

## Medical Malpractice

### Hospital Malpractice

Finding the needle in the haystack

By Abbott S. Brown

Trying to get discovery from some hospitals is like trying to find the proverbial needle in a haystack. Except you are first told that: (a) there is no haystack; (b) if there ever was a haystack, it did not have any needles; and finally (c) if there was a haystack with a needle, any discussion of it is privileged. If you persist, you are then advised that (d) all haystacks and needles were designed, manufactured, distributed, maintained and utilized by persons who were independent contractors and, furthermore, (e) the hospital is entitled to a limitation of liability. Fortunately, a trilogy of recent cases, two of which are unpublished, have provided a roadmap for plaintiffs seeking such discovery, and will perhaps put an end to the gamesmanship.

#### Investigation of Adverse Events

Perhaps the most important unpublished medical malpractice opinion of the year is *Applegrad v. Bentolila*, A-3747-09T2 (App. Div. 2010), where the plaintiff sought production of numerous reports,

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including the occurrence report; director of patient safety analysis; risk management quality-assurance review; mother/baby quality-assurance/performance review; OB/GYN quality-assurance response; and others. The hospital contended that all of the reports were privileged under the Patient Safety Act (PSA), N.J.S.A. 26:2H-12.23 and precedent.

The motion judge conducted an in camera review of the contested documents and, citing *Christy v. Salem*, 366 N.J. Super. 535 (App. Div. 2004), initially held that those portions of the reports that expressed opinions were confidential but those “that deal with facts” must be disclosed. The motion judge then reconsidered, and held that pursuant to the PSA, all reports were entirely privileged. The plaintiff’s motion for leave to appeal was granted and, given the importance of the issue, the New Jersey Association for Justice and the New Jersey Hospital Association were granted leave to appear as amicus.

The *Applegrad* panel first revisited *Christy* and the PSA, declaring that the statute’s purpose is to encourage disclosure of adverse events “so that they can be analyzed and used for improvement.” For this reason, the PSA generally protects the confidentiality of documents produced by a hospital as part of a process of self-critical analysis. The *Applegrad* panel

then observed that the PSA states in somewhat contradictory language that “[n]othing in this [A]ct shall be construed to increase or decrease the discoverability, in accordance with *Christy* [ , supra], of any documents, materials or information if obtained from any source or context other than those specified in this act.” N.J.S.A. 26:2H-12.25(k).

Although the Court declined to resolve these issues on an inadequate record, the *Applegrad* panel imposed the burden on hospitals to produce a full record, and upon motion judges to make very specific findings as to each document:

Fair evaluation of whether a document is entitled, in full or in part, to judicially-enforced confidentiality requires more information about the actual genesis of the document, such as why it was created, for whom it was prepared, who participated in its creation, whether it is a response to (or whether it prompted) other communications, whether it was disclosed to persons other than those listed within it, and so on. Such important contextual information has not been developed in the present record. The record also reveals little about the relevant organizational structures and processes for self-assessment within Valley Hospital, either before or after the enactment of the PSA. For instance, it appears that the hospital presently has a Director of Patient Safety, but we

cannot tell what the responsibilities of that person are. Nor do we know how those current functions compare with other functions concerning peer review and self-critical assessments performed at the hospital before the PSA's enactment. The record is also silent as to how the functions of the Patient Safety Director, or any committees or operations under the scope of his or her authority, correspond to other related ongoing operations within the hospital, such as a "Utilization Review Committee" or any "Peer Review" bodies.

The *Applegrad* court then provided the following virtual roadmap for those seeking these reports.

First, the hospital must submit a detailed certification from "a hospital official on personal knowledge, establishing the specific basis for the hospital's assertion that the entire contents of each of the documents in question are privileged" (emphasis added), as stated in R. 4:10-2(e)(1), which requires the party withholding the information to "describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection." The certification "shall address, on a document-by-document basis, the origins and purposes of each document, a description of the internal processes within the hospital that generated each document, and how those processes relate to pertinent statutes, regulations, accreditation procedures, and other standards apart from the PSA." (Emphasis added.)

Second, the trial court may permit plaintiffs to engage in limited discovery to "explore the bona fides of the privilege claims, the hospital's self-assessment processes (both before and after the enactment of the PSA) and other more contextual considerations."

Finally, the trial court shall "examine each document individually, and explain as to each document deemed privileged why it has so ruled." (Emphasis added.) The motion judge must "specifically determine whether the documents were of a kind, or contained information and analyses, that the hospital had routinely compiled prior to the adoption of the PSA." The motion judge should determine the significance "under the PSA if the hospital indeed failed to report [the plaintiff's] circumstances to State regulators." (Emphasis added.)

*Applegrad* imposes a significant burden on the hospital to explain in detail why reports are privileged and the motion judge to make detailed findings. So now you get to find out if there was a needle, and perhaps how it got into the haystack. However, hospitals have routinely asserted that the needle was placed there by independent contractors for whom the hospital is not responsible, and that the hospital's liability is limited by charitable immunity. Both of these issues have also been recently addressed.

#### Discovery of Apparent Employees

In *Estate of Cordero v. Christ Hospital*, 403 N.J. Super. 306 (App. Div. 2008), the court applied the doctrine of "apparent employment" to hospital-based health care providers. Cordero was admitted to Christ Hospital for surgery, and the defendant, an anesthesiologist, "was assigned, randomly" to Cordero. The plaintiff contended that Christ Hospital was liable for the anesthesiologist's negligence under the theory of "apparent employment." The Appellate Division agreed, and held that this doctrine applies when a "hospital, by its actions, has held out a particular physician as its agent and/or employee and . . . a patient has accepted treatment from that physician in the reasonable belief that it is being rendered in behalf of the hospital." The *Cordero* court then outlined the factors that courts should consider when addressing this issue:

1. Whether the specialty, like anesthesiology, radiology or emergency care, is

typically provided in and is an integral part of medical treatment received in a hospital;

2. Whether notice of the doctor's status or disclaimers of responsibility were provided;
3. Whether the patient had the opportunity to reject the doctor and select a another doctor;
4. Whether the patient had any contact with the doctor prior to the incident at issue; and
5. Whether the patient had any knowledge about the doctor's arrangement with the hospital.

Applying these five factors to the case, the court concluded that because the plaintiff accepted the defendant's care "under circumstances that would lead a reasonable patient to believe the care was rendered in behalf of Christ Hospital, [the] plaintiffs are entitled to a rebuttable presumption" that the defendant was an employee of the hospital.

The recognition of the doctrine of apparent employment will have major implications in malpractice cases against hospitals. A hospital may be liable for the negligence of certain physicians — particularly emergency department doctors, anesthesiologists, radiologists and pathologists — even though they are not employees of the hospital. The doctrine of apparent employment may provide another source of compensation to a gravely injured patient when a hospital-based physician they were assigned is under-insured. However, hospitals still cling to the limitation of liability found in N.J.S.A. 2A:53A-8. This may soon change.

#### Proof of Charitable Status

The final barricade in the hospital's defense is the assertion of a limitation on liability. However, in perhaps the second most important unpublished case of the year, *Klein v. Bristol Glen Inc.*, A1382-08 (App. Div. 2010), explains that this defense may no longer be viable.

Klein was injured when she fell on the grounds of the defendant, an elder care community. The defendant asserted that it

was a nonprofit corporation whose stated mission is to “provide quality and caring services to senior men and women in a Christian community.” When the defendant moved for summary judgment based upon charitable immunity, the plaintiffs sought additional discovery, including “[a]ll records in regard to payments by patients; salaries of employees, including management employees; [and] salaries of the President and Vice-President of Bristol Glen, Inc.” The defendant refused to produce this discovery, and the motion judge nevertheless granted the defendant’s motion for summary judgment. The motion judge determined that the defendant was a “charitable organization” pursuant to N.J.S.A. 2A:53A-7 and 9 and was “formed for non-profit purposes, organized as religious and charitable operations, and were promoting such activities at the time of the injury sustained.”

The appeal raised the question: What is a charity? The discovery that had been provided revealed that residents paid up to \$3,513 per month, an entrance fee of between \$199,700 and \$319,000, or a nonrefundable entrance fee of between \$126,600 and \$227,100. However, once a resident was accepted into the community, they would not have to leave if they could no longer pay. The *Klein* court deemed it

significant that charitable donations made up only .8 percent of the defendant’s operating budget.

In reversing, the Appellate Division first observed that “where a defendant seeks the protection of the Act based on its status as an entity organized exclusively for charitable purposes, courts must undertake the fact-sensitive analysis,” citing *Parker v. St. Stephen’s Urban Dev. Corp.*, 243 N.J. Super. 317, 321 (App. Div. 1990), and *Ryan v. Holy Trinity Evangelical Lutheran Church*, 175 N.J. 333, 341 (2003). The *Klein* court noted that in *Abdallah, v. Occupational Ctr. of Hudson County, Inc.*, 351 N.J. Super. 280, 284 (App. Div. 2002) a nonprofit entity relied on charitable donations equal to 1.5 percent of the institution’s total revenue and that was deemed “too insignificant” to accord it charitable status. In most significant language that will apply to the largest hospital systems, “Without that opportunity and the discovery of financial information sought, the court could not have been in a position to determine whether defendants’ dominant motive is charity [and not] some other form of enterprise.” The court then added, in language that will chill hospital executives and their counsel:

On remand, plaintiffs must be provided an opportunity to discover information previously requested that will reveal the extent to which Bristol Glen and UMH exist and function as moneymaking operations, and the extent to which they truly rely on charitable donations. That opportunity was not provided in the proceeding below.

Although *Klein* interpreted N.J.S.A. 2A:53A-7 and 9, when CEOs and presidents of hospital systems in New Jersey reportedly make as much as \$7.9 million annually, there is a good argument to be made that such a hospital system is no longer a “nonprofit corporation, society or association organized exclusively for hospital purposes,” as required by N.J.S.A. 2A:53A-8, but rather a large, profit-making business.

These three cases provide roadmaps for three distinct areas of discovery. The discovery suggested by these three cases will no doubt be routine in the near future, and will be of great assistance to patients seeking compensation for medical negligence. ■