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Health Law

Are Surgery Residents Liable for Medical Error

The law makes a distinction between a medical resident acting as a student and a resident acting as a physician in medical malpractice cases.

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Henry Allen was scheduled for a routine vein ligation procedure with Dr. Smith, a surgeon to whom he had been referred. The surgery was performed in March 1990 at a private hospital. A first-year surgery resident assisted Dr. Smith with the operation. It was the residents first exposure to this procedure, but he had assisted in other surgeries. He made the opening incisions during this surgery and "closed" after Dr. Smith had performed the actual vein ligation.

Following surgery, Mr. Allen complained of extreme pain in his right groin. No immediate attention was paid to his complaint. The pain continued, and Mr. Allen sought the advice of several medical specialists. More than a year later, Mr. Allen employed another surgeon to attend to the problem. This surgeon performed a second operation, during which he found and removed a large fibrous mass in Mr. Allens right groin. The surgeon also removed a portion of Mr. Allens lymphatic system. As a result of this surgery, Mr. Allen developed lymphodema of his right leg from which, according to medical testimony, he will suffer permanent disability.

Mr. Allen sued Dr. Smith, the resident physician, and the hospital for medical malpractice. Experts for Mr. Allen testified that during the March 1990 operation, a tributary of the saphenous vein had been tied and ligated by suture material entrapping a tributary of the ilioinguinal nerve. As a result of this nerve entrapment, Mr. Allen suffered substantial pain. Mr. Allen argued that the botched procedure caused the fibrous mass and was the proximate cause of his permanent disabilities resulting from the lymphodema.

Legal Analysis

The above facts are adapted from *Alswanger v Smego* [1]. The plaintiffs claim against the hospital rested on the theory of "respondeat superior" (employers are liable for harms caused by the negligence of their employees, acting within the scope of employment) [2]. Using this theory the hospital would be liable for the residents negligent acts, since the resident was technically an employee of the hospital at the time. The defendant hospital, however, argued that the first-year resident was a "borrowed servant," an argument that would establish an exception to the respondeat superior theory of negligence. The hospital contended, "a surgeon may replace a hospital as a master of a hospital employee by exercising supervision and control over the employee, thereby assuming liability for negligence of the borrowed servant" [3]. Thus, since the first-year resident was under the surgeons—not the hospitals—control during the procedure, the hospital could not be found liable. The court agreed with the hospital, reasoning that Dr. Smego had control over the means and methods of the plaintiffs operation, and the Stamford Hospital did not. During the operative procedure, the resident was the borrowed servant of Dr. Smego [4]. Thus, the resident and hospital could not be liable for medical negligence.

In contrast to this Connecticut court decision, Virginia courts have allowed recovery against resident physicians. In *Lilly v Brink*, for example, the court found that, even though a resident physician was employed by a public entity—a state university hospital—he was not protected by a state immunity statute that prohibits suits against state employees who are acting within the scope of their duties [5]. The court questioned the appropriateness of granting immunity based solely on the nature of employment rather than on the specific function performed by the resident [6]. The court

distinguished between the resident as a student and the resident as a physician. In this case the resident had diagnosed indigestion and released the patient, who died later that day from a cardiac event. The court determined that the physical exam and assessment were not training exercises for a second-year resident. Rather, the resident used his own discretion in diagnosing, treating, and releasing the patient. The court viewed this performance as equal to that of any fully licensed physician, so the resident should also be treated as one.

Questions for Discussion

1. The law differentiates between the roles of residents, holding them responsible when they are evaluating and using judgment as physicians and not responsible when they are acting as students or "borrowed servants." Do you think most residents are aware of this legal distinction? Should they be made aware?
2. Would knowing how the law views residents status make any difference in their response to supervisors requests or in their everyday clinical conduct?
3. Do you think the legal distinction is just, or should a resident always (never) be liable for mistakes made during training?

References

1. *Alswanger v Smego,* 1999 Conn. Super. LEXIS 1052.
2. Restatement of the Law, Third, Torts: Liability for Physical Harm.
3. Alswanger, 7.
4. Alswanger, 21
5. *Lilly v Brink* 51 Va Cir 444 (2000).
6. Lilly, 447.
