

LIABILITY FOR INDEPENDENT CONTRACTORS

Sword Doctrine

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Outline

- ▶ Apparent Agency
- ▶ Apparent Agency Applied to Hospitals - Sword Doctrine
- ▶ Evolution of the Sword Doctrine
- ▶ Future of the Sword Doctrine
- ▶ Why it Matters for Healthcare Organizations
- ▶ How Healthcare Organizations Can Protect Themselves

Vicarious Liability → Apparent Agency

- ▶ Conduct of a **principal** that causes a **third party** to believe the **agent** is authorized to act on behalf of the **principal**.
- ▶ **Equitable theory** that binds the principal to the acts or liabilities of the agent, despite absence of an actual agency relationship.
 - ❑ Principal - Agent
 - ❑ Manifestation
 - ❑ Equitable Theory

Apparent Agency

Example

- ▶ Conduct of a **Principal** causes a **third party** to believe the **agent** is authorized to act on behalf of the **principal**. **Equitable theory** that binds the principal to the acts or liabilities of the agent, despite absence of an actual agency relationship.
 - ❑ Principal - General Contractor - Agent - Plumber
 - ❑ Manifestation by the Principal
 - ❑ Equitable Principal - Fairness

Apparent Agency Applied

- ▶ Conduct of a **Hospital** that causes a **patient** to believe the **doctor** is an employee of the **hospital**. Equitable theory that binds the **hospital** to the acts or liabilities of the **doctor**, despite absence of an employment relationship.
 - ❑ Principal - Hospital
 - ❑ Agent - Doctor
 - ❑ Third Party - Patient

Sword v. NKC Hospitals, Inc.

714 N.E.2d 142 (Ind. 1999)

- ▶ *Iterman v. Baker* (1938)
 - ▶ Hospitals are not vicarious liable for doctors.
- ▶ Facts:
 - ▶ No allegations of negligence of negligence against the hospital.
 - ▶ The hospital advertised comprehensive specialist services.
- ▶ Holding:
 - ▶ Hospitals can be vicariously liable for independent contractors

Apparent Agency

Recall that for apparent agency to apply, you need 2 things:

- ▶ **Manifestation** - by the principal (hospital) to the third party (patient) that the agent (doctor) is acting on behalf of the principal (hospital)
- ▶ **Reliance**- of the third-party (patient) on the manifestations by the principal (hospital)

Sword v. NKC Hospitals, Inc.

- ▶ Holding:
 - ▶ **Manifestation is Presumed:** A Hospital will be deemed to have held itself out as a provide of care unless it gives notice to a patient.
 - ▶ **Reliance is Presumed:** If no meaningful notice, then reliance is presumed.

Sword v. NKC Hospitals, Inc.

▶ Summary:

- ▶ The Court made it **possible** to sue a hospital for an independently contracted doctor's negligence.
- ▶ The Court made it **easier** for a patient to prove their case against the hospital
- ▶ Narrow holding: only applied to hospitals
- ▶ Court's reasoning behind the scenes

Cases After Sword

- ▶ *Columbus Regional Hosp. v. Amburgey*, 976 N.E.2d 709 (Ind. Ct. App. 2012)
- ▶ *Hargett ex rel. Humphries v. CMS*, (USDC SD IN 2014)
- ▶ *Webster v. CDI*, 917 F.3d 574, (7th. Cir. 2019)

The Future of the *Sword Doctrine*

- ▶ *Wilson v. Anonymous*, 172 N.E.3d 274
- ▶ *Arrendale v. American Imaging & MRI*, 172 N.E.3d 274

Why Does This Matter?

- ▶ Indiana Medical Malpractice Act
- ▶ Cap on Damages
 - ▶ As of July 1, 2017: 1.65 million - \$400,000 Provider
 - ▶ As of July 1, 2019: 1.8 million - \$500,000 Provider
- ▶ “Qualified Provider”
- ▶ Meaningful Notice

How to Protect Your Organization

- ▶ Maintain Professional Liability Insurance
- ▶ Become a Qualified Provider with the Indiana Department of Insurance
- ▶ Give Meaningful Notice to all patients

Meaningful Notice

- ▶ *Helms v. Rudicel*, 986 N.E.2d 302 (Ind. Ct. App. 2013)
 - ▶ *Many of the physicians and other health care providers who treat patients at Cardinal Health System facilities are not employed by BMH, but are independent contractors who have been granted the privileges of using Cardinal Health System facilities to treat patients.”*

Meaningful Notice

- ▶ *Ford v. Jawaid*, 52 N.E.3d 874 (Ind. Ct. App. 2016)
 - ▶ *I acknowledge that the health care professionals who attend to me, including but not limited to anesthesiologists, radiologists, pathologists, emergency room physicians, and provide and perform such medical and surgical care, tests, procedures, drugs and other services and supplies may be independent contractors and not employees or agents of Floyd Memorial Hospital and Health Services.*

Questions?

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