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Medical Malpractice

HOSPITAL LIABILITY FOR SECURITY OF PATIENTS

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Hospitals, like all property owners, are under a duty to provide minimal security measures and control the conduct of others to protect persons on their premises. [FN1] With reference to admitted patients, this duty takes on attributes of patient care, because they are typically more vulnerable than other persons. Unlike tenants in an apartment building, guests in a hotel or workers in an office building, hospital patients are not behind locked doors, are often physically infirm and, frequently, suffer impaired awareness. Confined to beds and clad in gowns, they are also subject to physical and visual handling by persons with whom they are not familiar. They can only assume that these persons are authorized to be there and to do that which they are doing. In other words, patients confined to hospitals are often at the mercy of others and must rely on the hospital to protect them.

Duty of Reasonable Care

The hospital's duty is dictated by the circumstances, and the standard is one of reasonable care. Where a hospital fails to take reasonable measures to protect a patient under the circumstances, thereby resulting in injury to the patient, it may be held liable.

The decisional law addressing that potential liability, including the Court of Appeals' recent opinion in **N.X.** v. **Cabrini** Med. Ctr., [FN2] is the subject of this month's column.

A hospital is under a duty to exercise reasonable care and diligence in safeguarding its patient from harm inflicted by third persons, and the degree of care required is measured by the capacity of the patient to provide for her own security. [FN3] Applying this standard, the Appellate Division, Second Department, in Clinton v. City of New York, [FN4] affirmed a judgment in favor of a hospital patient who was stabbed multiple times by another patient with a pair of suture scissors. The evidence indicated that the scissors were not locked away, but were next to the offending patient's bed for an extended period of time, creating a risk of serious harm. This supported the jury's finding that the hospital was negligent in failing to take minimal security measures to prevent patients from gaining access to and misusing a dangerous implement. One Justice dissented on the ground that the patient who committed the assault was not known to be dangerous.

The First Department applied the same standard in Freeman v. St. Clare's Hosp., [FN5] upholding a judgment in favor of a patient who sustained injuries during an attempted rape by another patient. At the time of the attack, the victim-patient was in multiple restraints in the emergency room, and the hospital was on notice that the attacker-patient "was aggressive and might cause trouble." The court noted that the "exact extent of the injury need not be foreseeable so long as some type of injury may be reasonably anticipated."

Subsequently, in Morris v. Lenox Hill Hosp., [FN6] the First Department applied the rule to two cases where patients in a hospital were injured when an unknown assailant injected a neuromuscular agent into their intravenous bags. Discarded vials of the drugs and wrappings from the IV bags were under a shelf in an unlocked storage room in the hospital, located near the operating rooms where each patient had undergone surgery. The defendant obtained dismissal of the negligence cause of action from the Supreme Court on the ground that the circumstances under which the drug was injected and the person responsible for doing so could not be ascertained. A divided Appellate Division reversed, with the majority finding that circumstances afford a sufficient basis for an inference of negligence by the hospital in failing to safeguard a dangerous substance under the hospital's exclusive control and for the doctrine of res ipsa loquitor.

The dissent was of the view that summary judgment should have been granted because there could be no proximate cause as a matter of law. Since the public had no access to the pertinent floor of the hospital, the dissent found that the act had to have been committed by a hospital employee. It concluded that such an act by a hospital employee is so extraordinary that it is not reasonably foreseeable and constitutes a superceding act which breaches the causal connection. The Court of Appeals affirmed on the grounds stated in the majority's opinion.

Attacks by hospital employees raise the additional issues of negligent hiring, retention and supervision, as well as potential vicarious liability. Many claims of this nature involve allegations of sexual misconduct by employees. The Court of Appeals addressed such a claim in Cornell v. State of New York. [FN7] The plaintiff was a 14-year-old patient at a State run mental health facility, who was homosexually assaulted by an attendant at the hospital. The Court of Claims found no negligence by the State, which finding was affirmed by the Third Department, noting that the employee was highly recommended, received fair to good job ratings from his superiors and had no history of dangerous sexual propensities. There was one dissent on the ground that a special relationship existed between the State and the patient in its custody and control, which gave rise to a duty to protect the patient, and that the State should therefore be liable for the breach occasioned by the misconduct of its employee.

Scope of Employment Rule

The Court of Appeals framed the issue as whether the State should be held vicariously liable for the intentional torts committed by its employees outside the scope of their employment, on the basis of a special protective duty owed the victim, and it answered the question in the negative.

The Court declined to apply an exception to the scope of employment rule where the employer has entered into relationship requiring it to be responsible for the protection of the plaintiff, expressing concern that it would impose absolute liability on the State. The decision, however, was seemingly limited to State-run facilities and appeared to leave open the possibility that the exception would apply to private institutions. The Court stated that "[t]he relation between the State and patients at State institutions is sui generis and not aptly compared to the type of voluntarily assumed relationship which may carry with it the imposition of absolute liability."

However, when the Court subsequently addressed the liability of a private hospital for sexual misconduct by an employee in Judith M. v. Sisters of Charity Hospital, [FN8] it rejected vicarious liability. The plaintiff was allegedly sexually abused by an employee who was bathing her. The Fourth Department ruled that the hospital was properly granted a summary dismissal of the action because it demonstrated that the employee had no history of sexual misconduct. Two Justices dissented, finding an issue of fact as to whether the hospital should have known of his propensity to abuse female patients and concluding that the hospital should be vicariously liable because it placed its employee in a position of control over and close personal relationship with the patient.

The Court of Appeals held that there can be no vicarious liability because the employee acted beyond the scope of his employment. Noting that liability under respondeat superior must be a foreseeable and natural incident of the employment, the Court found that the employee departed from his duties solely for personal motives unrelated to the hospital's business. With respect to direct negligence, the Court found no evidence refuting the hospital's proof that it had acted reasonably in its hiring and supervision of the employee or that it consented to or ratified his tortious conduct. The Second Department had previously applied the same standards in holding in Mataxas v. North Shore Univ. Hospital, [FN9] that a hospital could not be held liable for the alleged sexual molestation of the plaintiff by a technician during a CT scan.

'N.X. v. **Cabrini'**

Against this background, the Court of Appeals addressed claims of sexual abuse by a hospital employee in **N.X.** v. **Cabrini** Med. Ctr. and helped to define the boundaries of hospital liability for such misconduct by employees. The plaintiff in that case was admitted for ambulatory vaginal surgery. She was placed in a four-bed recovery room, still under the effects of anesthesia. Three nurses were in the room, including a supervisor, and their attention was focused on another patient in a bed two feet away. The curtain between the two beds was not drawn, and the two remaining beds were unoccupied. Dr. Andrea Favara, a male surgical resident, dressed in scrubs and wearing a hospital identification, entered the room and went to the plaintiff's bed. He was not listed as one of plaintiff's physicians and none of the nurses knew him. The

plaintiff testified that she woke up as he was lifting her gown and pulling her thighs apart, and he ordered her to open her legs. He then placed his fingers inside her. She asked him to stop and attempted to sit up. On her third plea, he finally removed his fingers, at which time she experienced pain and observed blood on his gloves. The nurses denied seeing or hearing the interaction, but intercepted him as he was leaving the room, at which time they introduced themselves. After the plaintiff complained, the supervising nurse confronted Mr. Favara, who admitted he examined her without a female witness, as required under hospital rules. He was eventually terminated after an investigation.

The plaintiff alleged both direct and vicarious liability by the hospital stemming from the assault. The Supreme Court found questions of fact with respect to direct negligence based upon a "heightened duty" to safeguard the patient and with respect to whether Mr. Favara's conduct was within the scope of his employment. It dismissed a claim of vicarious liability based upon apparent authority, and the plaintiff withdrew the claim of negligent hiring.

A divided First Department dismissed all claims against the hospital. [FN10] In rejecting vicarious liability, the majority found that the sexual assault was not within the scope of Mr. Favara's employment. It also rejected any duty by the nurses to protect the plaintiff or make any inquiry of Mr. Favara as he approached her, finding that his conduct was not reasonably foreseeable, since he had no history of sexual misconduct.

Two dissenting Justices found issues of fact with respect to both direct and vicarious liability. They concluded that a history of misconduct is not the only factor to be considered in determining whether the conduct was foreseeable, and that once the surrounding facts and circumstances known to the hospital are taken into consideration, foreseeability could not be decided as a matter of law. The dissent also found issues of fact as to whether Mr. Favara's conduct was outside the scope of his assigned tasks as a resident. Even if outside the scope of his actual authority, the dissent found the support for the proposition that vicarious liability may be imposed if the plaintiff relied upon the apparent authority conferred by the hospital, which aided Mr. Favara in accomplishing his assault.

The Court of Appeals reversed and reinstated the complaint solely on the issue of the hospital's direct negligence. It rejected vicarious liability on the ground that a sexual assault is not in furtherance of the hospital's business and is committed for purely personal motives. The Court rejected the plaintiff's characterization of the assault as an internal examination which falls within the scope of a resident's employment. However, the Court found that under the circumstances, there were issues of fact as to whether the nurses failed to adequately protect the plaintiff while she was recovering from surgery.

'Flexible' Standard

The Court's decision was not premised on a "heightened duty" stemming from the effects of anesthesia, but upon the flexible standard requiring hospitals to take measures to protect patients commensurate with their circumstances. The Court described the standard as follows:

> A hospital has a duty to safeguard the welfare of its patients, even from harm inflicted by third persons, measured by the capacity of the patient to provide for his or her own safety. This sliding scale of duty is limited, however; it does not render a hospital an insurer of patient safety or require it to keep each patient under constant surveillance. As with any liability in tort, the scope of the hospital's duty is circumscribed by those risks which are reasonably foreseeable. [Citations omitted.]

Applying this standard to the facts of that case, the Court found "issues of fact as to whether the nurses actually observed or unreasonably ignored events immediately preceding the misconduct which indicated a risk of imminent harm to plaintiff, triggering the need for protective action." Among the factors identified by the Court as potentially indicating a risk of harm were: (1) residents are seldom called to the recovery room; (2) at least one nurse was aware that Mr. Favara was not one of the plaintiff's doctors, was not acquainted with him and saw him enter the room and proceed to the plaintiff's bed; (3) although the nurses claimed they never saw Mr. Favara wear or remove gloves, gloves were available near the plaintiff's bed and after the assault plaintiff saw blood on his gloves; (4) all of the nurses were aware that hospital policy required a female present; and (5) the specific circumstances of Mr. Favara pulling up the patient's gown, ordering her to open her legs, the patient protesting, the nurse's being in close proximity at the time, in a small room with only four beds and only one other patient and the curtain being open. These factors, the Court concluded, provide a sufficient basis for a jury to find that the nurses unreasonably disregarded events alerting them to a risk of misconduct which could have been prevented.

Conclusion

The opinion in **N.X.** v. **Cabrini** helps define the standards applicable to claims of hospital liability based upon attacks of patients. It makes clear that vicarious liability will not apply to sexual misconduct by employees. It further makes clear that a prior history of misconduct is not the sine qua non of the hospital's direct liability for employee misconduct. Instead, it depends on the situation, including the patient's vulnerability and the hospital's awareness of a potential threat under the circumstances.

This standard is not limited to misconduct by hospital employees. The same standard of care would have required the nurses to inquire and prevent the incident if the assailant had been a patient or trespasser disguised as a doctor. The critical issue is whether, under the totality of the circumstances, the responsible hospital personnel should reasonably perceive a risk to the patient and undertake reasonable efforts to prevent that risk. This simple standard of reasonableness under the circumstances is not unduly burdensome to hospitals, and the risk of liability will hopefully encourage greater efforts by hospital to protect patients who cannot protect themselves.

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FN(1) See Jacqueline S. v. New York City Housing Auth., 81 N.Y.2d 288, 294 (1993) (landowners generally); Kirkman v. Astoria General Hosp., 204 A.D.2d 401, 402 (2nd Dept. 1994) (hospitals); Platovsky v. City of New York, 199 A.D.2d 373, 374 (2nd Dept. 1993) (hospitals).

FN(2) N.Y.2d, NYLJ Feb. 15, 2002, p. 18, col. 4 (2002).

FN(3) See Morris v. Lenox Hill Hosp., 232 A.D.2d 184, 185 (1st Dept. 1996), aff'd, 90 N.Y.2d 953 (1997); Freeman v. St. Clare's Hosp., 156 A.D.2d 300 (1st Dept. 1989); Clinton v. City of New York, 140 A.D.2d 404, 405 (2nd Dept.), lv. denied, 73 N.Y.2d 703 (1988).

FN(4) 140 A.D.2d at 405.

FN(5) 156 A.D.2d at 300-01.

FN(6) 232 A.D.2d at 184-86.

FN(7) 46 N.Y.2d 1032 (1979), aff'g, 60 A.D.2d 715 (3rd Dept. 1977).

FN(8) 93 N.Y.2d 932 (1999), aff'g, 249 A.D.2d 890 (4th Dept. 1998).

FN(9) 211 A.D.2d 763 (2nd Dept. 1995).

FN(10) 280 A.D.2d 34 (1st Dept. 2001).

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