Ct. App. 1988).

212. *Id.* at 114.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.* at 115.

217. *Johns v. Medical Personnel Pool of N.E. Fla.*, No. 87-989-CA (Fla. Cir. Ct., filed 1988).

L.P.N.s to fill a temporary position at a university hospital. The temporary nurse negligently hooked a nasal gastric suction machine to exhaust instead of suction, thereby perforating the patient's bowel. The patient sued both the agency and the hospital claiming first, that the nurse was an agent of the agency and second, that the hospital failed to provide a professional standard of nursing care comparable to other hospitals in the community.

Medical Personnel Pool denied that the nurse was an agent or employee of its corporation, and filed a cross claim against the hospital alleging that it exclusively controlled and directed the nurse's work. The hospital in turn filed a cross claim against Medical Personnel Pool stating that the agency undertook a duty to provide nurses qualified to operate a gastric suction machine. The hospital also filed a cross claim against the nurse for contribution if the hospital were found liable. The trial court granted the patient's motion for partial summary judgment, and held the hospital, the agency, and the nurse jointly and severally liable for the injuries.<sup>218</sup>

#### *J. Expressed and Common Law Indemnity Clauses*

Because a hospital is required and actually has the means to control an agency nurse's work, it may be advantageous for the hospital to contract with the supplemental staffing agency to indemnify and insure against medical malpractice liability. Virtually all large staffing agencies provide medical malpractice insurance coverage for their employees.<sup>219</sup> Smaller companies can afford to charge lower rates for supplemental staffing services because they typically do not pay these premiums.<sup>220</sup> Medical Personnel Pool, a national staffing and home health agency in Fort Lauderdale, Florida, offers hospitals a contract with an indemnity clause when it provides supplemental staffing services. The following is a sample clause from a Medical Personnel Pool contract:

Agency hereby indemnifies and holds the Hospital harmless from and against any and all liability, losses, damages, claims, or causes of action, and expenses connected therewith (including reasonable attorney's fees) caused, directly or indirectly, by or as a result of the performance of Agency or its employees or agents'

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218. *Id.* (order granting motion for partial summary judgment). The hospital and the nursing agency split the cost of a \$925,000 settlement, the hospital paying \$150,000, and the agency paying \$775,000. *Domestic News*, The Associated Press, February 27, 1988.

219. Conversation with Gill Mitchell, Director of Contract Development, Medical Personnel Pool, a division of H & R Block, Fort Lauderdale, Florida (June 1988).

220. *Id.*

duties hereunder.<sup>221</sup>

This indemnity clause shifts any liability that the hospital may have for an agency nurse's malpractice to the providing agency employing the nurse.

One court upheld a similar provision in a contract between a hospital and a professional corporation of emergency room physicians. In *Ollerich v. Roterig and Emergency Medical Physicians*,<sup>222</sup> the plaintiff was taken by his mother to a hospital emergency room for treatment of a severed finger. There, he received negligent treatment by a physician employed by Medical Physicians ("E.M.P.").<sup>223</sup> E.M.P. physicians and the hospital had signed a contract with an indemnity clause holding the hospital harmless for any negligent acts by the medical corporation's physicians.<sup>224</sup> The court enforced this clause as a matter of law, thus requiring the professional corporation to assume responsibility for the injury.<sup>225</sup>

If there is no such written agreement between a hospital and an agency, then common law indemnity<sup>226</sup> may be implied when the following elements are present. There must be different degrees of duty to the injured party. Next, the tortfeasor must be liable to the injured party vicariously by operation of law. Last, the tortfeasor must have a duty, not only to the injured party, but also to the co-tortfeasor.<sup>227</sup>

## V. SUGGESTIONS FOR AVOIDING LIABILITY

Since *Darling v. Charleston Memorial Hospital*,<sup>228</sup> hospitals increasingly have been held accountable for the actions of health care practitioners rendering patient care on their premises. Recent national policy changes in health care directed towards cost containment are raising questions about the quality of patient care.<sup>229</sup>

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221. The author thanks Medical Personnel Pool, Inc., Fort Lauderdale, Florida for providing a sample copy of its contract.

222. 419 N.W.2d 548 (S.D. 1988).

223. *Id.*

224. *Id.* at 549.

225. *Id.* at 550.

226. Defined as "[a] contractual or equitable right under which the entire loss is shifted from a tortfeasor who is only technically or passively at fault to another who is primarily or actively responsible." BLACK'S LAW DICTIONARY 769 (6th ed. 1990).

227. W. FREEDMAN, JOINT AND SEVERAL LIABILITY: ALLOCATION OF RISK AND APPORTIONMENT OF DAMAGES 53 (1987).

228. Discussed *supra* notes 43-45 and accompanying text.

229. Bowen, *Shattuck Lecture: What is Quality Care?*, 316 NEW ENG. J. OF MED. 1578 (1987).

Liability problems arise when hospitals must rely upon outside agencies to meet specific personnel requirements. Temporary nurses are less acquainted with the hospital's facilities, internal policies, and procedures. A hospital can inquire as to whether an agency provides educational programs for its nurses, but the hospital has no way of determining whether the quality or content of the programs is sufficient. The hospital cannot accurately evaluate nurses' knowledge base or skill level they show up to fill vacant positions. At the same time, the hospital's duty to its patients dictates that it is responsible for the nursing care rendered on its premises and that it is expected to exercise a certain amount of control over its nurse employees.

The supplemental staffing agency usually employs the temporary nurse. The hospital, however, has the right to control and direct these nurses' work once they appear at the hospital to work. This "right to control" is the linchpin in any finding that the hospital is the employer of the agency nurse and therefore liable for that nurse's negligence. Under a related theory—the borrowed servant rule—a hospital is liable for "borrowed" nurses' actions simply because of the hospital's right to control their actions. To date, few cases involving agency nurse malpractice on a client hospital's grounds have reached the courts. The legal theories under which potential plaintiffs may bring suit are in place. Given the long-term nurse shortage and the increasing use of agency nurses, undoubtedly there will be an expansion in this area of hospital liability. Hospitals, therefore, should prepare themselves. This preparation should include adequate investigation of the utilized agency and its practices, adequate investigation of all agency nurses' credentials, and close monitoring and supervision of the agency nurses when they are practicing within the hospital.

Because the nursing shortage is a long-term problem, hospitals will continue to employ agency nurses to fill personnel gaps. Because nurses are the largest employee resource in hospitals,<sup>230</sup> their services typically are targeted for reduction by administrators.<sup>231</sup> At the same time, when there is a nursing shortage, administrators increasingly count on supplemental staffing agencies to fill vacan-

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230. Prescott, *Use of Nurses from Supplemental Services: Implications for Hospitals*, NURSE ADMIN. Q. 81 (1986).

231. McCormick, *What's the Cost of Nursing Care?*, HOSPITALS, Nov. 5, 1986, at 48, 50. Historically, nursing care was estimated to comprise 30 to 40% of hospital expenses. However, a study conducted by Medicus Systems Corporation assessing the actual cost of "hands-on" nursing care found that these expenditures constituted only 17.8% of Medicare reimbursement.



cies. Whenever possible, excessive and prolonged use of temporary nurses by hospitals should be avoided in order to assure a certain level of quality care and to keep the risk of malpractice liability at a minimum. Hospitals must seek their own alternatives. The establishment of an in-house registry or "float pool" programs is highly recommended because the hospital can require nurses to attend orientation and periodic in-service seminars. Hospitals also may contract with independent nurse practice groups or nurse staffing agencies to provide entire twenty-four hour nursing services for habitually understaffed units. Such a service agreement between a hospital and staffing agency is similar to hospitals' current use of physicians to provide radiological or emergency room services. This type of arrangement would be governed by a written contract providing indemnification against medical malpractice loss.

Nurses are struggling to be more than mere physicians' assistants without independent professional duties of their own. Perhaps because of their expanding roles, some have been named as defendants in medical malpractice lawsuits. As a result, approximately only half of all practicing nurses now carry medical malpractice insurance. Public policy would dictate that an injured patients should be compensated for any injuries sustained on hospital premises regardless of whether a nurse carried professional liability insurance. This leaves the supplemental staffing agency and the hospital, as the deepest pockets, open for malpractice claims. Indeed, if a hospital utilizes a nurse from a small staffing agency that fails to carry medical malpractice insurance for its nurses, the hospital may be the *only* deep pocket defendant in the case of agency nurse malpractice.<sup>232</sup> Although hospitals may not be able to avoid lawsuits, they may be able to guard against liability.

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232. Parenthetically, hospitals and supplemental staffing agencies are in a better position than nurses to insure for such losses.