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# The Expansion of Hospital Liability in Illinois: The Use and Abuse of Apparent Agency

William C. Anderson, III\*  
and Marilee Clausing\*\*

## I. INTRODUCTION

As medical malpractice awards escalate,<sup>1</sup> the plaintiffs' bar is discovering that the professional liability insurance limits of non-hospital defendants are frequently inadequate to satisfy those verdicts. As a result, hospitals are defendants in suits that would formerly have been directed primarily at individual health care providers.<sup>2</sup> In support of their search for funds, plaintiffs increasingly have advanced novel theories of hospital liability.<sup>3</sup> One of the most popular of these theories is the doctrine of apparent or ostensible agency.<sup>4</sup>

The Illinois Supreme Court has not yet had the opportunity to pass on the apparent agency doctrine as it applies to hospitals in medical malpractice actions. This Article will argue that adoption of the doctrine should be avoided because of the practical realities regarding the ways in which hospitals function and because of sound public policy reasons.

## II. THE DEVELOPMENT OF HOSPITAL LIABILITY: *RESPONDEAT SUPERIOR* AND CORPORATE NEGLIGENCE

Historically, hospitals were immune from liability for the mal-

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1. The American Medical Association reports that settlements and awards have broken all records, with multi-million dollar payouts becoming increasingly common. AMERICAN MEDICAL ASSOCIATION SPECIAL TASK FORCE ON PROFESSIONAL LIABILITY INSURANCE, PROFESSIONAL LIABILITY IN THE '80s, REPORTS 1, 2, & 3 (1984).

2. See Phoenix & Schleuter, *Hospital Liability for the Acts of Independent Contractors: The Ostensible Agency Doctrine*, 30 ST. LOUIS U.L.J. 875 (1986); Slawkowski, *Do the Courts Understand the Realities of Hospital Practices?*, 22 ST. LOUIS U.L.J. 452, 452 (1978).

3. See *infra* notes 5-97 and accompanying text.

4. See *infra* note 66. The terms apparent agency and ostensible agency are often used interchangeably.

practice of their employed doctors and nurses.<sup>5</sup> The rationale for this immunity was elaborated in the early 1900's in Justice Cardoza's opinion in *Schloendorff v. Society of New York Hospital*.<sup>6</sup>

The plaintiff in *Schloendorff* complained of a stomach illness and was admitted as a patient at the Society of New York Hospital.<sup>7</sup> The plaintiff was diagnosed as having a fibroid tumor and an operation was performed.<sup>8</sup> Subsequently, the plaintiff suffered gangrene which led to an amputation. The plaintiff sued, alleging that she had not consented to the operation. The trial court directed a verdict in favor of the defendant. In affirming the directed verdict, Justice Cardoza first examined the legal underpinnings of hospital immunity: the doctrine of implied waiver or charitable immunity and the relationship between a hospital and its doctors and nurses.<sup>9</sup> The settled law regarding charitable immunity at the time was that one who accepts the benefit of a charity enters a relationship that exempts one's benefactors from liability for the negligence of its servants in the administering of the charity.<sup>10</sup>

The holding of *Schloendorff* concerning the relationship between a hospital and its physicians and nurses was of great impact. The relationship between a hospital and physician, reasoned Cardoza, is not one of master and servant because the physician occupies the position of independent contractor who follows a separate calling, and is thus separately liable for his own wrongs to his patients.<sup>11</sup> Similarly, Justice Cardoza maintained that nurses do not act as servants of the hospital; rather, nurses act as delegates of their supervising physician.<sup>12</sup> According to Justice Cardoza, a hospital merely undertakes to procure the services of medical professionals who then exercise their skills and judgment in treatment of patients.<sup>13</sup>

Over the next forty years, state courts continued to wrestle with

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5. See Phoenix & Schlueter, *supra* note 2, at 876; Slawkowski, *supra* note 2, at 452; Note, *Medical Malpractice — Ostensible Agency and Corporate Negligence — Hospital Liability May Be Based on Either Doctrine of Ostensible Agency or Doctrine of Corporate Negligence*, 17 ST. MARY'S L.J. 551, 553 (1986) [hereinafter Note, *Medical Malpractice*]; Recent Decisions, *Torts — Medical Malpractice — Negligence of Independent Contractor Physicians Who Provide Specialized Services Is Imputed Vicariously to Hospitals Through Apparent Agency Principles*, 55 MISS. L.J. 879, 880 (1985).

6. 211 N.Y. 125, 105 N.E. 92 (N.Y. 1914).

7. *Id.* at 127, 105 N.E. at 92.

8. *Id.* at 128, 105 N.E. at 93.

9. *Id.* at 128-29, 105, N.E. at 93.

10. *Id.*

11. *Id.* at 129, 105 N.E. at 93.

12. *Id.* at 133, 105 N.E. at 94-95.

13. *Id.* at 132, 105 N.E. at 94-95.

the concept of hospital tort immunity. This continued effort led to the development of a distinction between "administrative" acts and "medical" acts.<sup>14</sup> Meanwhile, the federal courts rejected the implied waiver or charitable immunity defense entirely.<sup>15</sup> This rejection was not surprising given that hospitals were evolving into central loci for the housing of sophisticated and technologically advanced equipment, the purchase, maintenance, and operation of which might well prove prohibitive to the average physician. Consequently, a symbiosis born of necessity developed between physicians and hospitals. Over time, hospitals changed their character from their initial existence as simple charitable institutions<sup>16</sup> that provided bed and board for physicians' patients, into sophisticated, complex, and integrated corporate entities. They became comprehensive health care centers responsible for arranging, coordinating, and monitoring total health care on a fee-for-service basis.<sup>17</sup>

Furthermore, with the introduction of the modern concept of liability insurance to cover professional negligence, the traditional concerns underlying the doctrine of charitable immunity became much more difficult to apply.<sup>18</sup> Hospitals integrated physicians into their structure and often employed them directly as house physicians, interns, and residents.<sup>19</sup> Hospitals utilized a team approach to health care and provided a variety of functions such as developing standards and procedures for the appointment and retention of medical staff, maintaining quality control, coordinating medical and non-medical aspects of treatment into one functional

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14. A distinction developed over the years whereby a hospital was held liable for "administrative acts" while it retained its immunity for the "medical acts" of its physicians. See, e.g., *Jones v. New York Hosp.*, 57 A.D.2d 429, 134 N.Y.S.2d 779 (1954), *rev'd on other grounds*, 286 A.D.2d 825, 143 N.Y.S.2d 628 (1955). For examples of administrative acts, see Levin, *Hospital's Liability for Independent Emergency Room Service*, 22 SANTA CLARA L. REV. 791, 795-96 (1982) (administrative acts include transfer of patient from one hospital to another, use of electric cautery that ignited alcohol on patient's abdomen, administration of transfusions without written orders, and having a suicidal patient moved to a dangerous location).

15. See *President & Dir. of Georgetown College v. Hughes*, 130 F.2d 810 (D.C. Cir. 1942).

16. See *supra* note 10 and accompanying text.

17. See *Ybarra v. Spangard*, 25 Cal. 2d 486, 491, 154 P.2d 687, 691 (1944). See also Clifford, *Medical Malpractice and the Independent Contractor Defense: Hospitals Do Practice Medicine*, 1981 PERS. INS. ANNALS 315, 315-17; Note, *Medical Malpractice*, *supra* note 5, at 555.

18. See Southwick, *Hospital Liability — Two Theories Have Been Merged*, THE J. OF LEGAL MED. 1 (1983).

19. See Nord, *The Big Change — Suing Doctors Today Means Suing Hospitals. Here's Why*, 1985 THE BRIEF 7, 7; Note, *Theories for Imposing Liability Upon Hospitals For Medical Malpractice: Ostensible Agency and Corporate Liability*, 11 WM. MITCHELL L. REV. 561, 569 (1985) [hereinafter Note, *Theories for Imposing Liability*].

unit,<sup>20</sup> providing educational and research opportunities, and furnishing technical and specialist services to their patients and physicians.<sup>21</sup>

Recognizing these changes, in 1957 the New York Court of Appeals, in *Bing v. Thunig*,<sup>22</sup> noted the "inconstant course" of the *Schloendorff* rule, calling it "riddled with . . . exceptions and subjected to various qualifications and refinements."<sup>23</sup> Accordingly, the *Bing* court held that hospitals would no longer be immune from tort liability under *respondeat superior*.<sup>24</sup> In reaching its decision, the court reviewed the historical underpinnings of the charitable immunity of hospitals.<sup>25</sup> It reasoned that hospital immunity should rest on foundations stronger than those advanced in *Schloendorff*.<sup>26</sup> It pronounced the concept of implied waiver by a patient of a right to recover for negligence "logically weak" and "pretty much a fiction."<sup>27</sup> Likewise, the *Bing* court found the idea that professional personnel, such as doctors and nurses, should be treated as independent contractors when they were in fact employees to be inconsistent and anomalous.<sup>28</sup> The court concluded that

20. See Clifford, *supra* note 17, at 316.

21. See Angel, *Professionals and Unionization*, 66 MINN. L. REV. 383, 411-12 (1982).

22. 2 N.Y.2d 656, 143 N.E.2d 3, 163 N.Y.S.2d 3 (1957).

23. *Id.* at 663, 143 N.E.2d at 6, 163 N.Y.S.2d at 8.

24. *Id.* at 666, 143 N.E.2d at 8, 163 N.Y.S.2d at 11. The *Bing* court also rejected the medical/administrative act dichotomy. It quite succinctly outlined the fine distinctions between administrative and medical acts that had made the classification difficult for the courts:

Placing an improperly capped hot water bottle on a patient's body is administrative . . . while keeping a hot water bottle too long on a patient's body is medical. . . . Administering blood, by means of a transfusion, to the wrong patient is administrative . . . while administering the wrong blood to the right patient is medical. . . . Employing an improperly sterilized needle for a hypodermic injection is administrative . . . while improperly administering a hypodermic injection is medical.

*Id.* at 660-61, 143 N.E.2d at 4-5, 163 N.Y.S.2d at 7. See Note, *Theories for Imposing Liability*, *supra* note 19, at 566.

25. *Bing*, 2 N.Y.2d at 662, 143 N.E.2d at 5, 163 N.Y.S.2d at 7.

26. *Id.* at 663, 143 N.E.2d at 6, 163 N.Y.S.2d at 8.

27. *Id.*

28. *Id.* The court noted:

The conception that the hospital does not undertake to treat the patient, does not undertake to act through its doctors and nurses, but undertakes instead simply to procure them to act upon their own responsibility, no longer reflects the fact. Present-day hospitals, as their manner of operation plainly demonstrates, 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.

*Id.* at 666, 143 N.E.2d at 8, 163 N.Y.S.2d at 11.

hospitals should "shoulder the responsibilities borne by everyone else."<sup>29</sup> Although it cannot be said that *Bing* was the first decision to impose vicarious liability upon a hospital for the malpractice of its professionals, the decision can be used as an arbitrary benchmark for the historical development of hospital liability that followed.<sup>30</sup>

The Illinois courts eventually followed New York's lead in rejecting charitable immunity. The Illinois Supreme Court first adopted the doctrine of charitable immunity in *Parks v. Northwestern University*,<sup>31</sup> by holding that a charitable institution could not be found liable under the doctrine of *respondeat superior* for the negligent acts of its agents or employees. The court reasoned that the funds of a charitable institution acquired and held in trust could not be diverted from the trust to a person who enjoyed the benefit of the charity.<sup>32</sup> This doctrine was applied to hospitals, as well as other charitable corporations for approximately four decades.<sup>33</sup>

The doctrine was modified by the Illinois Supreme Court in the 1950 case of *Moore v. Moyle*.<sup>34</sup> In *Moore*, recovery was allowed against non-trust funds, such as insurance policies, of charitable corporations. The court reasoned that the concern over protection of trust funds was not valid when a policy of insurance existed that would cover damages.<sup>35</sup>

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29. *Id.*

30. Before imposing vicarious liability upon a hospital, a determination must first be made as to whether a master-servant relationship exists. The primary consideration is the extent of control exercised by the hospital over an individual. See Levin, *supra* note 14, at 797. A master-servant relationship is one in which the master retains the right to control the time, manner, and method of performing a job. *Id.* This "control test" is conceptually simple but is often difficult to apply. For example, the control exercised by a hospital as to the time, manner, and method of work performed by a physician or nurse is often confused with the right to require a certain result or to regulate in general terms an individual's conduct. *Id.* See also Malleris, Foltz & Grenier, *Special Problems Respecting Institutional Negligence*, in *Defense Of Medical Malpractice* 4-1, 4-14 (Ill. Inst. for CLE, 1987). Theoretically, if a physician or nurse does not meet the control test, vicarious liability for negligent acts should not be imputed to the hospital. For a thorough discussion of the doctrine of *respondeat superior* and its application to hospitals, see Reuter, *Toward a More Realistic and Consistent Use of Respondeat Superior in the Hospital*, 29 ST. LOUIS U.L.J. 601 (1985). See also Southwick, *supra* note 18, at 1.

31. 218 Ill. 381, 75 N.E. 991 (1905).

32. *Id.* at 385, 75 N.E. at 993.

33. See *Hogan v. Chicago Lying-In Hosp.*, 335 Ill. 42, 166 N.E. 461 (1929); *Maretick v. South Chicago Community Hosp.*, 297 Ill. App. 488, 17 N.E. 1012 (1st Dist. 1938); *Olander v. Johnson*, 258 Ill. App. 89 (2d Dist. 1930); *Haines v. State Board of Agriculture*, 184 Ill. App. 191 (3d Dist. 1913).

34. 405 Ill. 555, 92 N.E.2d 81 (1950).

35. *Id.* at 562, 92 N.E.2d at 86.

Shortly thereafter, in *Molitor v. Kaneland Community Unit District No. 302*,<sup>36</sup> the Illinois Supreme Court found that none of the reasons advanced in support of the closely aligned doctrine of school immunity maintained viability in modern day society.<sup>37</sup> It likened the basis for school immunity to the trust fund basis for charitable immunity, and found that in this day and age such immunity could not be justified on a protection of public funds theory.<sup>38</sup>

Charitable immunity was officially laid to rest in Illinois in *Darling v. Charleston Community Memorial Hospital*.<sup>39</sup> In *Darling*, the court found that charitable immunity could no longer stand in light of *Molitor*. The *Darling* court reasoned that whether or not particular assets of a charitable organization are exempt from execution to satisfy a judgment does not determine liability.<sup>40</sup> In addition to abolishing charitable immunity, *Darling* established the principle that a hospital, apart from its agents or employees, owed a duty directly to patients to supervise the activities of medical staff physicians.<sup>41</sup>

The plaintiff in *Darling* sustained a leg fracture during a football game and was taken to the defendant's emergency room.<sup>42</sup> Dr. Alexander, a medical staff physician on call to the emergency room that day, casted the leg and placed it in traction. Shortly thereafter, the patient began to complain of pain and his toes began to swell. Despite palliative measures by Dr. Alexander, the condition worsened. The patient stayed at Charleston Community Hospital for two weeks and continued to complain of severe pain.<sup>43</sup> After transfer to another hospital, it was learned that necrosis of the leg had set in as a result of an impairment of circulation caused by constriction of the cast. The leg was eventually amputated.<sup>44</sup>

The plaintiff alleged that the hospital was negligent for failing to supervise the care and treatment rendered to the plaintiff by the

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36. 18 Ill. 2d 11, 163 N.E.2d 89 (1959).

37. *Id.* at 25, 163 N.E.2d at 92.

38. *Id.* at 22, 163 N.E.2d at 94.

39. 33 Ill. 2d 326, 211 N.E.2d 253 (1965), *cert. denied*, 383 U.S. 946 (1966).

40. *Id.* at 337-38, 211 N.E.2d at 260.

41. See Phoenix & Schleuter, *supra* note 2, at 878; Rapp, *Darling and Its Progeny: A Radical Approach to Hospital Liability*, 60 ILL. B.J. 883 (1972); Comment, *Piercing the Doctrine of Corporate Hospital Liability*, 17 SAN DIEGO L. REV. 383, 385 (1980). Numerous Illinois cases since *Darling*, as well as various commentators, have stated otherwise. See *infra* notes 55-58 and accompanying text.

42. *Darling*, 33 Ill. 2d at 326, 211 N.E.2d at 255.

43. *Id.* at 328-329, 211 N.E.2d at 255.

44. *Id.* at 329, 211 N.E.2d at 256.

nurses and Dr. Alexander, failing to require a consultation, and negligently permitting Dr. Alexander to perform orthopedic procedures for which he was not qualified.<sup>45</sup> The hospital defended maintaining that it could not practice medicine and thus could not control Dr. Alexander's professional judgment. Moreover, the hospital asserted that the nurses were executing the legal orders of the physician rather than the hospital and that therefore it was not liable for those acts.<sup>46</sup>

Quoting *Bing*, the *Darling* court noted that the traditional notion that a hospital is not responsible under the doctrine of *respondet superior* for the acts of its employed health care providers no longer reflected the realities of practice at modern day hospitals.<sup>47</sup> This fact, combined with its abolition of charitable immunity, formed the basis for its holding that the defendant hospital owed a duty to supervise the care and treatment rendered to the plaintiff not only by its nurses, but also by Dr. Alexander.<sup>48</sup>

The *Darling* case illustrates not only the concept of indirect liability imposed upon hospitals by the doctrine of *respondet superior*, but also the direct liability imposed by the doctrine of corporate negligence.<sup>49</sup> Corporate negligence derives from a hospi-

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45. *Id.*

46. *Id.* at 330, 211 N.E.2d at 256. (quoting the defendant's brief). The defendant argued as follows:

It is a fundamental rule of law that only an individual properly educated and licensed, and not a corporation, may practice medicine. . . . Accordingly, a hospital is powerless under the law to forbid or command any act by a physician or surgeon in the practice of his profession. . . . A hospital is not an insurer of the patient's recovery, but only owes the patient the duty to exercise such reasonable care as his known condition requires and that degree of care, skill and diligence used by hospitals generally in that community. . . . Where the evidence shows that the hospital care was in accordance with standard practice obtaining in similar hospitals, and Plaintiff produces no evidence to the contrary, the jury cannot conclude that the opposite is true even if they disbelieve the hospital witnesses. . . . A hospital is not liable for the torts of its nurse committed while the nurse was but executing the orders of the patient's physician, unless such order is so obviously negligent as to lead any reasonable person to anticipate that substantial injury would result to the patient from the execution of such order. . . . The extent of the duty of a hospital with respect to actual medical care of a professional nature such as is furnished by a physician is to use reasonable care in selecting medical doctors. When such care in the selection of the staff is accomplished, and nothing indicates that a physician so selected is incompetent or that such incompetence should have been discovered, more cannot be expected from the hospital administration.

*Id.*

47. *Id.* at 332, 211 N.E.2d at 259.

48. *Id.* at 329, 211 N.E.2d at 256.

49. Corporate negligence has been defined as the failure of those entrusted with the task of providing accommodations and facilities necessary to carry out the charitable



tal's direct and non-delegable duty as an institution to provide for a patient's care, safety, and management.<sup>50</sup> Prior to *Darling*, there were three generally recognized duties that a hospital owed to its patients:<sup>51</sup> the exercise of reasonable care in the selection and retention of its staff physicians and employees;<sup>52</sup> the maintenance of buildings and grounds;<sup>53</sup> and the maintenance of hospital equipment.<sup>54</sup> Commentators have heralded the *Darling* decision for its creation of still another duty — supervising the medical care rendered to patients not only by employed physicians but also by independent staff physicians.<sup>55</sup> The *Darling* court, however, seemed to view Dr. Alexander as an employed physician because he had been placed on emergency room call by the hospital.<sup>56</sup> Subsequent Illinois cases indeed have borne out this fact.<sup>57</sup> Despite the fact that the *Darling* holding has often been overstated, it is now generally held that a hospital owes a direct duty to patients to supervise the care and treatment rendered by staff physicians who are independent contractors.<sup>58</sup> In justification for this expansion of hos-

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purpose of the corporation to follow in a given situation the established standard of conduct to which the corporation should conform. See *Bader v. United Orthodox Synagogue*, 148 Conn. 449, 453, 172 A.2d 192, 194 (1961).

50. Zaremski & Spitz, *Liability of a Hospital As An Institution: Are the Walls of Jericho Tumbling?*, 16 FORUM 225 (1980).

51. Southwick, *supra* note 18, at 17.

52. See, e.g., *Hipp v. Hosp. Auth. of Marietta*, 104 Ga. App. 174, 121 S.E.2d 273 (1961) (hospital liable for failure to investigate the moral character and background of an orderly employed by the hospital who later molested a child at the hospital); *Garlington v. Kingsley*, 277 So.2d 183 (La. App. 1973), *rev'd on other grounds*, 289 So.2d 88 (La. 1974) (material question of fact existed as to whether hospital was liable on a theory of corporate negligence for selecting nurses and other employees who were incompetent); *Wilson N. Jones Memorial Hosp. v. Davis*, 553 S.W.2d 180 (Tex. App. 1977) (hospital negligent for failing to check orderly's references before hiring him).

53. See Southwick, *supra* note 18, at 17; Comment, *The Hospital-Physician Relationship: Hospital Responsibility for Malpractice of Physicians*, 50 WASH. L. REV. 385 (1975); Zaremski & Spitz, *supra* note 50, at 229.

54. See Southwick, *supra* note 18, at 18. This particular form of negligence can result from the on-going use of equipment with a known defect, from misuse of equipment, or negligent selection of equipment for a particular purpose. See, e.g., *Phillips v. Powell*, 21 Cal. 39, 290 P. 441 (1930); *Ardoin v. Hartford Accident & Indem. Co.*, 350 So. 2d 205 (La. App. 1977), *reversed*, 360 So.2d 1331.

55. See *supra* note 41 and accompanying text.

56. *Darling*, 33 Ill. 2d at 329, 211 N.E.2d at 256. There is, however, some ambiguity in that regard. The appellate court referred to him as being "on the medical staff." See *Darling*, 50 Ill. App. 2d at 268, 200 N.E.2d at 158.

57. See *Collins v. Westlake Community Hosp.*, 12 Ill. App. 3d 847, 847, 299 N.E.2d 326, 328-29 (1st Dist. 1973), *rev'd on other grounds*, 57 Ill. 2d 388, 312 N.E.2d 614 (1974); *Lundahl v. Rockford Memorial Hosp., Ass'n.*, 93 Ill. App. 2d 461, 235 N.E.2d 671, 674 (2d Dist. 1968).

58. See Southwick, *supra* note 18, at 30. The *Darling* court also held that hospital by-laws, rules, regulations, licensing requirements, and accreditation standards of The Joint

pital liability, some commentators have argued that modern-day hospitals play an active role in patient care and that patients have come to expect that treatment will be rendered by individuals who are part of a well-coordinated and efficient hospital team.<sup>59</sup> They argue that patients expect the hospital to exercise some control over treatment.<sup>60</sup> Unfortunately, those commentators view hospitals more as business corporations that exercise control over all that goes on within their walls rather than as institutional coordinators of care with little, if any, ability or opportunity to influence the individual medical care provided to a patient by his physicians.<sup>61</sup>

In response to those commentators' position, it is important to stress that the structure and function of a business corporation differs significantly from that of a hospital. Business corporations have a hierarchy of authority wherein each person reports to, and is directly supervised by, an individual above him on the organizational chart. At the top of the organizational chart is a chief executive officer who is responsible for the actions of those below him in the hierarchy. He or she exercises control, whether it be direct or through middle managers, over the method and manner in which the corporation conducts business. He or she has control over the actions of those who tend to the corporation's business.

A hospital, like a business corporation, has a hierarchy of authority and an organizational chart. Unlike a business corporation, however, there is a dichotomy of structure within a hospital that directly influences the manner in which it functions. A hospital's "business" is to provide, in conjunction with its medical staff, health care services to patients. The medical staff provides the essential medical care; the hospital provides vital support in the form of facilities, equipment, and ancillary personnel such as nurses, res-

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Commission on Accreditation of Hospitals are admissible as evidence of the standard of care at the time of trial. *Darling*, 33 Ill. 2d at 332, 211 N.E.2d at 260-61. Since *Darling*, some courts have used this concept to support liability against hospitals for violations of such: rules, regulations, requirements, and standards on a corporate negligence theory. See, e.g., *Duckett v. North Detroit General Hosp.*, 84 Mich. App. 426, 269 N.W.2d 626 (1979). Moreover, it is considered to follow therefrom that the failure to institute hospital rules and regulations can, in and of itself, support a finding of corporate negligence. See, e.g., *Keene v. Methodist Hosp.*, 324 F. Supp. 233 (N.D. Ind. 1971); *Habuda v. Trustees of Rex Hosp., Inc.*, 3 N.C. App. 11, 164 S.E.2d 17 (1968).

59. See Note, *Independent Duty of a Hospital To Prevent Physicians' Malpractice*, 15 ARIZ. L. REV. 953 (1973) [hereinafter Note, *Independent Duty of a Hospital*]; Note, *Theories for Imposing Liability*, *supra* note 19, at 562.

60. See Note, *Independent Duty of A Hospital*, *supra* note 59, at 967.

61. For a critique of the trend towards expansion of hospital liability, see Slawkowski, *supra* note 2.

idents and technologists. Although a hospital, like a business corporation, may exercise control over the actions of its employees, it does not exercise control over an independent staff physician's medical treatment of his or her patients. The medical staff physician does not report to anyone in the hospital administration's hierarchy regarding the manner in which he or she treats his or her patients. He or she is, in essence, the chief executive officer of the treatment of his or her patients. The private physician alone exercises control, based upon his or her professional medical judgment, as to the medical treatment rendered to patients.

Misconstruing a hospital as a business corporation accounts in great part for the willingness of courts to expand hospital liability. Of course, in order to impose liability on a hospital under the *respondet superior* or corporate negligence theories, either a tort by a servant/agent/employee or corporate wrongdoing must exist. Faced with a situation in which neither exists, the plaintiffs' bar was compelled to rely upon the frequently inadequate resources of private practitioners to respond in damages. Consequently, the doctrine of apparent agency developed.

### III. THE EVOLUTION OF APPARENT AGENCY

An apparent agency relationship is said to exist when one party erroneously leads a third party to believe that another individual is the agent of the first party.<sup>62</sup> This concept derives from the Restatement of Agency<sup>63</sup> and the Restatement of Torts.<sup>64</sup> Its application to the hospital-independent contractor physician relationship has but one purpose — to impose liability upon the hospital for the negligent acts of the physician that result in injury to a patient in the absence of an employer-employee relationship. The result is

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62. See Payne, *Recent Developments Affecting a Hospital's Liability for Negligence of Physicians*, 18 S. TEX. L.J. 389, 398-99 (1977). See also *infra* note 66.

63. See RESTATEMENT (SECOND) OF AGENCY § 7 (1958), which states:

One 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.

64. See RESTATEMENT (SECOND) OF TORTS § 429 (1966) which states:

One who employs an independent contractor to perform services for another which are accepted in the reasonable belief that the services are being rendered by the employer or by his servants, is subject to liability for physical harm caused by the negligence of the contractor in supplying such services, to the same extent as though the employer were supplying them himself or by his servants.

that a plaintiff collects money damages from the deepest pocket available, usually that of the institution.

When discussing the doctrine of apparent agency, three often interchangeable concepts come into play — actual agency,<sup>65</sup> apparent agency,<sup>66</sup> and estoppel to deny employment.<sup>67</sup> Although there may be academic distinctions to be drawn among the three,<sup>68</sup> from a practical standpoint they are almost always grouped and discussed together by both courts and commentators.<sup>69</sup> There are two

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65. The application of actual agency principles to a hospital-physician relationship involves an inquiry as to whether the hospital exercised sufficient control over the actions of the physicians to impute an agency relationship. The two determinative factors are usually the extent of control and method of payment. *See Greene v. Rogers*, 147 Ill. App. 3d 1009, 1014, 498 N.E.2d 867, 871 (3d Dist. 1986).

66. Apparent and ostensible agency are used synonymously, BLACK'S LAW DICTIONARY defines an apparent or ostensible agent as follows:

*Apparent agent or ostensible agent.* One whom the principal, either intentionally or by want of ordinary care, induces third persons to believe to be his agent, though he has not, either expressly or by implication, conferred authority on him. A person who, whether or not authorized, reasonably appears to third person, because of manifestations of another, to be authorized to act as agent for such other. Restatement, Second, Agency § 8.

BLACK'S LAW DICTIONARY 59 (5th ed. 1979) The interchangeability of the concepts of ostensible or apparent agency and estoppel to deny employment is illustrated by the following definition given for ostensible agency:

An implied or presumptive agency which exists where one, either intentionally or from want of ordinary care, induces another to believe that a third person is his agent, though he never in fact employed him. *It is, strictly speaking, no agency at all, but is in reality based entirely upon estoppel.*

*Id.* at 992 (emphasis added).

These definitions closely parallel the description of apparent agency found in the Restatements. *See supra* notes 63-64 and accompanying text. Commentators and courts also often use the concepts of apparent agency and estoppel to deny employment interchangeably. *See Malleris, Foltz & Grenier, supra*, note 30 at 4-14.

67. The doctrine of estoppel to deny employment requires that the injured plaintiff rely to his detriment upon the representation of the hospital, whether express or implied, relative to the relationship between it and the physician. *See Greene v. Rogers*, 147 Ill. App. 3d at 1016, 498 N.E.2d at 872 (3d Dist. 1986). *See also, Northern Trust v. St. Francis Hosp., et al.*, 86-0887 (4th Div. 1988).

68. *See, e.g., Beeck v. Tucson General Hosp.*, 18 Ariz. App. 165, 500 P.2d 1153 (1972); *Adamski v. Tacoma General Hosp.*, 20 Wash. App. 98, 579 P.2d 970 (1978); *Phoenix & Schleuter, supra* note 2, at 879; *Southwick, supra* note 18, at 10; Note, *Medical Malpractice, supra* note 5, at 560; Note, *Theories for Imposing Liability, supra* note 19, at 560.

69. *See, e.g., Beeck v. Tucson Gen. Hosp.*, 18 Ariz. App. 165, 500 P.2d 1153 (1972); *Adamski v. Tacoma Gen. Hosp.*, 20 Wash. App. 98, 579 P.2d 970 (1978); *Phoenix & Schleuter, supra* note 2 at 879; Note, *Medical Malpractice, supra* note 5, at 560; Note, *Theories for Imposing Liability, supra* note 19, at 560.

During the publication phase of this Article, the Illinois Appellate Court for the First District handed down its opinion in *Northern Trust Co. v. St. Francis Hosp.*, 168 Ill. App. 3d 270, 522 N.E.2d 699 (1st Dist. 1988). The plaintiff alleged that the emergency room physician was the apparent agent of the defendant hospital. Regarding the issue of

requirements to be met in establishing malpractice liability based upon an apparent agency relationship between a hospital and a non-employed physician: 1) that the hospital, either through commission or omission, created the appearance that a principal-agent relationship existed between it and the independent physician; and 2) that the plaintiff reasonably relied upon that appearance and belief.<sup>70</sup> The patient must further demonstrate that the reliance caused his injury in some fashion. The central focus of this test is whether the hospital has, through its actions or lack thereof, induced a patient of ordinary prudence to believe that the physician was its agent.<sup>71</sup> Unfortunately, the emphasis is frequently on the patient's subjective impressions and expectations rather than the objective issue of what the "prudent person" would believe and the nature of legal relationship that exists between hospital and physician.<sup>72</sup>

Many justify the application of the apparent agency doctrine to the hospital-physician relationship by pointing to the underlying

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apparent agency, the court instructed the jury that the plaintiff had the burden of proving that: (1) the hospital placed the emergency room physician in a situation that led the plaintiff to believe that an agency relationship existed; (2) that the plaintiff relied on the action of the hospital; and (3) that if the plaintiff had known the physician was not an agent of the hospital, he would have taken a different course of action. *Id.* at 277-78, 522 N.E.2d at 704.

On appeal of a verdict for the hospital, the plaintiff argued that the trial judge erred in giving the above instruction to the jury because "the law of apparent agency does not require proof of a change in position." *Id.* at 278, 522 N.E.2d at 704. The court rejected the plaintiff's argument. It found that the doctrine of apparent agency is based on the doctrine of equitable estoppel, and that there is no practical difference between them. *Id.*

*Northern Trust* illustrates the willingness of courts to interchange the concepts of apparent agency and estoppel to deny employment. Fortunately, the *Northern Trust* court, seemingly unlike the *Sztorc* court, stressed that detrimental reliance cannot be inferred, but must be proven. Compare *Northern Trust*, 168 Ill. App. 3d at 279, 522 N.E.2d at 705, with *Sztorc*, 146 Ill. App. 3d at 278, 496 N.E.2d at 1202. See *infra* notes 160-62.

70. See *Phoenix & Schleuter*, *supra* note 2, at 879. Other commentators have outlined up to three or four elements necessary to invoke the doctrine of apparent agency. See, e.g., *Southwick*, *supra* note 18, at 10 (four elements: patient has been invited by hospital to use the services of the physician; hospital holds itself out as providing a complete range of medical care; patient relies upon these representations; reliance permits conclusion that the physician is an integral part of the hospital); Note, *Medical Malpractice*, *supra* note 5, at 560 (three elements: patient must reasonably believe that the physician is operating under the hospital's authority; the belief must have been generated by the hospital's act or omission; the patient must have relied upon the representation); Note, *Theories for Imposing Liability*, *supra* note 19, at 573-74 (three elements: the patient must reasonably believe the physician's authority; the hospital's act or omission must have generated such a belief; the patient who relies upon the physician's authority must not be negligent).

71. See *Arthur v. St. Peters Hosp.*, 169 N.J. Super. 575, 580, 405 A.2d 443, 446 (1979).

72. See *Payne*, *supra* note 62, at 393; *Phoenix & Schleuter*, *supra* note 2, at 881-82.

assumption that a patient has no duty to inquire about the legal relationship of the physician to the hospital.<sup>73</sup> Essentially, it is presumed that a hospital that holds itself out as having the ability to provide a service and the necessary personnel impliedly vouches for the competency of the personnel involved.<sup>74</sup> Apparent agency is most often relied upon with regard to establishing hospital liability for the conduct of emergency room physicians, pathologists, radiologists, and anesthesiologists.<sup>75</sup> It also has been used with surgeons, psychiatrists, and cardiologists.<sup>76</sup> The authors disagree with those who find the application of the doctrine to such physicians justifiable. It is the authors' opinion that such application is contrary to established apparent agency case law and the realities of hospital practice.

One of the earliest cases recognizing apparent agency as a viable theory for hospital liability was the 1942 California case of *Stanhope v. Los Angeles College of Chiropractic*.<sup>77</sup> *Stanhope* involved a radiologist who had complete control over the function and operation of the radiology department and collected his own fees rather than relying upon the hospital to collect them for him.<sup>78</sup> The radiology department, however, was located within the hospital and the sign that identified the name of the radiology department was ambiguous as to whether the department was or was not run by the hospital.<sup>79</sup> These factors were sufficient to allow the court to determine that the radiologist was indeed the apparent agent of the hospital.<sup>80</sup> Thirteen years later, California utilized the doctrine again to find a hospital liable for the actions of an anesthesiologist.<sup>81</sup> Determinative factors included the physician's exclusive work for the hospital and the hospital's supplying of the anesthetic agents.<sup>82</sup>

Many other jurisdictions have followed the *Stanhope* rationale and have recognized apparent agency as a viable theory on which to base hospital liability.<sup>83</sup> The factors and circumstances that a

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73. See *Howard v. Park*, 37 Mich. App. 496, 501, 195 N.W.2d 39, 41-42 (1972); Note, *Theories For Imposing Liability*, *supra* note 19, at 575.

74. See Strodel, *Ostensible Agency — Piercing the Veil of Hospital — Physician "Independent Contracts"*, 1981 PERS. INJ. DESKBOOK 326, 327.

75. See Butler & Laszlo, *Hospital Liability for Physician Negligence in Georgia: A Realistic Approach*, 37 MERCER L. REV. 701, 712 (1986).

76. See Note, *Medical Malpractice*, *supra* note 5, at 562.

77. 54 Cal. App. 2d 141, 128 P.2d 705 (1942).

78. *Id.* at 708.

79. *Id.*

80. *Id.*

81. See *Seneris v. Haas*, 45 Cal. 2d 811, 291 P.2d 915 (1955).

82. *Id.* at 828-30, 291 P.2d at 926-27.

83. See, e.g., *Beeck v. Tucson Gen. Hosp.*, 18 Ariz. App. 165, 500 P.2d 1153 (1972);

court will consider in determining the existence or non-existence of an apparent agency relationship between a hospital and physician vary. In addition to the above, consideration thus far has been given to factors such as whether the patient chose the hospital rather than the physician;<sup>84</sup> whether there was a pre-existing relationship between patient and physician prior to hospitalization;<sup>85</sup> whether there was payment of a salary by the hospital;<sup>86</sup> whether there was an exclusive relationship between physician and hospital;<sup>87</sup> the degree of patient reliance on the hospital's reputation as opposed to reliance on the physician's reputation;<sup>88</sup> the degree of control exercised by the hospital governing body over the appointment of physicians<sup>89</sup> and the hours they work;<sup>90</sup> whether the hospital supplied the equipment and support staff used by the physician;<sup>91</sup> the nature and extent of the emergency that brought the patient to the hospital;<sup>92</sup> from whom the bill for services came;<sup>93</sup> the similarity of dress between hospital employees and the non-employed physician;<sup>94</sup> and the representations of hospital employees about the status of the non-employee physician.<sup>95</sup>

Generally speaking, the factors considered by the courts focus on the patient's reasonable understanding and belief regarding the relationship between the hospital and the physician, as well as the

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*Vanaman v. Milford Memorial Hosp.*, 272 A.2d 718 (Del. 1970); *Irving v. Doctors Hosp. of Lake Worth, Inc.*, 415 So. 2d 55 (Fla. App. 1982); *Steward v. Midani*, 525 F. Supp. 843 (N.D. Ga. 1981); *Williams v. St. Claire Medical Center*, 657 S.W.2d 590 (Ky. App. 1983); *Mehlman v. Powell*, 281 Md. 269, 378 A.2d 1121 (1977); *Howard v. Park*, 37 Mich. App. 496, 195 N.W.2d 39 (1972); *Mduba v. Benedictine Hosp.*, 52 A.D.2d 450, 384 N.Y.S. 2d 527 (1976); *Rucker v. High Point Memorial Hosp.*, 20 N.C. App. 650, 202 S.E.2d 610 (1974); *Hannola v. Lakewood*, 68 Ohio App. 61, 426 N.E.2d 1187 (1980); *Smith v. St. Francis Hosp., Inc.*, 676 P.2d 279 (Okla. App. 1983); *Themins v. Emmanuel Lutheran Charity Bd.*, 54 Or. App. 901, 637 P.2d 155 (1981); *Capan v. Divine Providence Hosp.*, 287 Pa. Super. 364, 430 A.2d 647 (1980); *Adamski v. Tacoma Gen. Hosp.*, 20 Wash. App. 98, 579 P.2d 970 (1978).

84. *See* *Wilson v. Stilwith*, 411 Mich. 587, 309 N.W.2d 898 (1981).

85. *Id.* *See also* *Grewe v. Mt. Clemens Gen. Hosp.*, 404 Mich. 240, 273 N.W.2d 429 (1978); *Smith v. St. Francis Hosp., Inc.*, 676 P.2d 279 (Okla. App. 1983).

86. *See* *Greene v. Rogers*, 147 Ill. App. 3d 1009, 498 N.E.2d 867 (3d Dist. 1986).

87. *See* *Seneris v. Haas*, 45 Cal. 2d 811, 291 P.2d 915 (1955).

88. *See* *Vanaman v. Milford Memorial Hosp.*, 272 A.2d 718 (Del. 1970).

89. *See* *Hannola v. Lakewood*, 68 Ohio App. 2d 61, 426 N.E.2d 1187 (1980).

90. *See* *Beeck v. Tuscon Gen. Hosp.*, 18 Ariz. App. 165, 500 P.2d 1153 (1972).

91. *Id.*

92. *See* *Hannola v. Lakewood*, 68 Ohio App. 2d 61, 426 N.E.2d 1187 (1980).

93. *Id.*

94. *See* *Porter v. Sisters of St. Mary*, 756 F.2d 669 (8th Cir. 1985).

95. *Id.* In *Porter*, a hospital employee told the plaintiff patient that Dr. Schneider, an independent contractor, was "our best man" or "our best person for the job." This representation was considered to be crucial evidence supporting the plaintiff's claim of apparent agency. *Id.* at 673-74.

amount of control exercised by the hospital over the physician. Many of the same factors looked to by the courts outlined above<sup>96</sup> have been considered by Illinois courts when addressing the issue of apparent agency relative to an independent contractor physician.<sup>97</sup>

#### IV. THE DEVELOPMENT OF APPARENT AGENCY IN ILLINOIS

Despite other jurisdictions' expansion of hospital liability as early as the 1940's,<sup>98</sup> Illinois only recently employed apparent agency principles to do so.<sup>99</sup> The earliest attempts in Illinois to hold hospitals liable for the alleged negligent acts of non-employed physicians were based on actual agency theories.<sup>100</sup> These early cases did *not* consider apparent agency or estoppel as viable alternatives to an actual agency relationship.

For example, in *Hundt v. Proctor Community Hospital*,<sup>101</sup> the plaintiff alleged that the defendant hospital was vicariously liable for the misconduct of the surgeon who was "a member of the active medical staff" at the hospital.<sup>102</sup> The surgeon allegedly had performed a surgical procedure on the plaintiff that was different from that to which she had consented.<sup>103</sup> This different procedure resulted in the plaintiff's total paralysis.

The plaintiff did not assert independent wrongdoing on the hospital's part under the doctrine of corporate negligence nor did she allege vicarious liability for the wrongdoing of the hospital's employees. Rather than attempting to assert an apparent agency relationship between the hospital and surgeon in order to impute the surgeon's negligence to the hospital, the plaintiff alleged that the relationship between the hospital and surgeon was an agency relationship because the surgeon and hospital were acting as "joint

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96. See *supra* notes 77-82, 84-95 and accompanying text.

97. See *infra* notes 150-51 and accompanying text.

98. See *supra* notes 77-80 and accompanying text.

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

100. See, e.g., *Johnson v. St. Bernard Hosp.*, 79 Ill. App. 3d 709, 399 N.E.2d 198 (1st Dist. 1979); *Hundt v. Proctor Community Hosp.*, 5 Ill. App. 3d 987, 284 N.E.2d 987 (3d Dist. 1972). For a discussion of the distinction between actual agency and the closely related theories of apparent agency and estoppel to deny agency, see *supra* notes 65-67 and accompanying text.

101. 5 Ill. App. 3d 987, 284 N.E.2d 676 (3d Dist. 1972).

102. *Id.* at 989, 283 N.E.2d at 678.

103. The plaintiff signed a consent for a "spinal fusion, and such additional operations or procedures as are considered therapeutically necessary. . . ." *Id.* at 988, 283 N.E.2d at 677. According to the medical records, a spinal fusion was not performed. Instead, a rhizotomy of the left thoracic vertebra was done. *Id.*



venturers."<sup>104</sup> The court noted that it was undisputed that the surgeon was engaged in private practice, was a member of the independent medical staff, and, more importantly, did not receive a salary or other compensation from the defendant hospital.<sup>105</sup> Interestingly, the court did not dwell upon the issue of control except to note that the surgical consent that was obtained from the patient by the nurse was executed at the direction of the surgeon.<sup>106</sup>

The court summarily dismissed the plaintiff's agency allegation by noting that the joint venturer theory had never been applied to the physician-hospital relationship and that such a relationship was different from the typical joint venturer situation.<sup>107</sup> The court continued by emphasizing the traditional view of the staff physi-

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104. *Id.* at 989-90, 284 N.E.2d at 678.

105. *Id.*

106. One of the determinative factors to the establishment of an agency relationship is whether the hospital exercised sufficient control over the actions of the physician. *See supra* note 65. *See also* *Greene v. Rogers*, 147 Ill. App. 3d 1009, 1014, 498 N.E.2d 867, 871 (3d Dist. 1986). For an in-depth discussion of the control factor as explained by the *Greene* court, see *infra* notes 192-98 and accompanying text.

107. In attempting to establish that the hospital and physician were joint venturers, plaintiff relied upon *Carroll v. Caldwell*, 12 Ill. 2d 487, 147 N.E.2d 69 (1958), and *Ditis v. Ahlvin Const. Co.*, 408 Ill. 416, 97 N.E.2d 244 (1951). *See Hundt*, 5 Ill. App. 3d at 990-91, 284 N.E.2d at 678. The *Carroll* court noted that courts have not laid down an exact definition of what constitutes a joint venture. The answer depends upon the terms of the particular agreement, the construction that the parties have given to the agreement, and the nature of the undertaking. Characteristics and elements of a joint venture were outlined: A joint venture contemplates an enterprise that is jointly undertaken — it is an association of joint undertakers to carry out a single project for profit; there must be a community of interest in accomplishing a common purpose, a proprietary interest in the subject matter of the enterprise, a right to direct and govern policy and a duty to share in profit and losses. *Carroll*, 12 Ill. 2d at 496-97, 147 N.E.2d at 74. The relationship is a matter of intent and arises only when the parties intended to associate themselves. *Id.* In rejecting the joint venture theory, the *Hundt* court noted that the joint venturers found in the above cases did not involve a hospital-physician relationship. The only element that the hospital-physician relationship met was that there was a community of interest in promoting the good health of patients. *Hundt*, 5 Ill. App. 3d at 990, 284 N.E.2d at 678.

Recently, in *Barton v. Evanston Hosp.*, 159 Ill. App. 3d 970, 513 N.E.2d 65 (1st Dist. 1987), the Appellate Court for the First District held as a matter of law that a hospital could not be held vicariously liable for the actions of an independent physician on a joint venturer theory. The court found that a joint venture would not be imputed to the hospital-physician relationship because joint control is missing in such a relationship. The court rejected plaintiff's contention that such joint control exists when a hospital supplies a physician with materials and personnel and, likewise, when the physician directs and controls the actions of the personnel supplied by the hospital. Interestingly, the First District considers such factors to be insufficient to support a claim of joint venture but sufficient to support a claim of apparent agency. Surely it should be more difficult to prove that a hospital is solely responsible for the actions of an independent physician in treating his patients within its walls than to prove joint responsibility between physician and hospital for such medical treatment.

cian/hospital relationship as an "independent relationship."<sup>108</sup> Although the court acknowledged that the both hospital and physician had to cooperate with each other for the purposes of the hospitalization it pointed out that necessity for cooperation did not nullify the independent roles of each.<sup>109</sup>

Consistent with *Hundt* is *Johnson v. St. Bernard Hospital*.<sup>110</sup> In *Johnson*, the Illinois Appellate Court for the First District was confronted again with a situation in which a plaintiff attempted to hold a hospital liable for the allegedly negligent acts of an independent physician, in this case an emergency room physician. The court reiterated the traditional rule that "the decision to treat a patient in a particular manner is a medical question entirely within the discretion of the treating physician, not the hospital, and the negligence of a physician in the treatment of a patient cannot be imputed to the hospital where the physician is not an agent or under the direction of the hospital."<sup>111</sup> The court further noted that although a hospital may be liable for injuries to a patient caused by its agents or employees,<sup>112</sup> it could not be held liable for the acts of one who renders medical care as an independent contractor outside of the hospital's control.<sup>113</sup> Because it was undisputed that the emergency room physician was not employed or paid by the hospital, the court found that the physician did not have the requisite employer-employee or principal-agent relationship with the hospital to impose vicarious liability under a *respondeat superior* theory.<sup>114</sup>

As an alternative to her actual agency theory, the plaintiff asserted that the hospital should be held liable for the acts of the independent contractor physician because he performed functions

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108. *Hundt*, 5 Ill. App. 3d at 990, 284 N.E.2d at 678.

109. *Id.*

110. 79 Ill. App. 3d 709, 399 N.E.2d 198 (1st Dist. 1979)

111. *Id.* at 714, 399 N.E.2d at 203 (citing *Collins v. Westlake Community Hosp.*, 12 Ill. App. 3d 847, 299 N.E.2d 326 (1st Dist. 1973), *rev'd on other grounds*, 57 Ill. 2d 388, 312 N.E.2d 614 (1974); *Lundahl v. Rockford Memorial Hosp. Ass'n*, 93 Ill. App. 2d 461, 255 N.E.2d 671 (2d Dist. 1968)).

112. *Id.* (citing *Foster v. Englewood Hosp. Ass'n*, 19 Ill. App. 3d 1055, 313 N.E.2d 255 (1st Dist. 1974)).

113. *Id.* (citing *Hundt v. Proctor Community Hosp.*, 5 Ill. App. 3d 987, 284 N.E.2d 676 (3d Dist. 1972); *Stern v. Baum*, 89 Ill. App. 2d 142, 232 N.E.2d 96 (1st Dist. 1967)).

114. *Id.* at 715, 399 N.E.2d at 203. Unlike the plaintiff in *Hundt*, the plaintiff in *Johnson* also alleged that the hospital was directly negligent in failing to ensure that the patient got prompt and adequate attention and in failing to assure proper and adequate orthopedic consultation. *Id.* at 711, 399 N.E.2d at 201. Relying upon *Darling*, the court found this theory created a question of fact sufficient to defeat the defendant hospital's motion for summary judgment. *Id.* at 718, 399 N.E.2d at 204-06.

statutorily prescribed to the hospital.<sup>115</sup> The First District summarily dismissed this assertion, finding that the statutory provision upon which the plaintiff relied was not broad enough to impose upon the hospital the duty to practice medicine within an independently operated emergency room facility.<sup>116</sup>

Illinois first recognized and applied the apparent agency doctrine to a medical malpractice case in *Gasbarra v. St. James Hospital*.<sup>117</sup> The plaintiff brought a wrongful death action pursuant to the decedent's emergency room treatment at the defendant hospital. The hospital's emergency room was managed by an independent professional corporation, Doctors Emergency Care Association ("DECA"). Pursuant to a written agreement with the hospital, DECA was to provide physicians' services to all patients brought to the emergency room.<sup>118</sup> The agreement further provided that the hospital was to furnish all non-physician personnel as well as all supplies, space, and equipment necessary for the operation of the emergency department.<sup>119</sup> A DECA physician provided emergency care to the decedent.<sup>120</sup>

The plaintiff sued the hospital alleging that the DECA physicians were the agents of the defendant hospital<sup>121</sup> or, in the alterna-

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115. *Id.* at 715, 399 N.E.2d at 203. The plaintiff relied upon a provision of "An Act Requiring Hospitals to Render Hospital Emergency Services," ILL. REV. STAT. ch. 111½, para. 86 (1977), which provided that "every licensed hospital that provided general medical and surgical hospital services shall provide a hospital emergency service."

116. *Johnson*, 79 Ill. App. 3d at 715, 399 N.E.2d at 203.

117. 85 Ill. App. 3d 32, 406 N.E.2d 544 (1st Dist. 1979). The *Gasbarra* case involved an appeal by the plaintiff, after a verdict for the hospital, of the trial court's denial of her motion for a directed verdict. The initial hearing on plaintiff's appeal was held on December 7, 1979. On June 20, 1980, a hearing was held on the plaintiff's petition for rehearing. The plaintiff contended in her petition that the appellate court had misunderstood the nature of her motion for directed verdict at the trial level. The court viewed plaintiff's motion for directed verdict as a single motion for directed verdict on the issue of liability. The plaintiff claimed that her motion was also a motion on various other issues, including the nature of the defendant hospital's relationship with the emergency room physicians. *Id.* at 42, 406 N.E.2d at 553. For a discussion of the controversy relative to that relationship, see *infra* notes 121-40 and accompanying text. Although plaintiff's petition for rehearing was denied, it is the appellate court's supplemental opinion on the denial of the rehearing that contains the court's discussion of the nature of the relationship between the hospital and non-employee physicians. *Gasbarra*, 85 Ill. App. 3d at 43-45, 406 N.E.2d at 553-55.

118. *Id.* at 44, 406 N.E.2d at 554.

119. *Id.* at 43, 406 N.E.2d at 554.

120. *Id.*

121. *Id.* at 35, 406 N.E.2d at 548. The plaintiff did not name DECA or the individual physicians as defendants in the action. *Id.* at 41, 406 N.E.2d at 552. She named only the defendant hospital. In order to impute the physicians' alleged wrongdoing to the hospital, she attempted to prove that the physicians were the agents of the hospital. In one portion of the opinion, when discussing the plaintiff's contention that she should

tive, that the hospital should be equitably estopped from denying an agency relationship.<sup>122</sup> Neither DECA nor the emergency room physicians were named in the suit. The *Gasbarra* court properly noted that the right to control the manner in which work is to be performed is the predominant factor to be considered in determining whether a principal-agency relationship exists<sup>123</sup> and that the resolution of that question depends upon the particular circumstances of each case.<sup>124</sup> Because the plaintiff was appealing from a denial of a directed verdict, the court emphasized that the issue of whether one is an agent or an independent contractor is generally a question of fact, "unless the relationship is so clear as to be undisputed."<sup>125</sup>

In its analysis of whether the physicians were the agents of the hospital, the court looked to a number of factors: the fact that the hospital provided the facilities, equipment, ancillary personnel, and forms used by the emergency department; the fact that on the four occasions the decedent was seen in the emergency room; the fact that the plaintiff was never informed that DECA, and not the hospital, managed and operated the emergency room; the fact that all billings were prepared and sent to the plaintiff by the hospital; the fact that the consent-for-treatment form signed by the plaintiff gave consent to the hospital for treatment of the decedent; and the fact that the name of DECA did not appear on any of the bills or consent forms.<sup>126</sup>

The court also scrutinized the agreement between DECA and the hospital. It noted that the agreement provided that DECA was to supply uninterrupted emergency medical services, employ physicians to provide those services, supervise, direct, and operate the

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have been allowed to question the president of DECA as an adverse witness, the court noted that the plaintiff alleged that the DECA physicians "were the actual or apparent agents of the defendant." *Id.* (emphasis added). When discussing the nature of the relationship between the hospital and the DECA physicians relative to the question of agency in the supplemental opinion, however, the court merely spoke in terms of actual agency or estoppel to deny agency, not apparent agency. It well could be that the *Gasbarra* court, like many other courts and commentators was using the terms of actual agency, apparent agency, and estoppel to deny agency interchangeably. See *supra* notea 65-70 and accompanying text.

122. *Gasbarra*, 85 Ill. App. 3d at 44, 406 N.E.2d at 554.

123. *Id.* at 43, 406 N.E.2d at 553 (citing *Allstate Insurance Co. v. National Tea Co.*, 25 Ill. App. 3d 449, 323 N.E.2d 521 (1975)). For a discussion of the role control plays in the determination of whether an agency relationship exists, see *supra* note 65.

124. *Id.* (citing *Yuhas v. Allis-Chalmers Distrib. Corp.*, 12 Ill. App. 3d 814, 299 N.E.2d 166 (1973)).

125. *Id.* (citing *Blake v. Dickinson*, 31 Ill. App. 3d 379, 332 N.E.2d 575 (1975)).

126. *Id.* at 43-44, 406 N.E.2d at 554.

department, and maintain quality control of the medical services rendered to patients entering the emergency room.<sup>127</sup> The agreement also provided that DECA physicians were to be "of a superior quality consistent with the requirements of the hospital" and that their responsibilities for patient care were to be "in accordance with the standards established therefore by the administration of the hospital."<sup>128</sup> The plaintiff argued that these provisions of the agreement illustrated that the physicians were the agents of the hospital because they were contractually bound to obey rules promulgated by the hospital, thus implying control over their activities by the hospital.<sup>129</sup> To counter the plaintiff's argument, the hospital emphasized the fact that all of the physicians were employed by DECA, not by the hospital, and that they were completely in control of the medical care given to emergency patients.<sup>130</sup> The hospital argued that it could not exercise control over the manner in which a DECA physician treated a patient, and that DECA promulgated its own rules and regulations that took precedence over the hospital's rules and regulations.<sup>131</sup>

After enumerating the above factors, the *Gasbarra* court made no comment upon whether the circumstances warranted a finding that there was or was not an agency relationship between the DECA physicians and hospital. Rather, because the case was before them on an appeal from a denial of a directed verdict, the court merely stated that it could not say that an agency relationship was so clear as to be undisputed.<sup>132</sup> Therefore, the factual question went to the jury who, upon consideration of the numerous factors relative to the issue of control, found in the defendant hospital's favor on the question of agency.<sup>133</sup>

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127. *Id.* at 44, 406 N.E.2d at 554.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* The standard for a directed verdict is whether all of the evidence, when viewed in the aspect most favorable to the opponent, so overwhelmingly favors the movant that no contrary verdict based upon the evidence could stand. *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510, 229 N.E.2d 504, 513-14 (1967). The evidence presented failed to meet this standard. Accordingly, plaintiff's motion for a directed verdict was denied and the agency question was submitted to the jury.

133. *Gasbarra*, 85 Ill. App. 3d at 34, 406 N.E.2d at 547. A special interrogatory was submitted to the jury inquiring as to whether the jury found the emergency room physicians to be independent contractors. It was answered in the affirmative. *Id.* The plaintiff contended that such an interrogatory should not have been submitted to the jury and that, in any event, the finding that the DECA physicians were independent contractors was against the manifest weight of the evidence. *Id.* at 37, 406 N.E.2d at 549. The plaintiff had objected to the special interrogatory on the grounds that it should not be

Arguing in the alternative, the plaintiff contended that a verdict should have been directed in her favor as to the agency issue on the basis of estoppel.<sup>134</sup> Because this was a case of first impression, the court reviewed the basic principles of law relative to estoppel. The court noted that:

Equitable estoppel may be defined as the effect of the voluntary conduct of a party whereby he (or she) is absolutely precluded from asserting rights which might otherwise have existed as against another person who has, in good faith, relied upon such conduct and has been led thereby to change his position for the worse, and who on his part acquired some corresponding rights.<sup>135</sup>

The court stressed that in order to apply the doctrine of estoppel, there must have been reliance in good faith upon the conduct of another *and* a change of position for the worse as a result of the reliance.<sup>136</sup> Neither element was the subject of specific testimony at the time of trial. Yet the court, in a move that was perhaps an omen of the First District's willingness to utilize the doctrine to hold hospitals responsible for the negligence of non-employed physicians,<sup>137</sup> found that the facts presented to the jury could readily support the assumption that the plaintiff relied on the hospital's conduct.<sup>138</sup> Fortunately, the court did not assume that there was also a change of position by the plaintiff. It reasoned that the plaintiff brought the decedent to the hospital for medical care that

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submitted because it would not control the general verdict. Although the court concluded that the special interrogatory should not have been submitted, the fact that it was, was not in and of itself reversible error because there was little indication that the jury had been confused by the interrogatory to the detriment of plaintiff. *Id.* at 39, 406 N.E.2d at 551.

134. *Id.* at 44, 406 N.E.2d at 554.

135. *Id.* at 44-45, 406 N.E.2d at 554 (quoting *Slavis v. Slavis*, 12 Ill. App. 3d 467, 473, 299 N.E.2d 413, 417 (1973)).

136. *Id.* at 45, 406 N.E.2d at 555 (citing *Hartford Accident & Indem. Co. v. D.F. Best, Inc.* 56 Ill. App. 3d 960, 372 N.E.2d 829 (1977), and *Atwater v. Atwater*, 18 Ill. App. 3d 202, 309 N.E.2d 632 (1974)). The court quoted ILLINOIS LAW & PRACTICE on estoppel as follows:

Since the doctrine of estoppel is invoked to prevent injustice or a fraudulent result, there can be no estoppel where . . . the person claiming equitable estoppel has not been induced to alter his position in such a way that he will be injured if the other person is not held to the representation. It is not necessary, however, that actual malice motivate the representations or conduct which have been acted on to work an estoppel, so long as there is a change in position by the adverse party to his detriment.

18 ILL. L. & PRAC. *Estoppel* § 234 (1956).

137. See *infra* notes 144-64 and accompanying text.

138. *Gasbarra*, 85 Ill. App. 3d at 45, 406 N.E.2d at 555.

she indeed received, albeit allegedly improperly.<sup>139</sup> Because the plaintiff did not contend that she would have taken other action had she been informed that the physicians were not employees of the hospital, the court quite appropriately would not apply the doctrine of estoppel to the facts of the case.<sup>140</sup>

Although *Gasbarra* involved a discussion of the concepts of actual agency and estoppel to deny agency, and not apparent agency *per se*, many of the factors that the court enumerated in its analysis of the facts are factors that the First District later would utilize in applying the doctrine of apparent agency to the hospital/independent physician relationship.<sup>141</sup> Although the *Gasbarra* court properly noted that control over the manner in which the work was performed was the predominant factor to be considered in determining whether an agency relationship existed,<sup>142</sup> the numerous factors enumerated went well beyond the issue of control.<sup>143</sup> In short, *Gasbarra* involved use of apparent agency considerations in addressing an actual agency question. Although it did not apply the doctrine of apparent agency to the facts before it, there was an implicit willingness to do so if confronted with different facts in the future.

Such a set of facts presented themselves in the 1986 case of *Sztorc v. Northwest Hospital*.<sup>144</sup> The *Sztorc* case involved the plaintiff's appeal of the trial court's order granting summary judgment to the defendant hospital.<sup>145</sup> The summary judgment was granted because the court found as a matter of law that the hospital was not liable under a theory of apparent agency for allegedly negligent treatment rendered to the plaintiff by an independent group of radiologists practicing on the hospital premises.<sup>146</sup> The plaintiff contended on appeal that the trial court erred in granting summary judgment because there was a genuine issue of material fact as to

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139. *Id.*

140. *Id.*

141. *See infra* notes 150-51 and accompanying text.

142. *See supra* notes 123-24 and accompanying text.

143. For example, the fact that the plaintiff was never informed that DECA, and not the hospital, managed the emergency room, and the fact that DECA's name did not appear on the bills or consent forms are not relevant to the issue of control but rather are matters that might cause a reasonably prudent plaintiff to believe that the doctors are the agents of the hospital. Likewise, the question of who provided the equipment, facilities, and ancillary personnel for emergency care says little about who controlled the manner in which the physician provided medical care to the emergency room patients.

144. 146 Ill. App. 3d 275, 496 N.E.2d 1200 (1st Dist. 1986).

145. *Id.* at 276, 496 N.E.2d at 1200.

146. *Id.*

the apparent agency question.<sup>147</sup>

The plaintiff underwent a right radical mastectomy at the defendant hospital.<sup>148</sup> The surgery was performed by Dr. Khodadad, a surgeon and named defendant in the action. The plaintiff was also under the care of her longtime family physician, Dr. Schroeder, who was also named as a defendant. Following the plaintiff's discharge from the hospital, Dr. Schroeder prescribed outpatient radiation therapy and told the plaintiff to go to the defendant hospital for the treatments. She received thirty one sessions of radiation therapy at the hospital in the radiation department over a period of approximately five weeks.

Over the following three years the plaintiff noticed a gradual loss of function in her right arm. Drs. Khodadad and Schroeder assured her that her arm function would improve over time. Thereafter, the plaintiff underwent surgery on her right brachial plexus and discovered that her arm had been permanently damaged as a result of overexposure to radiation.<sup>149</sup> The plaintiff attempted to impute the radiologists' liability to the defendant hospital through use of the apparent agency doctrine.

The court outlined the undisputed facts relevant to the plaintiff's claim of apparent agency.<sup>150</sup> First, the radiology department at the defendant hospital was comprised of a group of physicians operating under the name of "IG Radiology."<sup>151</sup> That department was owned, operated, and staffed by Dr. Irving Greenberg, whose initials presumably generated the departmental name. Although each of the radiologists in the group had staff privileges at the hospital, none of them were actually employees. Furthermore, all of the equipment used for radiation therapy was owned by Dr. Greenberg, and he was solely responsible for its repair, maintenance, and calibration. Dr. Greenberg billed the radiology patients directly and each bill contained only Dr. Greenberg's name. The hospital did not receive any revenues for the radiation treatments provided by Dr. Greenberg's group.

The radiology department was located on the main floor of the hospital and in order to reach it, patients had to enter through the hospital's main entrance and proceed through the lobby and down a main hallway through a set of swinging doors labeled "X-ray

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147. *Id.* at 276-77, 496 N.E.2d at 1201.

148. *Id.* at 276, 496 N.E.2d at 1200.

149. *Id.* at 276, 496 N.E.2d at 1200-01.

150. *Id.* at 277, 496 N.E.2d at 1201.

151. *Id.*



Department." The doors also bore the names of Dr. Greenberg and the other physicians, as well as the designation "Department of Radiation Therapy." The same radiology department serviced both inpatients and outpatients, all of whom were scheduled for appointments by a technician that was employed by Dr. Greenberg. Finally, there was not a dress code or other manner by which patients could distinguish Dr. Greenberg's employees from the hospital's employees.

The *Sztorc* court commented that summary judgment "is a drastic method of disposing of litigation"<sup>152</sup> and that it should not be granted when there exists a triable issue of fact, such as when there are undisputed material facts from which reasonable persons might draw different inferences.<sup>153</sup> The court then summarily concluded that "[o]ur courts have consistently found the question of agency to constitute such an issue of fact."<sup>154</sup> Reasoning that it was well settled after *Darling* that even absent an actual agency relationship a hospital could be held liable for the acts of independent physicians practicing on the premises,<sup>155</sup> the *Sztorc* court outlined the use of the apparent agency doctrine in the other jurisdictions.<sup>156</sup> It rationalized that the doctrine's purpose was to preclude the entry

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152. *Id.*

153. *Id.* (citing *Johnson v. St. Bernard Hosp.*, 79 Ill. App. 3d 709, 399 N.E.2d 198 (1st Dist. 1979), *appeal denied*, 79 Ill. 2d 631 (1979)). Specifically, *Johnson* noted that "[a] triable issue precluding summary judgment exists where there is a dispute as to material facts, or where, the material facts being undisputed, reasonable persons might draw different inferences from the facts." *Johnson*, 79 Ill. App. 3d at 714, 399 N.E.2d at 202.

154. *Sztorc*, 146 Ill. App. 3d at 277, 496 N.E.2d at 1201 (citing *Barkhausen v. Naugher*, 395 Ill. 562, 70 N.E.2d 565 (1947) and *Sherman v. Field Clinic*, 74 Ill. App. 3d 21, 392 N.E.2d 154 (1st Dist. 1979)). Interestingly, the *Sherman* case did not involve a motion for summary judgment nor did it address the question of whether the existence of an agency relationship is a question of fact that must be submitted to a jury. The case involved a motion to dismiss that attacked the sufficiency of a complaint that alleged an agency relationship. The court did not reach the underlying question of whether the absence of an agency relationship is properly raised in a motion to dismiss because the movant failed to attach the requisite affidavit in support of its motion. *Sherman*, 74 Ill. App. 3d at 26, 392 N.E.2d at 158.

Additionally, it should be noted that the *Barkhausen* case cited by plaintiff did not state that the determination as to whether an agency relationship exists is a question of fact for the jury. Rather, it held that the determination as to whether a known agent was authorized to act was a question of fact to be submitted to a jury. *Barkhausen*, 395 Ill. 2d at 566, 70 N.E.2d at 567.

155. *Sztorc*, 146 Ill. App. 3d at 278, 496 N.E.2d at 1201 (citing *Darling v. Charleston Community Mem. Hosp.*, 33 Ill. 2d 326, 211 N.E.2d 253 (1965), *cert. denied*, 383 U.S. 946 (1966)). Although the *Sztorc* court said it was "well settled" that *Darling* stood for this proposition you may recall that the *Darling* court made no reference to the employment status of the physician in question and may well have considered him to be an employed physician. See *supra* notes 56-57 and accompanying text.

156. *Sztorc*, 146 Ill. App. 3d at 278, 496 N.E.2d at 1201-02.

of summary judgment "under circumstances where a person, like plaintiff here, goes to a hospital which holds itself out as a full service institution offering a range and variety of services such as radiation treatment under the assumption that such services are in fact being provided by the hospital."<sup>157</sup> The court noted that the use of the doctrine in other jurisdictions rested upon the presumption that when a person goes to a full service hospital for care and treatment, "he or she does so in reliance upon the reputation of the institution and the skill and expertise of its personnel."<sup>158</sup> It further noted that the underlying rationale behind those holdings was that patients, who are generally unaware of the independent status of the treating physicians, should not be bound by the "secret limitations" that are contained in a private contract between a hospital and independent physician.<sup>159</sup>

The defendant hospital contended that the plaintiff's claim that the radiologists were the apparent agents of the hospital should be defeated because she failed to show good faith reliance upon the hospital's expertise and a holding out or inducement to accept treatment there.<sup>160</sup> The defendant pointed to the plaintiff's deposition testimony wherein she stated that she did not know whether it would have made any difference to her if the radiologists had been in private practice or employed by the hospital.<sup>161</sup> The court im-

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157. *Id.*

158. *Id.* at 278, 496 N.E.2d at 1202 (citing *Stanhope v. Los Angeles College of Chiropractic*, 54 Cal. App. 2d 141, 128 P.2d 705 (1942); *Smith v. St. Francis Hosp.*, 676 P.2d 279 (Okla. App. 1983); *Hannola v. Lakewood*, 68 Ohio App. 2d 61, 426 N.E.2d 1187 (1980); *Themins v. Emanuel Lutheran Charity Bd.*, 54 Or. App. 901, 637 P.2d 155 (1981); *Adamski v. Tacoma Gen. Hosp.*, 20 Wash. App. 98, 579 P.2d 970 (1978)). The court also cited *Holton v. Resurrection Hosp.*, 88 Ill. App. 3d 655, 410 N.E.2d 969 (1st Dist. 1980) for the proposition that the mere fact that treatment is rendered on a hospital's premises creates a presumption of agency at least for purposes of determining the sufficiency of a complaint. The *Holton* court's finding was indeed limited to precisely that situation, i.e. determining the sufficiency of a complaint on a motion to dismiss, and should not be so broadly interpreted as to create a presumption of agency in any other situation where an allegation of apparent agency is made.

159. *Sztorc*, 146 Ill. App. 3d at 278, 496 N.E.2d at 1202.

160. 146 Ill. App. 3d at 278-79, 496 N.E.2d at 1202.

161. *Id.* The colloquy was as follows:

Q: Inasmuch as Dr. Schroeder ha[d] recommended that you go to the radiation therapy department for treatment, would it have made any difference to you, one way or the other, whether or not Dr. Greenberg and Dr. Bluhm were in private practice or whether they were employed by Northwest Hospital?

A: I don't know.

Q: You don't know whether it would have made any difference?

A: I don't know.

Q: So you don't know now, and you didn't know then, is that right?

A: I don't know.

plicitly agreed with the hospital's assertion that it was necessary to find that the plaintiff would have acted differently had she known of the contractual agreement between the radiologists and hospital. Rather than accept her deposition testimony as dispositive of that issue, however, the court decided that a question of fact remained as to whether she would have indeed acted differently.<sup>162</sup>

The court concluded that it disagreed with the trial court's assessment that there was no basis in the evidence for holding the defendant liable under a theory of apparent agency.<sup>163</sup> It held that "the totality of facts in the instant case could lead a normal person, such as plaintiff, to reasonably believe that the radiology services being provided to her were in fact being provided by defendant hospital, and that a triable issue of fact with respect to apparent agency therefore exists which must preclude summary judgment."<sup>164</sup>

The *Szorc* court's unprecedented adoption of the apparent agency doctrine in Illinois was uncalled for and poorly reasoned with respect to the specific facts before it. The court gave no sound reason for the adoption of the apparent agency doctrine in a medical malpractice case in Illinois. The long-standing traditional rule in Illinois had been that the decision to treat a patient in a particular manner was a medical question entirely within the discretion of the treating physician, rather than the hospital, and that the negligence of a physician treating a patient could not be imputed to the hospital where the physician was an independent contractor.<sup>165</sup> The staff physician-hospital relationship was seen as an independent relationship and mutual cooperation between the two did not require abandonment of the independent roles of each.<sup>166</sup> The *Szorc* court cited the *Darling* case for the erroneously broad proposition that a hospital could be held liable for the acts of independent physician on the premises even absent an agency relationship.<sup>167</sup> It seemed to believe that adoption of the apparent agency doctrine was a logical extension of the *Darling* decision. The court's belief in that regard was misguided — it involved a basic misconstruction of the *Darling* court's holding and it employed a leap in logic that ignored the traditional common law

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*Id.*

162. *Id.* at 279, 496 N.E.2d at 1202.

163. *Id.*

164. *Id.*

165. *See supra* notes 111-13 and accompanying text.

166. *See supra* notes 108-09 and accompanying text.

167. *See supra* notes 55-56, 155 and accompanying text.

principles that were based upon the realities of hospital practices.<sup>168</sup>

In validating apparent agency as a theory of recovery for the plaintiff, the court confused the nature of the relationship between a principal and an independent contractor.<sup>169</sup> When a principal merely delegates, as did the hospital to the radiologists in *Sztorc*, it is not liable for the negligence of the contractor.<sup>170</sup> It is only when a principal exercises control over the manner in which the contractor performs the work that it may be held liable.<sup>171</sup> In an agency or employment relationship, the principal or employer has the absolute right to supervise, direct, and control the activities of the agent. It is because of this high degree of control that courts have found it just to impute liability for the agent's or employee's actions to the principal or employer.<sup>172</sup>

In contrast, a hospital has no power to control the medical decisions of the independent physician concerning his care and treatment of a patient.<sup>173</sup> Although hospital by-laws, rules, regulations, policies, and procedures may contain general guidelines regarding independent staff physicians, they do not contain guidelines or mandates regarding the specifics of medical treatment. Moreover, the *Sztorc* case did not involve allegations of liability for violations of by-laws or for a failure to insist that rules be followed. Thus, any control allegedly imposed by them was not at issue. Most rules and regulations are procedural or organizational in nature and are necessary for uniformity and for the efficient operation of a large institution. Agreeing to abide by a hospital's rules and regulations represents more a spirit of cooperation between hospital and physician than evidence of control. In short, the decision to treat a patient in a particular manner still remains a medical question entirely within the treating physician's discretion and control. As such, there is no sound reason for disrupting the traditional rule of non-liability for hospitals for the actions of its independent physicians.

Even if there were sound reasons for the adoption of the apparent agency doctrine, the *Sztorc* case did not present facts that war-

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168. For an in-depth commentary upon the unique nature of the hospital-physician relationship, see Slawkowski, *supra* note 2, at 452.

169. See Malleris, Foltz and Grenier, *supra* note 30, at 4-14.

170. *Id.*

171. *Id.*

172. *Id.* at 4-14 to 4-15.

173. See Nagib v. St. Therese Hosp. Inc., 41 Ill. App. 3d 970, 355 N.E.2d 211 (2d Dist. 1976).

ranted its application. Under Illinois law, "apparent authority" generally arises when the principal creates, by its words or conduct, the reasonable impression in a third party that the agent has authority to perform on the principal's behalf.<sup>174</sup> The court seemed to place a great deal of weight upon the fact that the radiology department was physically located within the hospital and that patients had to walk through the main lobby and down a corridor to get to the department.<sup>175</sup> Such emphasis seems to imply that the mere fact that the care was rendered on the hospital's premises raises a presumption of an agency relationship. Such a presumption is without logic because it ignores decades of common law agency principles.

The *Sztorc* court emphasized the rationales and assumptions underlying its adoption of the apparent agency doctrine.<sup>176</sup> The court never applied those rationales or assumptions to the facts with which it was confronted. For example, the court noted that the doctrine was to be used in circumstances in which a patient goes to a hospital that holds itself out as a full service institution on the assumption that such patients go to the full service institution in reliance upon the institution's reputation.<sup>177</sup> It is unclear what the *Sztorc* court meant when it spoke of a "holding out." When one holds himself out, it is commonly understood that he is representing himself to be someone or something specific.<sup>178</sup> He is, in essence, affirmatively representing himself in a particular way. Based upon this definition, there was no evidence of a holding out in *Sztorc*. The hospital did nothing to represent to the plaintiff that it was a full service institution. It is equally unclear what the *Sztorc* court meant when it spoke of a full service hospital. Logically, it would seem that a full service hospital is one which offers all the medical services, facilities, equipment, and specialists' services that a modern day medical center is capable of offering. Following the *Sztorc* court's rationale that the doctrine of apparent agency is to be used in situations in which a patient goes to a full service hospital, hospitals that are unable to provide all possible services should be free from attack under the apparent agency theory. Indeed,

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174. See *Bellflower AG Serv. Inc. v. First Nat'l Bank & Trust Co.*, 130 Ill. App. 3d 80, 473 N.E.2d 998 (4th Dist. 1985); *Devers v. Prudential Property and Casualty Co.*, 86 Ill. App. 3d 542, 408 N.E.2d 462 (5th Dist. 1980).

175. See 146 Ill. App. 3d at 277, 496 N.E.2d at 1201.

176. See *supra* notes 157-59 and accompanying text.

177. See *supra* notes 157-58 and accompanying text.

178. "Hold out . . . 2: to represent to be. . . ." Webster's Ninth New Collegiate Dictionary 575 (1983).

Northwest Hospital, the defendant in the *Sztorc* case, is just such a hospital!<sup>179</sup>

Even more importantly, the plaintiff in the *Sztorc* case did not rely upon the hospital's reputation in seeking her radiation treatments at that institution. Instead, she was sent to that hospital at the direction of her long-standing family physician, Dr. Schroeder,<sup>180</sup> whose judgment she certainly must have trusted. Under the circumstances, it seems likely that the plaintiff would have gone wherever her family physician sent her. It seems unjust to hold a hospital liable for the allegedly negligent acts of an independent physician merely because it has the misfortune to be the institution to which a patient's independent family doctor sends her for treatment.

It is even more peculiar that the *Sztorc* court would hold the hospital liable on an apparent agency theory when the plaintiff herself was unable to say that she would have gone elsewhere had she known that the radiologists were not the agents or employees of the hospital.<sup>181</sup> There is no sound legal basis for imputing liability to a hospital for the acts of independent contractors on an apparent agency theory when there is no evidence that their status mattered

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179. The Illinois Hospital Licensing Act defines a hospital as follows:

§ 3. As used in this Act:

(A) "Hospital" means any institution, place, building or agency, public or private, whether organized for profit or not, devoted primarily to the maintenance and operation of facilities for the diagnosis and treatment or care of 2 or more unrelated persons admitted for overnight stay or longer in order to obtain medical, including obstetric, psychiatric and nursing, care of illness, disease, injury, infirmity, or deformity.

(a) any facility which is devoted primarily to providing psychiatric and related services programs for the diagnosis and treatment or care of 2 or more unrelated persons suffering from emotional or nervous diseases;

(b) all places where pregnant females are received, cared for, or treated during delivery irrespective of the number of patients received.

The term "Hospital" includes general and specialized hospitals, tuberculosis sanatoria, mental or psychiatric hospitals and sanatoria, and includes maternity homes, lying-in homes, and homes for unwed mothers in which care is given during delivery.

Hospital Licensing Act, ILL. REV. STAT. ch. 111½, para. 144 (1985). The above definition indicates that there are many different kinds of hospitals offering a variety of services. Such services range from basic bed and board for general medical patients to isolettes for high risk neonates; from simple laboratory and radiological testing to complex and sophisticated testing possible only with the most technologically advanced equipment; from general practice physicians to sub-specialists.

Northwest Hospital, now known as the John F. Kennedy Medical Center, is a community hospital, not a tertiary care medical center. Telephone conversation with Sister Bonaventure Kusek, President of John F. Kennedy Medical Center (August 29, 1988).

180. See *Sztorc*, 146 Ill. App. 3d at 276, 496 N.E.2d at 1200.

181. See *supra* note 161 and accompanying text.

to the plaintiff. Imputing liability demonstrates not a desire to fairly determine which parties are rightfully in the lawsuit, but rather a desire to keep the deep pocket institution in the suit at all costs.

Despite a set of facts that strongly favored the hospital's position relative to its motion for summary judgment, the *Sztorc* court stated that Illinois courts have consistently found that the issue of agency is a material question of fact such as to defeat a motion for summary judgment.<sup>182</sup> In so stating, the court ignored an entire line of cases which holds that although the existence of an agency relationship is generally a question of fact for the jury, it becomes a question of law to be decided by the court when the relationship of the parties is clear on the facts.<sup>183</sup> A hospital in an apparent agency case in Illinois now has less hope for resolution of the suit on a dispositive motion prior to trial than if it is in the suit on a direct negligence theory. An astute plaintiff's attorney need only allege apparent agency along with his other theories of recovery to assure the presence of the deep pocket for the duration of the litigation. Such a result is neither just to the institution nor is it well grounded in law.

Considering the ease with which liability can be imputed to a hospital under an apparent agency theory, plaintiffs' attorneys now begin to shape their cases early in the litigation to support an apparent agency claim. Plaintiffs who have been well prepared by their attorneys on the apparent agency issue routinely testify during their depositions that had they known a certain physician was not the agent or employee of the defendant hospital, they would have gone elsewhere for their care. Such testimony is suspect, however, because in all likelihood their only option would be to go to another hospital whose emergency room physicians, radiologists, anesthesiologists, pathologists, and surgeons are also independent contractors. Surely, most patients go to a particular hospital because that is where their trusted private physician sent them. It is unlikely that they would go elsewhere, even if they knew the true nature of the hospital-physician relationship. It is

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182. See *supra* notes 152-54 and accompanying text.

183. See *In re Estate of Rice*, 130 Ill. App. 3d 416, 473 N.E.2d 1382 (2d Dist. 1985); *Wargel v. First Nat'l Bank*, 121 Ill. App. 3d 730, 460 N.E.2d 331 (5th Dist. 1984); *Farrell v. Lincoln Nat'l Bank*, 24 Ill. App. 3d 142, 320 N.E.2d 208 (1st Dist. 1974).

It has been the authors' experience that trial judges, based upon the *Sztorc* decision, now routinely deny motions for summary judgment on behalf of hospitals in cases where apparent agency is alleged, summarily stating that whether an agency relationship exists is a question of fact sufficient to defeat a motion for summary judgment.

doubtful that patients in need of emergency treatment would forego that immediate treatment in order to go to another hospital merely because they discovered that the emergency physician at the initial hospital was an independent contractor. This is especially true when the emergency room physicians down the street are probably also independent contractors. The reality of hospital practice always has been, and will continue to be, that many different independent contractor physicians deliver care and treatment to patients within the confines of the hospital. To hold the hospital, in addition to the independent contractor, liable defies this reality and serves no purpose other than to increase the funds available to plaintiffs in the event they prevail at trial.

Despite the First District's adoption of the apparent agency doctrine in *Sztorc*, the Third District has refused to follow suit and has held fast to the well-founded traditional rules of liability respecting hospitals. In *Greene v. Rogers*,<sup>184</sup> the Illinois Appellate Court for the Third District affirmed the trial court's granting of the defendant hospital's motion for summary judgment on the issue of whether the emergency room physician was the actual or apparent agent of the hospital.<sup>185</sup> The opinion is well reasoned and demonstrates a clear understanding of the interrelated concepts of actual agency, apparent agency, and estoppel.

In *Greene*, the plaintiff's decedent entered the defendant hospital's emergency room with complaints of chest pains radiating to the arm and diaphoresis.<sup>186</sup> She did so on the advice of her private physician.<sup>187</sup> The emergency room physician, an independent contractor, ordered an electro-cardiogram and cardiac enzymes and admitted her to a general hospital floor.<sup>188</sup> While in the hospital, the patient underwent various diagnostic tests and a surgical consultation. Approximately six days after admission, another electro-cardiogram and cardiac enzymes were performed which conclusively revealed for the first time that she had suffered a heart attack. The patient was transferred promptly to the coronary care unit where she died the following day.

The plaintiff asserted that the emergency room physician was an agent of the hospital, either by express agency, apparent agency, or estoppel.<sup>189</sup> She alleged, therefore, that the hospital was vicari-

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184. 147 Ill. App. 3d 1009, 498 N.E.2d 867 (3d Dist. 1986).

185. *Id.* at 1022, 498 N.E.2d at 876.

186. *Id.* at 1012, 498 N.E.2d at 869.

187. *Id.* at 1017, 498 N.E.2d at 872.

188. *Id.* at 1012, 498 N.E.2d at 869.

189. *Id.* at 1011-14, 498 N.E.2d at 869-70.



ously liable under the doctrine of *respondeat superior* for the negligence of the physician in failing to diagnose her condition, failing to admit the decedent directly to the coronary care unit, and by allowing her to be put through extensive physical testing when she was suffering from a myocardial infarction.<sup>190</sup> The trial court awarded the hospital summary judgment after finding that the emergency room physician was not an agent of the hospital.<sup>191</sup>

The *Greene* court first addressed the actual agency issue and correctly noted that the two predominant factors in determining whether a physician is an agent or independent contractor are the control retained by the principal and method of payment.<sup>192</sup> The plaintiff asserted that the hospital by-laws, policies, and procedures maintained sufficient control over the emergency room physician to qualify him as an agent of the hospital. She further alleged that the emergency room physicians used hospital equipment and wore hospital gowns, thereby implying that these facts further evidenced control by the hospital.<sup>193</sup>

The *Greene* court found that the hospital policies and procedures concerning emergency room physicians did not establish that the hospital's control over the treatment of emergency room patients. In so finding, it demonstrated an understanding of the distinction between control over the method of organization and operation, and control over the manner of medical treatment. Although the hospital admittedly had some control over the emergency room relative to the admission, discharge, and referral of patients, such organizational and operational control did not rise to the level of control over a physician's treatment of a patient based upon his medical judgment and diagnosis.<sup>194</sup> The court reasoned that the emergency room policies and procedures were prescribed by law.<sup>195</sup> Control over the quality of emergency room care was provided by the medical staff pursuant to the rules and regulations of the Department of Health by way of the peer review process.<sup>196</sup> Because peer review was a retrospective process, the

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190. *Id.*

191. *Id.* at 1011-12, 498 N.E.2d at 869.

192. *Id.* at 1014-15, 498 N.E.2d at 871.

193. *Id.* at 1014, 498 N.E.2d at 870.

194. *Id.* at 1015, 498 N.E.2d at 871.

195. *Id.* The policies and procedures were prescribed by ILL. REV. STAT. ch. 111½, para. 142 *et seq.* (1985) and the regulations of the Illinois Department of Public Health. Section 3-2 of the rules and regulations of the Department of Public Health states that "the physician shall be responsible for all aspects of general medical care." (emphasis added).

196. *Greene*, 147 Ill. App. 3d at 1015, 498 N.E.2d at 871.

*Greene* court correctly concluded that there were no means by which the hospital administration could control the initial diagnosis and treatment of a patient in the emergency room.<sup>197</sup> The absence of control over the physician's medical decisionmaking demanded that the independent relationship between the hospital and physician be recognized.<sup>198</sup>

Likewise, the *Greene* court found that the method of payment to the emergency room physician did not support a finding of an agency relationship.<sup>199</sup> The plaintiff alleged that the emergency room physicians received their pay directly from the hospital.<sup>200</sup> The evidence, however, revealed that the hospital paid thirty thousand dollars monthly to Scott Emergency Medical Services, Ltd., the physicians' professional corporation, which then paid the individual physicians.<sup>201</sup> The court found that there was no question that the hospital did not pay the physicians directly.<sup>202</sup> Consequently, there was no express agency relationship between the emergency room physician and the defendant hospital.<sup>203</sup>

The *Greene* court then addressed the plaintiff's contention that the emergency physician was the apparent agent of the hospital.<sup>204</sup> The court noted that the doctrine of apparent agency is generally thought of as a contract theory of recovery although some states have carved an apparent agency exception for medical malpractice actions.<sup>205</sup> In an attempt to convince the court that the question of apparent agency should have been submitted to a jury, the plaintiff argued that there were disputed facts concerning whether the emergency room physician had the apparent authority to act on behalf of the hospital.<sup>206</sup> Specifically, he pointed to the facts that the emergency room physicians regularly wore garments that bore the hospital's insignia; that consent forms signed by patients prior to treatment did not indicate that the emergency physicians were employed by Scott Emergency Medical Services and not the hospi-

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197. *Id.*

198. *Id.*

199. *Id.* at 1015-16, 498 N.E.2d at 871.

200. *Id.* at 1014, 498 N.E.2d at 870.

201. *Id.* at 1015-16, 498 N.E.2d at 871.

202. *Id.* at 1016, 498 N.E.2d at 87.

203. *Id.*

204. *Id.*

205. *Id.* (citing *Hardy v. Brantley*, 471 So. 2d 358 (Miss. 1985); *Williams v. St. Claire Medical Center*, 657 S.W.2d 590 (Ky. Ct. App. 1983); *Hannola v. Lakewood*, 68 Ohio App. 2d 61, 426 N.E.2d 1187 (1980); *Adamski v. Tacoma Gen. Hosp.*, 20 Wash. App. 98, 579 P.2d 970 (1978)).

206. *Id.*

tal; that all equipment and staff were the property of, or employed by, the hospital; and that the hospital did nothing to inform the public that the emergency room physicians were not employees of the hospital.<sup>207</sup> The court found these facts to be undisputed and decided that it needed only to apply the law to the undisputed facts before it.<sup>208</sup> Without referring to the First District's decision in *Sztorc*, the *Greene* court succinctly concluded that "Illinois courts have yet to recognize the exception and will not do so in this case."<sup>209</sup>

Lastly, the court addressed the plaintiff's allegations regarding estoppel.<sup>210</sup> The court explained that the doctrine of estoppel requires that the injured party rely to his detriment upon the representations made by the person sought to be estopped.<sup>211</sup> The court concluded that any representations relied upon by the plaintiff were made by her attending physician, not the hospital, because it was he who had referred her to the hospital for treatment.<sup>212</sup> The plaintiff attempted to rely upon the fact that the emergency room physician was wearing a hospital gown at the time he treated the plaintiff, but the evidence was not conclusive in that regard.<sup>213</sup> He also pointed to the consent form and claimed reliance thereupon.<sup>214</sup> The plaintiff, not his deceased wife, however, had signed the consent form and reliance could therefore not be established.<sup>215</sup> Furthermore, neither the plaintiff nor the decedent had changed their position to their detriment based upon these alleged representations.<sup>216</sup> Presumably the decedent would have gone to the defendant hospital even if she knew the emergency physicians were independent contractors because her private physician had directed her to the hospital. In short, the *Greene* court concluded that the doctrine of estoppel did not apply to the case.<sup>217</sup>

In an opinion consistent with *Greene*, the Illinois Appellate Court for the Third District again confronted the issues of actual

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207. *Id.*

208. In reality, the hospital disputed the plaintiff's allegation regarding the consent form to the extent that he misquoted the form in his brief. The court decided, however, that this was not the kind of dispute that need be resolved by a jury. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* (citing *Atwater v. Atwater*, 18 Ill. App. 3d 202, 309 N.E.2d 632 (1st Dist. 1974); *Slavis v. Slavis*, 12 Ill. App. 3d 467, 299 N.E.2d 413 (1st Dist. 1973)).

212. *Id.* at 1016-17, 498 N.E.2d at 872.

213. *Id.* at 1017, 498 N.E.2d at 872.

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

and apparent agency in *Johnson v. Sumner*.<sup>218</sup> *Johnson* involved an appeal from the granting of a motion for summary judgment on behalf of the defendant hospital.<sup>219</sup> The plaintiff went to the hospital's emergency room, on the advice of her private physician, with complaints of abdominal pain and with a subsequently positive pregnancy test. The emergency room physician was an employee of Hospital Emergency Physicians, S.C., which had contracted with the hospital to provide physicians for the purpose of rendering emergency room medical services. The patient underwent surgery for an appendectomy but her complaints of abdominal pain persisted after discharge. Two months later, she underwent surgery for a ruptured ectopic pregnancy that necessitated removal of her fallopian tubes, thereby rendering her sterile.

The plaintiff alleged that the emergency room physician was the agent of the hospital and that the hospital was therefore vicariously liable for the allegedly negligent diagnosis and treatment of her condition.<sup>220</sup> At the hearing on the hospital's motion for summary judgment, the trial court was presented with the uncontradicted affidavit of the hospital's vice-president. The affidavit established that a written agreement had been entered into between the hospital and the professional corporation whereby Hospital Emergency Physicians, S.C., through a director chosen from the physicians by the corporation, would exercise overall supervision of the care and services provided in the emergency room, would directly bill patients for emergency services, and would provide training, education, and direction to the hospital staff regarding emergency care services.<sup>221</sup> In return, the hospital guaranteed a "cash flow" to the corporation in the amount of forty thousand dollars per month.<sup>222</sup>

On appeal, the plaintiff asserted that the nature of the relationship between the hospital and emergency room physicians raised factual questions that precluded the granting of summary judgment.<sup>223</sup> The plaintiff also requested that the Third District reconsider its position of refusing to adopt the doctrine of apparent agency in a medical malpractice action.<sup>224</sup>

The appellate court held firm to the position it took in the *Greene* case and stated that the facts and circumstances found in

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218. 160 Ill. App. 3d 173, 513 N.E.2d 149 (3d Dist. 1987).

219. *Id.* at 173-74, 513 N.E.2d at 150.

220. *Id.* at 174, 513 N.E.2d at 150.

221. *Id.*

222. *Id.*

223. *Id.* at 175, 513 N.E.2d at 151.

224. *Id.*

the *Johnson* case closely paralleled those cited by the plaintiff in *Greene*.<sup>225</sup> In a strong statement of rejection of the apparent agency doctrine, the *Johnson* court explained that the doctrine ignores the realities of the typical hospital-physician relationship wherein the physician controls the medical treatment a patient receives. Furthermore, the court indicated that application of the apparent agency doctrine in a medical malpractice situation does not promote the basic public policy of tort law that the tortfeasor, rather than someone else, be financially responsible to the injured party for his conduct.<sup>226</sup> Any negligence of an examining physician should be imputed to the hospital only if the physician is found to be the express agent of the hospital, not through an extension and application of the doctrine of apparent agency.<sup>227</sup>

Addressing the actual agency issue, the court looked at the facts relevant to the control and method of payment and concluded that they did not require a finding of an express agency.<sup>228</sup> The court concluded that there were sufficient undisputed facts to decide the issue as a matter of law and therefore affirmed the lower court's granting of summary judgment.<sup>229</sup>

The *Greene* and *Johnson* cases clearly illustrate that the express agency question can and should be resolved as a matter of law on a motion for summary judgment when the relationship of the parties is clear on the facts. They further demonstrate sound reasoning in declining to utilize the apparent agency doctrine to impute liability to the hospital for the acts of an independent contractor physician. The Illinois Supreme Court has not yet resolved the conflict concerning the apparent agency issue that now exists between the First and Third Districts. It is the hope and recommendation of the authors that the Illinois Supreme Court will find the logic and reasoning of the Third District persuasive and for the aforementioned reasons refuse to extend the apparent agency doctrine to medical malpractice cases.

## V. RECOMMENDATIONS TO HOSPITALS

Given the present state of the law and the uncertainty that the future holds, hospitals would be wise to structure and conduct

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225. *Id.*

226. *Id.*

227. *Id.* (citing *Greene v. Rogers*, 147 Ill. App. 3d 1009, 498 N.E.2d 867 (1986); *Johnson v. St. Bernard Hosp.*, 79 Ill. App. 3d 709, 399 N.E.2d 198 (1979); *Pickle v. Curns*, 106 Ill. App. 3d 734, 435 N.E.2d 877 (1982)).

228. *Id.* at 176, 513 N.E.2d at 151-52.

229. *Id.* at 177, 513 N.E.2d at 152.

their affairs in a manner that will limit their potential liability under the doctrine of apparent agency. The steps that hospitals can take are many and varied. Many of the courts that have applied the doctrine focus upon the patient's understanding of the relationship between hospital and health care providers. Accordingly, one of the first steps that hospitals should take is to educate and advise patients about the nature of those relationships upon their admission to the hospital and throughout their stay.<sup>230</sup> The first opportunity to do so presents itself when the patient arrives at the hospital. If the patient arrives for emergency care at a hospital emergency room that is managed and/or staffed by independent contractors, signs should be posted that alert the patient to the independent contractor status of the department. Likewise, if ancillary departments within the hospital, such as pathology and radiology, are controlled by or staffed by independent contractors, clearly posted signs should say so.<sup>231</sup> These independent contractor departments should bear names that reflect their individual status, separate and distinct from the institution.

Alternatively, if the first opportunity to educate a patient does not present itself until the patient arrives at the admission office, then the initial notification of the health care providers' relationship with the hospital and the role of the hospital in the overall treatment plan should be accomplished via the admission paperwork.<sup>232</sup> Patients are routinely asked to sign consents for treatment. These documents should contain express statements that make it clear that certain physicians and personnel within the hospital are independent contractors and that they, not the hospital, will control the method and manner of treatment in their medical discretion. Emergency room consent-for-treatment forms and surgical consents present additional opportunities to educate in much the same manner.<sup>233</sup>

Additionally, so as to avoid or defeat any claims of misrepresentation, the hospital dress code or, at the very least, identification badges, should reflect the status of the care providers vis-a-vis the hospital.<sup>234</sup> If an individual is an independent contractor or the employee of an independent contractor, the color of his uniform and the wording on his badge should so indicate. In no event should garb with hospital insignia be worn by independent con-

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230. See Levin, *supra* note 14, at 804.

231. See Phoenix & Schlueter, *supra* note 2, at 890.

232. See Slawkowski, *supra* note 2, at 458.

233. See Phoenix & Schlueter, *supra* note 2, at 891.

234. *Id.*

tractor personnel.<sup>235</sup>

A patient who is advised promptly and repeatedly of the independent status of certain individuals rendering care within the hospital will be hard pressed to show "good faith reliance" when that reliance will be based on his own unreasonable misconceptions.<sup>236</sup> It will become increasingly difficult to demonstrate any misrepresentation by the hospital when it is actively striving to set the record straight at every available opportunity.

Hospitals should also maintain separate billings for hospital-provided services and independent contractor-provided services. The independent contractors should coordinate their own billing and the bills should be free of any reference to the hospital. These bills could also contain brief statements, similar to those found in the consent forms, that advise the patients of the independent contractor status of the person or persons who provided the services.<sup>237</sup>

Whenever possible, hospitals should refrain from providing equipment, forms, support services, or personnel to independent contractor physicians or groups. In the event that it is necessary for a hospital to provide these items to independent contractors, it should do so through a leasing or rental agreement. In this way, the hospital will avoid the appearance of controlling in any fashion the activities of the independent contractors. Likewise, when a hospital refers a patient to a particular physician, the patient should be advised of the independent status of the individual. Although courts seem reluctant to rely upon the written agreements between hospitals and their independent contractors in resolving questions of agency, it would be wise to include an express provision to the effect that the hospital does not exercise any control over the method or manner of treatment and that such matters are left to the individual's medical discretion.<sup>238</sup>

A lucrative but controversial area in which hospitals could take steps to limit their liability is in the realm of marketing strategies.<sup>239</sup> Numerous alternatives to traditional hospitals have surfaced in recent years in the form of surgi-centers, urgent care centers, home health care services, and outpatient clinics. In order to remain competitive in today's health care industry, hospitals routinely advertise the existence of these alternative health care

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235. *Id.*

236. *Id.*

237. *Id.* See also Slawkowski, *supra* note 2, at 458.

238. See Levin, *supra* note 14, at 804.

239. For a thorough discussion of the impact of the apparent agency doctrine upon hospital marketing strategies, see Phoenix & Schlueter, *supra* note 2, at 886-90.

services. Such advertisements usually mention the hospital's name in association with the alternative health service thus implying a relationship of some sort between the two. Despite their frequently separate and distinct corporate identities, they will appear to the lay person to be one in the same. Such situations are ripe for assertions of apparent agency in future malpractice cases. When appropriate, hospitals would be well advised to assure that their advertisements communicate to the consumer that these alternate health care services are provided by independent contractors. Of course, the downside of doing so is that the hospital may suffer a loss of market share.<sup>240</sup>

## VI. CONCLUSION

Unfortunately, the doctrine of apparent agency is quickly gaining popularity as a method of imputing liability to a hospital for an independent contractor's wrongdoing. Although the defense bar should continue to educate the courts about the inappropriateness of applying the doctrine to medical malpractice cases given the realities of hospital-physician relationships, it should simultaneously counsel its institutional clients as to how they can manage their affairs so as to limit their potential liability under the doctrine.

Apparent agency has been too readily applied in a confusing and conflicting manner. The underlying reason for extending the doctrine artificially to the hospital-physician relationship can only be to assure the continued presence of the deep-pocket institution in a suit until the bitter end. The time has arrived for the high court of this state to intervene and prevent further use and abuse of the doctrine in this manner.

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240. *Id.* at 887.



