Does a Hospital Have a "Non-delegable Duty" to Supply Emergency Medical Services?

According to one Superior Court judge, the answer is yes. This issue arose in a recent case in which our office was defending Lawrence & Memorial Hospital ("L&M") at trial in New London Superior Court. On September 11, 2014, Judge Thomas G. Moukawsher issued an unprecedented ruling, sua sponte, in response to L&M's Motion for Directed Verdict that a hospital owed a patient a non-delegable duty of care in its emergency department and that it could not insulate itself from liability by outsourcing the delivery of emergency medical services to a third party or independent contractor. See Noel v. Lawrence & Memorial Hosp., 53 Conn. Supp. 269 (2014).

L&M had a contract with Emergency Medicine Physicians of New London, LLC ("EMP"), a co-defendant, whereby EMP provided the emergency medical services in the Emergency Department at L&M. Plaintiff had alleged that the co-defendant emergency room physician, who was employed by EMP, was the agent and apparent agent of L&M. As a result of Judge Moukawsher's decision, the allegations of agency and apparent agency became moot since he concluded that L&M was directly responsible for the care provided to patients in the Emergency Department of the Hospital. Judge Moukawsher based his decision on his conclusion that Connecticut Regulation 19-13-D3(j)(2) requires a hospital "to provide adequate care for persons with acute emergencies at all times" and that the duty to provide emergency medical services is too important to allow hospitals to delegate that responsibility.

The Noel decision has been widely circulated and, although it remains the only Connecticut Superior Court decision to recognize this doctrine in the context of hospital liability, it adds momentum to plaintiff's attorneys' recent efforts to erode the defense of agency and apparent agency claims asserted against hospitals in medical malpractice lawsuits. Historically, Connecticut courts rejected attempts to assert a non-delegable duty against a hospital in a medical malpractice action where the medical service at issue had been provided by a third party whom the hospital claims was an independent contractor. As a

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result, plaintiffs' only avenue to holding the hospital liable for the medical service was to allege that the third party was an agent or apparent agent of the hospital. While Judge Moukawsher limited his ruling to the provision of emergency medical services by a hospital, he appeared to invite the extension of the doctrine to other services provided at hospitals, including anesthesiology and pathology. The potential extension of the doctrine of non-delegable duty to hospitals in medical malpractice cases is a very disturbing development since it could completely undermine the purpose of the contractual arrangement between a hospital and a third party and expose the hospital to unanticipated liability and significant money damages.

What should hospitals do to protect themselves? It is advisable to review the contractual relationships between hospitals and their physician groups and consider requiring that the contracts contain an indemnification provision for the negligence of the independent contractor. In the event that the hospital's liability is triggered by a finding of non-delegable duty, it can recover from the physician group where the claim arose out of an individual physician's negligence. Hospitals may want to require that their independent contractors increase the coverage of their malpractice insurance to ensure that, in the event of a lawsuit, sufficient funds are available to satisfy an award of damages or settlement. At the present level of insurance carried by many independent contractors who provide medical services at Connecticut hospitals, the hospital often becomes a target defendant in a lawsuit arising out of the care provided by the independent contractor because they are regarded as the "deep pocket". Hospitals should also make sure that the credentialing process of physicians employed by an independent contractor is thorough and independent in order to ensure that the physician employees of the independent contractor are adequately qualified to perform the medical services and do not have any issues in their professional background that could raise questions about their ability to provide quality medical care in the event of lawsuit.

What happens next? While the Appellate Court will not have an opportunity to address this decision on appeal, our office is currently handling another appeal on the same issue in the matter of Tiplady v. Maryles. We anticipate that the decision by Appellate Court in Tiplady will clearly determine whether the doctrine of non-delegable duty will be applied in medical malpractice cases and thereby enable Connecticut hospitals to better assess the extent of the liability they face in medical malpractice litigation.

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