

MEDICAL GROUP MAY BE SUED FOR PHYSICIAN'S NEGLIGENCE

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In a significant ruling that is unfavorable to physician practice groups and their insurers, the Massachusetts Supreme Judicial Court recently held that a medical practice group that employed an obstetrician could be sued by a woman whose baby was delivered stillborn at a hospital following a car accident. The practice group could be sued, the court ruled, even though it was fault-free and had no apparent decision-making authority over the doctor. Dias v. Brigham Medical Associates Inc. (SJC-08739, December 23, 2002).

In so ruling, the SJC distinguished its earlier decision in Kelley v. Rossi, 395 Mass. 659, 662 (1985), in which the court adopted the general rule that an employer of a doctor (in the Kelley case the employer was a hospital), is not vicariously liable for the doctor's malpractice because "the very nature of a physician's function tends to suggest that in most instances he will act as an independent contractor." Following the Dias decision, however, employers of physicians may be vicariously liable even though they do not share in any of the doctor's fault, and did not control the details of his/her work.

The Dias case arose out of a car accident in which the plaintiff, Stella Dias, who was eight months pregnant, was involved in a car accident and was transported to St. Luke's Hospital. She was transferred to the labor and delivery department and was treated by Daniel Schlitzer, M.D. Ms. Dias gave birth to a stillborn baby, and in her lawsuit she alleged that the doctor failed to adequately assess the status of the fetus. She sued both Dr. Schlitzer and Brigham Medical Associates (BMA), which was a Massachusetts corporation comprised entirely of physicians who specialized in obstetrical medicine.

Significantly, the parties did not dispute that, at the time of alleged malpractice, Dr. Schlitzer was an employee and officer of BMA. Although Dr. Schlitzer worked

conventional 24 hour shifts at the hospital, he was also assigned by BMA for on-call coverage at the hospital. Dr. Schlitzer and BMA admitted in their answers to interrogatories that Dr. Schlitzer was an employee of BMA during the relevant time period. Both defendants were ostensibly unaware of the significance of this admission; the case would later turn on it.

BMA moved for summary judgment and argued that, under the Kelley decision, it could not be vicariously liable for the doctor's negligence because it could not directly control the physician's treatment decisions. The superior court judge granted the motion for summary judgment because he found that BMA did not and could not have exercised such control over the doctor. The superior court judge also reasoned that, if practice groups that employ doctors were held liable for the negligent treatment decisions of their member employees, the formation of such groups would be discouraged, and public policy therefore supported the summary judgment ruling in favor of BMA.

The doctrine of vicarious liability, or respondeat superior as it is also known, stands for the proposition that an employer (or master) is vicariously liable for the torts of its employee (or servant) committed within the scope of employment, even if the employer was free of fault. The doctrine was developed at common law in order to provide recovery, where it may not otherwise have been had from the wrongdoer, and to shift the costs of accidents to persons who benefit from the activities that caused the accidents. As between two innocent parties (the principal and the plaintiff), the principal places the agent in the position to do harm, and seeks to profit from the agent's activities. The principal therefore bears the costs of accidents associated with its activities. This reasoning is seen in other areas of law, such as products liability. It allocates the cost of an activity to the person who profits from that activity. That person is in the best position

to prevent accidents related to his enterprises by, for example, establishing safety practices, screening new employees, and maintaining better supervision.

Despite this recognized purpose for vicarious liability, several courts in the early 20th century, including those in Massachusetts, often held that, in order for the employer to be liable, the employee must have been subject to control by the employer, not only as to the result to be accomplished, but also as to the means that were used. Thus, a trucking company could escape vicarious liability for the torts of its driver if it could be shown that the employer was unable to give direction and control to the employee regarding the precise actions that resulted in the tort (such as the employee's driving method or choice of route).

In 1969, however, the SJC broadened the scope of liability under the theory of respondeat superior to fit more in line with the view of the majority of states. In Konick v. Berke Moore Co., 355 Mass. 463, 467 (1969), the court held that an employer was vicariously liable for an employee's negligence in driving an automobile on an errand for the employer even though the employer was unable to control the precise manner and means of the employee's driving. The court declined to follow its earlier cases because they were inconsistent with the purpose of vicarious liability -- to allocate the cost of an accident to the person who profits from the activity that caused it.

The SJC's 1985 Kelley v. Rossi decision, in which the employee of a doctor was held not to be liable for the doctor's negligence (in the absence of evidence that the employer controlled the details of the doctor's work) was considered by many lawyers and judges to be an exception to the general rule that employers were liable for their employees' torts. Trial court judges in Massachusetts have frequently granted summary judgment to physician practice groups when the groups have been sued together with the allegedly negligent doctors.

In Dias, the SJC distinguished the Kelley decision by pointing out that the Kelley case also dealt with the question of whether a doctor was a “public employee” (as that term is defined by the Massachusetts Tort Claim Act, which governs claims against the state or its subdivisions) of the state-owned hospital where he worked. Contrary to prevailing thought on the subject, the SJC announced that Kelley does not alter the rule that a private medical group that employs a physician is vicariously liable for its employee’s (the doctor’s) negligence.

The SJC explained that after employment is established, the only remaining issue is whether the doctor was working for BMA at the time of the tort. The doctor’s and BMA’s admissions during discovery that the doctor *was* an employee of BMA foreclosed any further inquiry on this question. The evidence was unclear on the only remaining issue of whether or not the doctor’s negligent conduct occurred while he worked within the scope of his employment. There was some ambiguity in the record as to whether he was acting as BMA’s employee at the time he treated the plaintiff or whether he was on staff at the hospital. The court therefore remanded the case to the superior court for further proceedings.

The further proceedings in the Dias case will not address whether or not Dr. Schlitzer was or was not an employee of BMA because that fact had already been admitted in discovery. In future similar cases, however, it will be critical to closely scrutinize the relationship between the medical groups and their physicians to determine whether an employer-employee relationship exists. Such questions are fact dependent and include the traditional factors that determine whether a person is an independent contractor or an employee of a principal. No one factor is determinative. They include:

- Whether the principal has the right to direct and control the details of an alleged employees' actions (the right to control, not actual control, is the most important factor).
- Method of payment (whether the employee received a W-2 form from the employer, or a 1099 form as an independent contractor).
- Whether the parties themselves believe they have created an employer-employee relationship.
- Does the employer provide the tools of the trade (instruments, staffing assistance, etc.)?
- Does the employer provide the training necessary for the work or does the putative agent bring the necessary expertise to the job?

Corporate liability for the negligence of physician employees is commonly recognized throughout the United States. Even though most courts have held that the right to control the details of an employee's work is the most important factor in determining whether that employee is an agent, rather than an independent contractor, many cases involving corporate responsibility for the malpractice of a physician have minimized the importance of that factor, and appear to be more result oriented. Some judicial decisions have relied on the doctor's apparent authority to act on behalf of the employer, rather than the traditional inquiry into whether the employer controls the details of the employee's work.

Despite what may be a national trend to expand medical liability to include medical practice groups, the liability of such groups in Massachusetts, and in states that follow the traditional rule, will depend upon determinations of whether physicians are employees or independent contractors of the medical practice groups. The superior court judge who granted

summary judgment for BMA expressed public policy concerns that the formation of medical practice groups would be discouraged if they were held vicariously liable for negligent treatment decisions by their member doctors. The SJC expressly stated in a footnote, however, that nothing in its opinion constrains the manner in which physician practice groups may organize or structure their relationships with other professionals. Thus, physician groups are well advised to carefully plan their partnerships with other doctors, and their insurers should carefully scrutinize the manner in which the group is organized in order to determine whether vicarious liability (liability without fault) may exist.