

### **III. ESTABLISH POTENTIAL AREAS OF HOSPITAL CORPORATE AND INSTITUTION LIABILITY**

#### **A. Employee Negligence – When Hospitals and Institutions Are Liable**

Generally, hospitals are liable for the negligence for their employees. This is an application of the principle of *respondeat superior*. This includes nurses, technicians, aides and other hospital staff, and doctors who are employees of the hospital.

Indiana Pattern Jury Instruction (IPJI) No. 23.15 provides that, “[A] hospital is liable for the negligent of within the scope of their employment.”

- (a) Employed physicians – The leading case establishing that a hospital may be held vicariously liable for the malpractice of its employee/physicians is *Sloan v. Metropolitan Health Counsel of Indianapolis, Inc.*, 516 N.E. 2d 1104 (Ind. Ct. App. 1987); *see also* Ind. Code Section 23-1.5-2-6.
- (b) Nurses and other skilled hospital personnel – Indiana Pattern Jury Instruction (IPJI) No. 23.16 provides that skilled hospital personnel have a duty to exercise reasonable care in administering services to patients in the hospital.

#### **A. Sort Through the Confusion Related to Non-Employee Negligence**

1. Ostensible Agency – Generally, hospitals are not liable for the acts or omissions of doctors on staff who are independent contractors; however, issues have arisen regarding emergency room doctors and other hospital based physicians. *See, Sword v. NKC Hospitals, Inc.*, 714 N.E. 2d 142 (Ind. 1999.) In these instances, the issue was whether the physician appeared to be acting as an employee of the hospital.

2. Non-Party Liability – Under Indiana’s Comparative Fault Act, Ind. Code Section 33-50-1-16 as relates to non-party defenses provides as follows:

A nonparty defense that is known by the defendant when the defendant files the defendant’s first answer shall be placed as a part of the first answer. The trial court may alter these time limitations or make other suitable time limitations in any manner that is consistent with:

- (1) giving the defendant a reasonable opportunity to discover the existence of a nonparty defense; and
- (2) giving the claimant a reasonable opportunity to add the nonparty as an additional defendant to the action before the expiration of the period of limitation applicable to the claim.

Ind. Code Section 33-50-1-16 as relates to medical malpractice claims provides:

This section applies to a claim filed with the insurance commissioner under IC 16-9.5 (before its repeal), IC 27-12 (before its repeal), or IC 34-18 against a qualified health care provider, with the exception that the pleading a nonparty defense is required by sections 15 and 16 of this chapter must occur not later than ninety (90) days after the filing of the claim with the insurance commissioner. However, this time limitation may be enlarged or shortened by a court having jurisdiction over the claim in such matters as will give:

- (1) the qualified health care provider reasonable opportunity to discover the existence of a nonparty defense; and
- (2) the claimant reasonable opportunity to assert a claim against the nonparty before the expiration of the period of limitation applicable to the claim.

There appears to be an inconsistency in the law since the Comparative Fault Act specifically provides that it does not apply to actions against qualified healthcare providers under Indiana's Medical Malpractice Act. Ind. Code Section 34-51-2-1(b) At common law, the doctrine of joint and several liability apply to situations involving contributory negligence. *See*, Indiana Pattern Jury Instruction (IPJI) No. 23.02.

**B. When Privileges Are Improperly Granted to Hospital Staff and Physicians – Is It Negligence?**

Under Indiana's Peer Review Act, all proceedings of a peer review committee are confidential and privileged. Ind. Code Section 34-30-15-1 provides:

- (a) All proceedings of a peer review committee are confidential.
- (b) Neither the personnel of a peer review committee shall be privileged communications.
- (c) Neither the personnel of a peer review committee nor any participant in a committee proceeding shall reveal any content of:
  - (1) communications to;
  - (2) the records of; or
  - (3) the determination of;a peer review committee outside the peer review committee.
- (d) However, the governing board of;
  - (1) a hospital;
  - (2) a professional health care organization;
  - (3) a preferred provider organization (including a preferred provider arrangement or reimbursement agreement under IC 27-8-11); or

- (4) a health maintenance organization (as defined in IC 27-13-1-19) or a limited service health maintenance organization (as defined in IC 27-13-34-4);

may disclose the final action taken with regard to a professional health care provider without violating the provisions of this section.

Under I.C. 34-30-15-3, information that is otherwise discoverable or admissible from original sources is not immune from discovery or use in any proceeding merely because it was presented during the proceedings before a peer review committee.

A major obstacle for any plaintiff to prove such a case is Indiana's Peer Review Act Ind. Code Section 34-30-15-1 et seq. Credential matters and hospital determinations involving the granting of staff membership and specific privileges to physicians are part of the peer review process and subject to the confidentiality and privilege provisions of the act.

### **C. How Nursing Negligence Can Be Identified**

As discussed above, a hospital is liable for the negligent acts of its employees, including nurses and other skilled hospital personnel. Nurses have a duty to exercise reasonable care in administering services to their patients in the hospital. This appropriately performing tasks within the scope of their practice, following hospital protocols and procedures, following physicians orders, instituting appropriate precautions, appropriately monitoring the patients' condition, timely notifying the physician of significant changes in the patients' condition, instituting appropriate nursing interventions within the scope of nursing practice, and timely and appropriately documenting the patients' condition and the nursing care provided.

Indiana Pattern Jury Instruction (IPJI) No. 23.16 provides as follows:

Skilled hospital personnel have a duty to exercise reasonable care in administering services to patients in the hospital. Generally, such personnel are not negligent in following the orders given by the attending physician. However, when a skilled hospital employees fails to [report changes in a patient's condition]

[question a physician's orders that are not in accord with standard medical practice] and the omission results in injury to the patient, then the skilled employee breaches [her][his] duty to the patient and the hospital liable for the injury.

Nurses, and the hospital on their behalf, can also be held liable for failing to question a doctor's orders when they are not in accord with a standard medical practice. *See Sisters of St. Francis v. Catron*, 435 N.E. 2d 305 (Ind. Ct. App. 1982); *Volger v. Dominguez*, 624 N.E. 2d 56 (Ind. Ct. App. 1993) *reh'g denied, trans. denied*.

#### **IV. USE OF EXPERT WITNESSES TO SUPPORT YOUR CASE**

##### **A. Why Expert Testimony Is so Important**

From the plaintiff's perspective, expert testimony is crucial in order to make a prima facie case. The plaintiff has the burden to prove the required standard of care, a breach of that duty and that the breach approximately caused damages to the plaintiff.

Expert testimony establishing that the healthcare provider's performance fell below the requisite standard of care is necessary to establish medical negligence. *Stumph v. Foster*, 524 N.E. 2d 812 (Ind. Ct. App. 1988). In the absence of such expert evidence, there is no genuine issue of material fact for a jury, and summary judgment is appropriate. *Stackhouse v. Scanlon*, 576 N.E. 2d 635, 639 (Ind. Ct. App. 1991). *See also Shoup v Mladick*, 537 N.E. 2d 552 (Ind. Ct. App. 1989), *Marquis v. Battersby*, 443 N.E. 2d 1202 (Ind. Ct. App. 1982).

Expert testimony is also important to educate the jury about the medical issues on the case and explain the importance of the various actions, or alleged omissions, of the parties.

##### **B. Guidelines for Determining the Qualifications of the Experts You Need**

Rule 702 of the Indiana Rules of Evidence provides:

- (a) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill experience, training, or education, may testify thereto in the form of an opinion or otherwise.
- (b) Expert scientific testimony is admissible only if the court satisfied that the scientific principles upon which the expert testimony rests are reliable.

Decisions regarding the admissibility of expert testimony lie within the discretion of the trial court and will be reversed only for an abuse of discretion. *See Messer v. Cerestar USA, Inc.*, 803 N.E. 2d 1240, 1247 (Ind. Ct. App. 2004)

**C. The Best Techniques for Finding Expert Witnesses**

Under Indiana's Medical Malpractice Act, the panel opinion is admissible. Ind. Code Section 34-18-10-23 provides:

A report of the expert opinion reached by the medical review panel is admissible as evidence in any action subsequently brought by the claimant in a court of law. However, the expert opinion is not conclusive, and either party, at the party's cost, has the right to call any member of the medical review panel as a witness. If called, a witness shall appear and testify.

There are numerous ways to locate expert witnesses including, from the plaintiff's perspective, contacts with the patients' subsequent treating doctors, contacts with other plaintiffs' counsel, contacts with past experts' used, seminars and expert services. From the defense perspective, these would include contacts with one's client, contacts with other defense counsel who have handled similar cases, contacts with experts used in the past, seminars and expert services.

The party that wins at the medical review panel stage will obviously consider as their first choice using one or all of the panel members.

In Indiana, information regarding an Indiana's doctors malpractice history and history of medical review panel opinions can be found online at the database

for the Indiana Department of Insurance at [www.indianapcf.com](http://www.indianapcf.com). Information regarding a physician's licensure history can be found at the Indiana Health Profession's Bureau database at [www.in.gov/hpb/boards](http://www.in.gov/hpb/boards). The American Medical Association also has a website that provides background information on physicians, [www.ama-assn.org](http://www.ama-assn.org).

### **How Winning Attorneys Use Experts**

Generally, the most effective experts are those that can break down and explain difficult concepts to a jury in clear, understandable language. The ideal expert will also appear credible and intellectually honest.