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Hospital Liability May Be Based on Either Doctrine of Ostensible Agency or Doctrine of Corporate Negligence.

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MEDICAL MALPRACTICE—OSTENSIBLE AGENCY AND CORPORATE NEGLIGENCE—Hospital Liability May Be Based On Either Doctrine Of Ostensible Agency Or Doctrine Of Corporate Negligence

Brownsville Medical Center and Valley Community Hospital v. Gracia 84-369-CV (Tex. App.—Corpus Christi, June 28, 1985, writ pending) (not yet reported)

Nine-year-old Fermin Gracia, Jr., suffered a blow to his abdomen and soon thereafter began complaining of intense stomach pain.[1] After four days in a Matamoros hospital, the parents discharged their son because his condition remained unchanged.[2] They transported Fermin to the Brownsville Medical Center, knowing that physicians would be available.[3] He was diagnosed by Dr. Lorenzana as having a "simple case of anemia" and then released.[4] By the next morning his condition had deteriorated.[5] A private

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1. *See* Brownsville Medical Center and Valley Community Hosp. v. Gracia, 84-369-CV, slip op. at 1 (Tex. App.—Corpus Christi, June 28, 1985, writ pending) (not yet reported) (child received kick to stomach from another boy). Fermin Gracia, Jr. was originally taken to Matamoras, Mexico, where he was admitted to a hospital on July 18th after his parents became extremely disturbed that their son was suffering from excruciating pains to his abdominal region, maintaining a high fever, and unable to keep any food in his stomach. *See id.* at 1-2.

2. *See id.* at 3. Fermin was discharged against the medical advice of his attending physician. *See id.* at 2.

3. *See id.* at 14. Mr. Fermin Gracia, Sr. testified at trial that they expected the emergency room to be fully staffed with physicians ready to provide treatment. *See* Brief for Appellant, Brownsville Medical Center at 30, Brownsville Medical Center and Valley Community Hosp. v. Gracia, 84-369-CV, slip op. (Tex. App.—Corpus Christi, June 28, 1985, writ pending) (not yet reported). Dr. Elias Lorenzana did physically examine Fermin in the emergency room and requested various blood tests and x-rays. *See* Brownsville Medical Center and Valley Community Hosp. v. Gracia, 84-369-CV, slip op. at 2 (Tex. App.—Corpus Christi, June 28, 1985, writ pending) (not yet reported).

4. *See* Brownsville Medical Center and Valley Community Hosp. v. Gracia, 84-369-CV, slip op. at 2 (Tex. App.—Corpus Christi, June 28, 1985, writ pending) (not yet reported). There is a discrepancy as to what information was communicated to the parents prior to release. *See id.* at 2. Mrs. Gracia stated that the physician never gave her the option to hospitalize her son; Dr. Lorenzana stated that he had. *See id.* at 2-3. It was not until the following day that Dr. Lorenzana even considered appendicitis to be a possibility. *See id.* at 3. Prior to that time, he did not feel that Fermin's condition was serious enough to warrant hospitalization. *See id.* at 2-3. Dr. Lorenzana stated at trial that he did not receive the results from the radiologist indicating the possibility of appendicitis until the following day, even though he personally read the x-rays the evening the child arrived at the hospital emergency room. *See* Brief for Appellant, Brownsville Medical Center at 23, Brownsville Medical Center and Valley Community Hosp. v. Gracia, 84-369-CV, slip op. (Tex. App.—Corpus Christi, June 28, 1985,

pediatrician subsequently diagnosed appendicitis and transferred the boy by ambulance to the Valley Community Hospital where he was immediately admitted[6] and prepared for surgery.[7] Shortly after admission, the hospital's social worker learned of the Gracia's inability to pay for services rendered.[8] After conferring with Dr. Rodriguez, the boy's surgeon, the decision was made to transfer the child to John Sealy Hospital located in Galveston, Texas.[9] Fermin Gracia, Jr. died eight days later at John Sealy, never having received surgical treatment.[10] Subsequently, the Gracias brought a wrongful

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writ pending) (not yet reported). If there is a possibility of appendicitis, it is imperative that an early diagnosis be made and treatment initiated, or risk the chance of the appendix rupturing. *See id.* at 23.

5. *See* Brownsville Medical Center and Valley Community Hosp. v. Gracia, 84-369-CV, slip op. at 4 (Tex. App.—Corpus Christi, June 28, 1985, writ pending) (not yet reported) (stomach pain and fever had returned).

6. *See id.* at 4-5. Dr. Carlos Monarrez noted both that Fermin had an acute abdomen with a strong possibility of appendicitis and that the child should have undergone immediate surgery. *See id.* at 4. After a surgical consultation with Dr. Rodriguez, Dr. Monarrez notified Valley Community Hospital that Fermin's condition was quite delicate. *See id.* at 4.

7. *See id.* at 6; *see also* Brief for Appellant, Brownsville Medical Center at 29, Brownsville Medical Center and Valley Community Hosp. v. Gracia, 84-369-CV, slip op. (Tex. App.—Corpus Christi, June 28, 1985, writ pending) (not yet reported) (surgery required was exploratory laparotomy).

8. *See* Brownsville Medical Center and Valley Community Hosp. v. Gracia, 84-369-CV, slip op. at 5 (Tex. App.—Corpus Christi, June 28, 1985, writ pending) (not yet reported). Financial evaluation forms were routinely referred to Minerva G. Coronado when new patients with financial difficulties arrived. *See id.* at 5. Mrs. Gracia did not have medical insurance and was not eligible for other financial assistance. *See id.* at 5.

9. *See id.* at 7. There was a question as to whether Dr. Rodriguez's approval to transfer Fermin was based on Mrs. Gracia's refusal to sign a consent form for the operation or whether it was due to a lack of financial resources. *See id.* at 5-6. Evidence indicated a joint decision was made by Dr. Rodriguez and the hospital's social worker, Minerva G. Coronado, to transfer the child. *See id.* at 19; *see also* Brief for Appellees at 10, Brownsville Medical Center and Valley Community Hosp. v. Gracia, 84-369-CV, slip op. (Tex. App.—Corpus Christi, June 28, 1985, writ pending) (not yet reported) (parents testified they never opposed surgery).

10. *See* Brownsville Medical Center and Valley Community Hosp. v. Gracia, 84-369-CV, slip op. at 7 (Tex. App.—Corpus Christi, June 28, 1985, writ pending) (not yet reported). Evidence was given at trial that the surgical delay tremendously increased the child's risk of harm. *See* Brief for Appellant, Brownsville Medical Center at 9, Brownsville Medical Center and Valley Community Hosp. v. Gracia, 84-369-CV, slip op. (Tex. App.—Corpus Christi, June 28, 1985, writ pending) (not yet reported). Dr. Smith, a board certified pediatric surgeon, testified that the mortality rate from appendicitis was less than one percent before rupture and 5-10 percent after rupture if surgery is performed. *See id.* at 9. He further testified that Brownsville Medical Center's emergency room should have admitted Fermin due to the high possibility of Fermin having appendicitis. *See* Brief for Appellee at 11, Brownsville Medical Center and Valley Community Hosp. v. Gracia, 84-369-CV, slip op. (Tex. App.—Corpus Christi, June 28, 1985, writ pending) (not yet reported). Dr. Smith testified that Fermin's chances of survival were between 90 and 95% had the operation taken place before transfer from Brownsville. *See id.* at 11. Fermin died as a result of numerous organ failures due to

death action against a large number of health care providers, including Brownsville Medical Center and Valley Community Hospital.[11] The trial court held Brownsville Medical Center vicariously liable for the negligent acts of Dr. Lorenzana on the theory of ostensible agency.[12] The trial court also held Valley Community Hospital liable for breaching a duty of care to the patient under the doctrine of corporate negligence.[13] Brownsville Medical Center and Valley Community Hospital then perfected an appeal to the Corpus Christi Court of Appeals.[14] Held - *Affirmed.* Hospital liability may be based on either the doctrine of ostensible agency[15] or the doctrine of corporate negligence.[16]

In the past hospitals enjoyed virtually absolute immunity from tort liability.[17] Public and private hospitals were immune from tortious liability be-

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massive infection which had spread throughout his abdomen. *See id.* at 12. The exploratory laparotomy was not performed at John Sealy because it was felt that there would be little benefit from such an operation at this time. *See* Brief for Appellant, Brownsville Medical Center at 43, Brownsville Medical Center and Valley Community Hosp. v. Gracia, 84-369-CV, slip op. (Tex. App.—Corpus Christi, June 28, 1985, writ pending) (not yet reported).

11. *See* Brownsville Medical Center and Valley Community Hosp. v. Gracia, 84-369-CV, slip op. at 7 (Tex. App.—Corpus Christi, June 28, 1985, writ pending) (not yet reported) (suits for wrongful death originally brought against Dr. Lorenzana, Brownsville Medical Center, Valley Community Hospital and numerous other parties who subsequently had their suits severed or dismissed).

12. *See* Brownsville Medical Center and Valley Community Hosp. v. Gracia, 84-369-CV, slip op. at 12 (Tex. App.—Corpus Christi, June 28, 1985, writ pending) (not yet reported). The jury found that Brownsville Medical Center offered medical care services, that there was a duty to provide reasonably competent physicians, and that the Gracias justifiably relied to their detriment. *See id.* at 12. Evidence indicated that the Brownsville Medical Center's administrator was in charge of contracting with physicians or physicians' groups to provide staff members for the emergency room. *See id.* at 13-14. Further, it was shown at trial that these physicians were paid by the hospital; that patients entering the emergency room were not allowed to select a physician, but received whoever was on duty at the time; that there were no signs or other indications within the emergency room stating these physicians were independent contractors; and finally, that the patients seeking care in the Brownsville Medical Center's emergency room were directly billed by the hospital for these services. *See id.* at 14.

13. *See id.* at 15. The Corpus Christi Court of Appeals also held that Valley Community Hospital had an independent duty to the deceased in that they should not have discontinued his medical care at such a critical moment, thereby contributing to Fermin's death. *See id.* at 19. Therefore, the hospital breached its duty by terminating medical care in order to transfer the child to John Sealy in Galveston. *See id.* at 16.

14. *See id.* at 1.

15. *See id.* at 14.

16. *See id.* at 19.

17. *See* McDonald v. Massachusetts Gen. Hosp., 21 A. 529, 532 (Mass. 1876) (frequently cited case regarding origin of hospital immunity in United States); *see also* Southwick, *Hospital Liability, Two Theories Have Merged,* 4 J. LEGAL MED. 1, 1-2 (1983) (since charitable immunity doctrine was generally developed by courts and not by statute, rejection of doctrine has been done primarily on state by state basis by courts).

cause they functioned as charitable organizations.[18] Hospital liability was also limited by the dichotomy that existed within the hospital institution between medical acts and administerial acts.[19] Only administerial acts and not medical treatment could serve as a basis for hospital accountability.[20] Furthermore, hospitals were not considered the employers of physicians; rather, the hospital treated the physician as an "independent contractor" who merely utilized the hospital's facilities.[21] Courts refused to hold hospi-

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18. *See, e.g.,* Wilcox v. Idaho Falls Latter Day Saints Hosp., 82 P.2d 849, 854 (Idaho 1938) (any person who accepts benefits from charity hospital enters relationship exempting such hospital from liability caused by negligent acts of its employees), *overruled,* 297 P.2d 1041 (Idaho 1956); Forrest v. Red Cross Hosp., 265 S.W.2d 80, 81 (Ky. 1954) (patients in charity hospital impliedly waive their rights to damages since medical services were rendered gratuitously), *overruled,* 348 S.W.2d 930 (Ky. 1961); Gartman v. City of McAllen, 107 S.W.2d 879, 880 (Tex. Comm'n App. 1937, opinion adopted) (city hospitals operating solely for public benefit and could not be held liable for tortious conduct of employees). During this time, only an institution which operated "for profit" could be held vicariously liable for the negligent acts of its employees. *See, e.g.,* W. PROSSER & W. P. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 133, at 1069 (5th ed. 1984) (explores recent rejection of charitable immunity doctrine by the courts); Hackler, *Hospital Trustee's Fiduciary Responsibilities: An Emerging Tripartite Distinction,* 15 WASHBURN L.J. 422, 427 (1976) (tort claims against private charity hospitals could not be paid with trust funds); Perdue, *Direct Corporate Liability of Hospitals: A Modern Day Legal Concept of Liability for Injury Occurring in A Modern Day Hospital,* 24 S. TEX. L.J. 773, 775-76 (1983) (non-profit institutions such as charity hospitals could not be held liable).

19. *See, e.g.,* Jones v. City of New York Hosp., 57 A.D.2d 429, 431, 134 N.Y.S.2d 779, 781 (N.Y. 1954) (hospital only responsible for administerial acts and cannot be held liable for medical acts such as those performed by physicians), *rev'd on other grounds,* 286 A.D.2d 825, 143 N.Y.S.2d 628 (N.Y. 1955); Penaloza v. Baptist Memorial Hosp., 304 S.W.2d 203, 206 (Tex. Civ. App.—Eastland 1957, writ ref'd n.r.e.) (no liability could be placed on hospital under any theory for negligent selection of nurse); Medical and Surgical Memorial Hosp. v. Cauthorn, 229 S.W.2d 932, 934 (Tex. Civ. App.—El Paso, 1950, writ ref'd n.r.e.) (failure of hospital to make available proper and safe instrumentalities will result in liability). The hospital's function was only to supply professionals, not heal patients. *See, e.g.,* KRAMER, THE NEGLIGENT DOCTOR 39 (1968) (medicine could only be practiced by physicians); Perdue, *Direct Corporate Liability Of Hospitals: A Modern Day Legal Concept of Liability for Injury Occurring in a Modern Day Hospital,* 24 S. TEX. L.J. 773, 786 (1983) (traditional hospital governing body powerless when it came to controlling medical acts); Southwick, *The Hospital as an Institution—Expanding Responsibilities Change Its Relationship With the Staff Physicians,* 9 CAL. W.L. REV. 429, 431 (1973) (hospital acted under traditional "hands off" policy when it came to decisions concerning medical care).

20. *See* Sendjar v. Gonzalez, 520 S.W.2d 478, 481 (Tex. Civ. App.—San Antonio 1975, no writ) (patient could not recover since the physician was not administratively negligent); *see also* Payne, *Recent Developments Affecting a Hospital's Liability for Negligence of Physicians,* 18 S. TEX. L.J. 389, 396 (1977) (exemplifies administrative versus medical act distinctions which have been made in Texas).

21. *See* Schloendorff v. Society of New York Hosp., 105 N.E. 92, 95, 211 N.Y. 125, 131 (N.Y. 1914) (physician acted as "independent-contractor" in removing lump from patient's stomach without her consent), *overruled,* Bing v. Thunig, 143 N.E.2d 3, 163 N.Y.S.2d 3 (N.Y. 1957). Justice Cordoza stated that vicarious liability could not be imposed on hospitals for

tals liable, under any theory, for the negligent acts of the independent contractor physicians.[22]

In recent times, however, the hospital has evolved into a highly sophisticated corporation operating, for the most part, on a strict "fee-for-service" basis.[23] The traditional obstacles preventing hospital liability have diminished and, in most cases, have been eliminated completely.[24] The hospital is now viewed as a single united organization seeking the best possible care for its patients.[25] With the elimination of hospital immunity, malpractice actions against hospitals for the negligence of their "physician-independent

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negligent acts of "independent-contractor physicians" due to the fact that hospitals have no control over a physician's medical acts. *See id.* at 94, 211 N.Y. at 131-32. During this period, hospitals did not employ physicians; doctors merely contracted for the use of the hospital's facilities. *See* Holbrook and Dunn, *Medical Malpractice Litigation: The Discoverability and Use of Hospital's Quality Assurance Records,* 16 WASHBURN L.J. 54, 55 (1976) (discusses non-applicability of liability against hospitals for medical acts).

22. *See* Schloendorff v. Society of New York Hosp., 105 N.E. 92, 92-93, 211 N.Y. 125, 128-29 (N.Y. 1914) (unauthorized surgery was administered by two physicians in hospital funded by charity), *overruled,* Bing v. Thunig, 143 N.E.2d 3, 163 N.Y.S.2d 3 (N.Y. 1957). Justice Cardoza held that there were two reasons why charitable hospitals should be allowed to avoid liability for physician malpractice: first, because a patient impliedly waives his right to damages for such acts upon admission to the charitable hospital; and second, due to his professional skills a physician is considered an "independent-contractor." *See id.* at 93, 211 N.Y. at 135. Independent contractors such as "contracted for" emergency room physicians are not employees of hospital. *See* Comment, *The Hospital-Physician Relationship: Hospital Responsibility for Malpractice of Physicians,* 50 WASHBURN L. REV. 385, 388 (1975) (distinguishes between servant and "independent-contractor" physicians).

23. *See* Moore v. Board of Trustees, 495 P.2d 605, 608 (Nev. 1972) (hospital has evolved into highly integrated community health center whose sole purpose is to make available highest possible quality care to patient), *cert. denied,* 409 U.S. 879 (1972); *see also* Ybarra v. Spangard, 154 P.2d 687, 691, 25 Cal.2d 486, 491 (1944) (hospitals today operate under highly integrated system of medical health care). Health care, through the advancement of technology and incorporation of hospitals, has derogated the physician's role and changed hospitals from small, charitable organizations into major industries. *See* Angel, *Professionals and Unionization,* 66 MINN. L. REV. 383, 411-12 (1982). Patients have a high expectation that the hospital staff is a well coordinated and productive unit offering only the best that medical care can provide. *See* Note, *Independent Duty of a Hospital to Prevent Physician's Malpractice,* 15 ARIZ. L. REV. 953, 953 (1973). Hospitals are also a rapidly growing business. *See generally* Craver, *The Application of Labor and Antitrust Laws to Physician Union: The Need for a Re-Evaluation of Traditional Concepts in a Radically Changing Field,* 27 HASTINGS L.J. 55, 55-56 (1975) (general evolution of hospital's growth).

24. *See, e.g.,* Flagiello v. Pennsylvania Hosp., 208 A.2d 193, 207-08 (Pa. 1965) (negligence of charitable hospital's employees must be treated same as negligence of any other employer's employee); Pierce v. Yakima Valley Memorial Hosp. Assoc., 260 P.2d 765, 772 (Wash. 1953) (charitable hospital liable if its negligence is proximate cause of injury); Adkins v. St. Francis Hosp., 143 S.E.2d 154, 155 (W. Va. 1965) (abolished charitable immunity doctrine, thereby making hospitals liable for negligent acts committed there).

25. *See* Galatz, *Hospital Liability: The Institution, the Physician, the Staff,* 20 TRIAL 64, 65 (May 1984) (hospitals cannot escape liability by administrative-medical distinctions). Hos-

contractors" and their employees are now being brought at an increased rate.[26] Courts have created several theories of liability that may be imposed on hospitals, including respondeat superior,[27] corporate negligence,[28] and ostensible agency.[29]

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pitals are not a combination of two separate institutions, but rather one single institution with one goal, the health of its patients. *See id.* at 65.

26. *See, e.g.,* Stephens v. Snyder Clinic Ass'n, 631 P.2d 222, 235 (Kan. 1981) (noting tremendous increase in number of malpractice suits being filed); State *ex rel.* Schneider v. Liggett, 576 P.2d 221, 227-28 (Kan. 1978) (public interest in finding solution to problem of medical malpractice), *appeal dism'd,* 439 U.S. 808 (1978); Attorney General v. Johnson, 385 A.2d 57, 76 (Md. 1978) ("severe" medical malpractice crisis occurred in 1974 in Maryland), *appeal dism'd,* 439 U.S. 805 (1978). Several commentators have also noted increase in malpractice suits being brought against hospitals. *See* Kahn, *Medical Malpractice Prevention,* 27 DEPAUL L. REV. 23, 23 (1977-78) (law review cited to interview indicating that in 1976 there were 40,000 to 50,000 causes of action for malpractice filed against hospitals); Payne, *Recent Developments Affecting a Hospital's Liability for Negligence of Physicians,* 18 S. TEX. L.J. 389, 390 (1977) (hospital malpractice rates increasing at alarming rates). The number of malpractice claims being brought are phenominal. *See generally* TEX. REV. CIV. STAT. ANN. art. 4590, § 1.02 (Vernon Supp. 1985) (legislative findings note malpractice crisis in Texas); Note, *Hospital Corporate Liability: An Effective Solution to Controlling Private Physician Incompetence?* 32 RUTGERS L. REV. 342, 376-77 (1979) (medical malpractice claims originating from hospitals account for approximately 75-80% of all medical malpractice suits).

27. *See, e.g.,* Santa Rosa Medical Center v. Robinson, 560 S.W.2d 751, 757 (Tex. Civ. App.—San Antonio 1977, no writ) (hospital held vicariously liable for negligent acts of nurse in failing to timely notify patient's physician after patient suffered head injuries from fight with nursing assistant); Wilson v. Jones Memorial Hosp. v. Davis, 553 S.W.2d 180, 183 (Tex. Civ. App.—Waco 1977, writ ref'd n.r.e.) (hospital held liable for negligent acts of orderly who, prior to deflating catheter balloon, attempted to remove it from patient); Ramone v. Mami, 535 S.W.2d 654, 655 (Tex. Civ. App.—Eastland 1975) (negligence of nurses in counting sponges during surgery imputed to hospital under doctrine of respondeat superior), *aff'd,* 550 S.W.2d 270 (Tex. 1977); *see also* Gregg v. National Medical Health Care Serv., 699 P.2d 925, 928-29 (Ariz. Ct. App. 1985) (hospital held liable for negligent acts of resident under doctrine of respondeat superior); Moeller v. Hauser, 54 N.W.2d 639, 645-46 (Minn. 1952) (resident of hospital held by court to be servant of hospital such that liability for his negligent acts could attach). Vicarious liability is being imposed on hospitals with increasing frequency. *See generally* Payne, *Recent Developments Affecting a Hospital's Liability for Negligence of Physicians,* 18 S. TEX. L.J. 389, 390 (1977) (most jurisdictions now hold hospitals liable for negligence of physician performing acts within their scope of employment).

28. *See* Darling v. Charleston Community Memorial Hosp., 211 N.E.2d 253, 260-61 (Ill. 1965) (landmark case in which court found that there was independent duty of care that hospital owed patient), *cert. denied,* 383 U.S. 946 (1966); Benedict v. St. Luke's Hosp., 365 N.W.2d 499, 504 (N.D. 1985) (trial court erred in not giving jury instruction that if they found physician's care of patient negligent, then hospital could be found liable for negligently staffing emergency room, irrespective of relationship between doctor and hospital). *See generally* Note, *Tort Law—Corporate Negligence of Hospitals and the Duty to Monitor and Oversee Treatment—Bost v. Riley,* 17 WAKE FOREST L. REV. 309, 323 (1981) (hospital may be held corporately liable for breaching duty of care owed patient).

29. *See* Seneris v. Haas, 291 P.2d 915, 928, 45 Cal.2d 811, 834 (1955) (landmark case concerning ostensible agency where hospital liability imposed when anesthesiologist's negli-

Respondeat superior holds employers liable for the negligent acts of their employees performed during the scope of employment.[30] Traditionally, hospitals were only responsible for the administerial acts of their employees; thus, they were able to successfully avoid all liability for those persons who performed medical acts.[31] Courts have abandoned this special theory of hospital immunity and now hold hospitals liable for all services performed by both administerial and medical employees in the hospital.[32]

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gence resulted in patient's paralysis). Where a non-salaried specialist performed services for patients at the hospital, the court held that he was an ostensible agent of the hospital upon which liability could be imposed. *See id.* at 927-28, 45 Cal. at 831-32. Several commentators have noted the increasing number of jurisidictions now applying the common law doctrine of ostensible agency. *See, e.g.,* Levin, *Hospital's Liability for Independent Emergency Room Service,* 22 SANTA CLARA L. REV. 791, 799 (1982) (estoppel used to impose liability upon hospital, not contract); Payne, *Recent Developments Affecting a Hospital's Liability for Negligence of Physicians,* 18 S. TEX. L.J. 389, 390 (1977) (general acceptance in most jurisdictions of doctrine of ostensible agency); Spero, *Hospital Liability: Vicarious and Direct Corporate Responsibility for Acts of Professional Negligence,* 15 TRIAL 22, 24 (July 1979) (if hospital did nothing to make patient aware of its "independent-contractor" relationship with hospital, then courts may estop hospital from denying such agency relationship existed).

30. *See* Bing v. Thunig, 143 N.E.2d 3, 4-5, 163 N.Y.2d 656, 660-61 (N.Y. 1957) (landmark case which recognized the impossibility of distinguishing between medical and administerial acts). The court subsequently refused to make such a distinction and instead applied the doctrine of respondeat superior. *See id.* at 9, 163 N.Y.S.2d at 12; *see also* LAKIN AND SCHIFF, THE LAW OF AGENCY 1 (1st ed. 1984) (defines agency and how it interacts with master-servant relationship); W. PROSSER & W.P. KEETON, THE LAW OF TORTS § 69 (5th ed. 1984) (negligence can be imputed on doctrine of respondeat superior); Southwick, *The Hospital's New Responsibility,* 17 CLEV.-MAR. L. REV. 146, 156 (1968) (hospital may be held vicariously liable for negligent acts of its employees).

31. *See, e.g.,* Runyon v. Goodman, 228 S.W. 397, 400-01 (Ark. 1921) (hospital administrator has difficult time trying to control discretionary functions and acts of physician); Mayers v. Litow, 316 P.2d 351, 354, 154 Cal. App. 413, 418 (Cal. Ct. App. 1957) (where physician "independent-contractor," vicarious liability could not be imposed on hospital since practice of medicine beyond hospital's control); Rosane v. Senger, 149 P.2d 372, 374-75 (Colo. 1944) (before changes in law occurred, respondeat superior inapplicable if physician required to use his professonal discretion).

32. *See, e.g.,* Weiss v. Kling, 101 S.E.2d 178, 180 (Ga. Ct. App. 1957) (attempts to impose hospital liability on basis of respondeat superior have resulted in creation of tests to distinguish between "independent-contractors" and employees, rather than traditional administerial-medical distinctions); Synnott v. Midway Hosp., 178 N.W.2d 211, 214 (Minn. 1970) (liability imputed to defendant hospital under respondeat superior after x-ray technician's negligence resulted in injury); Quick v. Benedictine Sisters Hosp. Assoc., 102 N.W.2d 36, 44 (Minn. 1960) (negligence of nurses and attendants constituted negligence of hospital). Both salaried and non-salaried physicians' negligence may be imputed to the hospital under this doctrine. *See* Bing v. Thunig, 143 N.E.2d 3, 8, 163 N.Y.S.2d 656, 660 (N.Y. 1957) (negligence of physician may be imputed to hospital if committed within physician's scope of employment); *see also* Note, *Tort Law—Corporate Negligence of Hospitals and the Duty to Monitor and Oversee Medical Treatment—Bost v. Riley,* 17 WAKE FOREST L. REV. 309, 316 (1981) (overseeing patient's care nondelegable duty upon which corporate negligence may be based). *But see* Comment, *Piercing the Doctrine of Corporate Hospital Liability,* 17 SAN DIEGO

Corporate negligence is a second theory upon which hospital liability may be premised.[33] Under this doctrine, the hospital is liable if it has failed to uphold the proper standard of care owed the patient, which is to ensure the patient's safety while at the hospital.[34] Because the corporate negligence doctrine imposes an independent duty on the hospital, an injured party does not have to rely on and establish the negligence of a third party.[35] A hospital's duties are classified into four general areas: (1) the duty to maintain reasonably safe and adequate facilities and equipment;[36] (2) the duty to se-

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L. REV. 383, 391 (1980) (corporate liability for negligence of "independent-contractor physicians" creates unrealistic standard for hospitals).

33. *See* Levin, *Hospital's Liability for Independent Emergency Room Service,* 22 SANTA CLARA L. REV. 791, 801 (1982) (corporate negligence can be distinguished from doctrine of respondeat superior and ostensible agency by reason that hospital itself owes duty of care directly to patient). *But see* Southwick, *Hospital Liability, Two Theories Have Been Merged,* 4 J. LEGAL MED. 1, 45-46 (1983) (no viable differences between doctrines of respondeat superior, ostensible agency, and corporate negligence).

34. *See, e.g.,* Purcell v. Zimbelman, 500 P.2d 335, 341-42 (Ariz. Ct. App. 1972) (negligent retention of physician where hospital had knowledge of physician's incompetence); Joiner v. Mitchell County Hosp. Auth., 186 S.E.2d 307, 308 (Ga. Ct. App. 1971) (negligent selection of physician resulted in hospital liability since hospital failed to investigate physician's qualifications), *aff'd,* 189 S.E.2d 412 (Ga. 1972); Bellaire Gen. Hosp. v. Campbell, 510 S.W.2d 94, 95 (Tex. Civ. App.—Houston [14th Dist.] 1974, writ ref'd n.r.e.) (hospital breached duty to furnish instruments which were not defective); *see also* Gonzales v. Nork, 573 P.2d 458, 460, 143 Cal. Rptr. 240, 242 (1978) (hospital negligent in supervising physician since hospital allowed physician to perform fifty unnecessary operations); Foley v. Bishop Clarkson, 173 N.W.2d 881, 885 (Neb. 1970) (hospital liable for negligent enforcement of rules and regulations after court found no medical history or physical exam done). Several commentators have noted the various nondelegable duties of a hospital. *See* Perdue, *Direct Corporate Liability of Hospitals: A Modern Day Legal Concept of Liability for Injury Occurring in the Modern Day Hospital,* 24 S. TEX. L.J. 773, 783 (1983); *see also* Comment, *The Hospital's Responsibility for Its Medical Staff: Prospects for Corporate Negligence in California,* 8 PAC. L.J. 141, 142 (1977) (under corporate negligence theory, institutions owe certain nondelegable duties to patients).

35. *See* Darling v. Charleston Community Memorial Hosp., 211 N.E.2d 253, 258 (Ill. 1965) (hospital liable for breaching duty of care owed directly to patient), *cert. denied,* 383 U.S. 946 (1966); *see also* Perdue, *Direct Corporate Liability of Hospitals: A Modern Day Legal Concept of Liability for Injury Occurring in the Modern Day Hospital,* 24 S. TEX. L.J. 773, 788 (1983) (*Darling* significant in establishing hospital's obligations and duties to patients and its potential liability); Spero, *Hospital Liability: Vicarious and Direct Corporate Responsibility for Acts of Professional Negligence,* 15 TRIAL 22, 24 (July 1979) (corporate negligence is additional form of negligence upon which hospital liability can be based, distinct from liability based on respondeat superior or ostensible agency).

36. *See, e.g.,* South Highlands Infirmary v. Camp, 180 So. 2d 904, 907 (Ala. 1965) (defective equipment injured patient, thereby resulting in hospital liability); Bellaire Gen. Hosp., Inc. v. Campbell, 510 S.W.2d 94, 95 (Tex. Civ. App.—Houston [14th Dist.] 1974, writ ref'd n.r.e.) (hospital breached duty of care in failing to furnish adequate equipment); Charrin v. Methodist Hosp., 432 S.W.2d 572, 574-75 (Tex. Civ. App.—Houston [1st Dist.] 1968, no writ) (liability may be imposed upon hospital for failure to maintain reasonably safe facilities); *see also* Perdue, *Direct Corporate Liability of Hospitals: A Modern Day Legal Concept of Liability for*

lect and retain only competent physicians;[37] (3) the duty to oversee a physician's care of patients;[38] and (4) the duty to formulate, adopt, and enforce adequate rules and policies to ensure quality care for the patient.[39] A breach of any one of these duties will result in liability under the doctrine of corporate negligence.[40]

The courts have also developed the doctrine of ostensible agency, a third theory upon which to predicate medical liability.[41] This doctrine arises

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Injury Occurring in the Modern Day Hospital, 24 S. TEX. L.J. 773, 789 (1983) (direct corporate liability may be imposed for negligence involving premises, equipment, or facilities).

37. *See, e.g.,* Penn Tanker Co. v. United States, 310 F. Supp. 613, 616-17 (S.D. Tex. 1970) (hospital administrator liable after negligently retaining physician with known alcohol problem); Joiner v. Mitchell County Hosp. Auth., 186 S.E.2d 307, 309 (Ga. Ct. App. 1971) (question as to whether hospital was aware of physician's incompetency was one of fact for jury); Johnson v. Misericordia Community Hosp., 301 N.W.2d 156, 164 (Wis. 1981) (hospital must exercise due care in selecting medical staff members or be faced with liability); *see also* Note, *Theories for Imposing Liability on Hospitals for Medical Malpractice: Ostensible Agency and Corporate Liability,* 11 WM. MITCHELL L. REV. 561, 580 (1985) (hospital has duty of investigating physician's qualifications and may be liable for negligently screening).

38. *See, e.g.,* Purcell v. Zimbelman, 500 P.2d 335, 343 (Ariz. Ct. App. 1972) (if hospital aware of physician's propensity to commit malpractice, then failure to act will result in liability for breach of duty to supervise medical staff); Darling v. Charleston Memorial Hosp., 211 N.E.2d 253, 256 (Ill. 1965) (hospital required to supervise medical treatments given by independent physicians); Bost v. Riley, 262 S.E.2d 391, 397 (N.C. Ct. App.) (hospital breached duty to correctly monitor and oversee patient's medical care), *cert. denied,* 269 S.E.2d 621 (N.C. 1980); *see also* Comment, *The Hospital-Physician Relationship: Hospital Responsibility for Malpractice of Physicians,* 50 WASH. L. REV. 385, 413 (1975) (hospital must supervise staff with proper care or liability may arise).

39. *See, e.g.,* Steeves v. United States, 294 F. Supp. 446, 454-55 (D. S.C. 1968) (hospital violated own rule in not requiring physician consultation regarding possible case of appendicitis); Bilonoha v. Zubutzky, 336 A.2d 351, 354 (Pa. 1978) (question of fact existed as to whether hospital failed to formulate adequate rules and regulations); Air Shields, Inc. v. Spears, 590 S.W.2d 574, 581-82 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.) (negligently created rules and regulations concerning administration of oxygen to infants may be basis for hospital liability). *See generally* Perdue, *Direct Corporate Liability of Hospitals: A Modern Day Legal Concept of Liability for Injury Occurring in the Modern Day Hospital,* 24 S. TEX. L.J. 773, 805 (1983) (commentator discusses hospital duties concerning rules and regulations).

40. *See* Wood v. Samaritan Institution, 161 P.2d 556, 558, 26 Cal.2d 847, 851 (Cal. Ct. App. 1945) (hospital institution owes independent duty of protection directly to its patients breach of which constitutes corporate negligence); *see also* Kahn, *Hospital Malpractice Prevention,* 27 DEPAUL L. REV. 23, 26-27 (1977-78) (hospital liability under doctrine of corporate negligence as broad as medical practice itself); Comment, *The Hospital's Responsibility For Its Medical Staff: Prospects for Corporate Negligence in California,* 8 PAC. L.J. 141, 142 (1977) (duty of reasonable care is required, breach of which will result in corporate liability); Comment, *The Hospital-Physician Relationship: Responsibility for Malpractice of Physicians,* 50 WASH. L. REV. 385, 411-12 (1975) (hospital liability may be imposed for negligently performing any nondelegable duties of care and safety owed patient by corporate hospital institution).

41. *See, e.g.,* Solich v. Wheeling, 543 F. Supp. 576, 579 (W.D. Pa. 1982) (all operating room personnel are possible ostensible agents); Paintsville Hosp. Co. v. Rose, 683 S.W.2d 255, 257 (Ky. 1985) (ostensible agency applied to relationship between hospital and emergency

when a hospital, intentionally or otherwise, causes a patient to believe that the physician is an agent of the hospital when, in reality, the physician is not.[42] There are three necessary elements which must be proven in order to be successful in a case based upon the doctrine of ostensible agency.[43] First, the patient must reasonably believe that the "independent-contractor physician" is operating under the hospital's authority.[44] Second, this mistaken belief must have been generated by the hospital's act or omission.[45] Third, the patient must have relied upon this representation.[46] If these elements are

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room physician); Capan v. Divine Providence Hosp., 430 A.2d 647, 650 (Pa. Super. Ct. 1980) (trial court erred in not instructing jury concerning issue of ostensible agency). Under this doctrine, the hospital is estopped from alleging that the medical professional was not its agent. *See* Stanczyk and Moffitt, *Hospitals, Physicians, and Their Liability Carriers: Ostensible Agency, Enterprise Liability, and Beyond,* 31 FED. INS. COUN. Q. 199, 203 (1981).

42. *See* Adamski v. Tacoma Gen. Hosp., 579 P.2d 970, 979 (Wash. Ct. App. 1978) (question of fact existed as to whether or not physician was held out as being hospital's ostensible agent). *See generally* Note, *Theories for Imposing Liability Upon Hospitals for Medical Malpractice: Ostensible Agency and Corporate Liability,* 11 WM. MITCHELL L. REV. 561, 573-74 (1985) (ostensible agency created where hospital erroneously causes patient to believe "attendant" is hospital's agent).

43. *See* Hill v. Citizens Nat'l Trust & Sav. Bank of Los Angeles, 69 P.2d 853, 855-56, 9 Cal.2d 172, 176 (1937) (landmark case first enumerating ostensible agency rules). The *Restatement (Second) of Agency* states that if a party "holds out" that another is his agent, and a third person reasonably relies upon this to his detriment, then this party will be subject to liability for the ostensible agent's negligent acts. *See* RESTATEMENT (SECOND) OF AGENCY § 267 (1958) (general definition of apparent agency); *see also* RESTATEMENT (SECOND) OF TORTS § 429 (1966) (discusses imposition of liability based on apparent agency created when principal hires "independent-contractor" to do principal's work).

44. *See, e.g.,* Hill v. Citizens Nat'l Trust and Sav. Bank, 69 P.2d 853, 855-56, 9 Cal.2d 172, 172 (1937) (belief that independent contractor is hospital's agent, most important element in determining ostensible agency); Grewe v. Mt. Clemens Gen. Hosp., 273 N.W.2d 429, 433 (Mich. 1978) (hospital held out that orthopedic resident was its employee, thereby making it vicariously liable for physician's negligence); Walter E. Heller & Co. v. Barnes, 412 S.W.2d 747, 755 (Tex. Civ. App.—El Paso 1967, writ ref'd n.r.e.) (third party would not have acted absent certain representation made by apparent agent).

45. *See* Allrid v. Emory Univ., 285 S.E.2d 521, 525-26 (Ga. Ct. App. 1982) (physician's negligence for failure to warn of dangerousness of product could not be imputed to hospital where hospital did not hold physician out as its agent), *aff'd,* 306 S.E.2d 905 (Ga. 1983); Howard v. Park, 195 N.W.2d 39, 41-42 (Mich. Ct. App. 1972) (medical center liable after holding out agency relationship with physician). The court in *Howard* relied heavily on fact that referral for negligent physician came from hospital and fact that entire medical treatment was performed at the medical center. *See id.* at 41-42; *see also* Payne, *Recent Developments Affecting A Hospital's Liability for Negligence of Physicians,* 18 S. TEX. L.J. 389, 398-99 (1977) (discussion of "holding out" in relation to hospitals).

46. *See* Grewe v. Mt. Clemens Gen. Hosp., 273 N.W.2d 429, 433 (Mich. 1978) (reasonable expectation that patient will be treated by competent physicians); Bing v. Thunig, 143 N.E.2d 3, 8, 163 N.Y.S.2d 656, 660 (N.Y. 1957) (person presenting himself to hospital has reasonable expectation that hospital will make effort to cure him). Once the hospital opens an emergency room to the public, the public may justifiably rely on the availability of adequate

satisfied, the hospital is estopped from denying that the physician was its agent.[47] In determining ostensible agency, courts recognize several presumptions.[48] First, the sole purpose of the patient's admission is to receive some form of health care as supplied by the hospital.[49] Second, strategic decisions such as admissions are entirely made by the physician on behalf of the medical institution.[50] And third, a patient has no duty to inquire whether the physician is an "independent-contractor" since, in most instances, patients are not aware of the contractual relationships that may exist between hospitals and physicians.[51] Thus, the doctrine of ostensible agency has been applied to a large spectrum of "hospital 'independent-con-

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care. *See* Galatz, *Hospital Liability: The Institution, the Physician, the Staff,* 20 TRIAL 64, 66 (1984). *See generally* Horty and Mulholland, *The Legal Status of the Hospital Medical Staff,* 22 ST. LOUIS U. L.J. 485, 490 (1978) (today, consumers merely view emergency rooms as another doctor's office ready to treat any ailment).

47. *See, e.g.,* Grewe v. Mt. Clemens Gen. Hosp., 273 N.W.2d 429, 433 (Mich. 1978) (hospitals may be held liable on basis of agency by estoppel if hospital has held out to general public that physician is its agent); Arthur v. St. Peters Hosp., 405 A.2d 443, 446 (N.J. Super. Ct. 1979) (liability imposed by estoppel); Lundberg v. Bay View Hosp., 191 N.E.2d 821, 823 (Ohio 1963) (court held that hospital estopped from raising defense that physician was "independent-contractor"); *cf.,* Mobile Oil Corp. v. Frederick, 615 S.W.2d 323, 325 (Tex. Civ. App.—Fort Worth) (ostensible agency founded on doctrine of estoppel), *rev'd on other grounds,* 621 S.W.2d 595 (Tex. 1981).

48. *See* Grewe v. Mt. Clemens Gen. Hosp., 273 N.W.2d 429, 432-33 (Mich. 1978) (presumption of no notice by patient of contractual relationship between hospital and physician); Arthur v. St. Peters Hosp., 405 A.2d 443, 446 (N.J. Super. Ct. 1979) (discusses presumptions generally and poses question as to whether person of ordinary prudence can presume that "independent-contractor physician" operating under hospital's authority in performing particular acts). *See generally* Levin, *Hospital's Liability for Independent Emergency Room Service,* 22 SANTA CLARA L. REV. 791, 800 (1982) (article enumerates some of these presumptions).

49. *See* Mehlman v. Powell, 378 A.2d 1121, 1124 (Md. 1977) (patient's health care expectations not realized where physician failed to recognize patient, suffering from pulmonary embolism, was in immediate danger). The primary reason the patient went to emergency room was for emergency treatment for his heart condition. *See id.* at 1122.

50. *See* Ybarra v. Spangard, 154 P.2d 687, 690, 25 Cal.2d 486, 492 (1944) (various agencies exercise control while patient is in hospital); Methodist Hosp. v. Ball, 362 S.W.2d 475, 487 (Tenn. Ct. App. 1961) (doctors rather than administrators normally make decision of whether or not to admit patient from emergency room). *But see* Note, *Theories for Imposing Liability Upon Hospitals for Medical Malpractice: Ostensible Agency and Corporate Liability,* 11 WM. MITCHELL L. REV. 561, 571 (1985) (hospital administrators would be unable to exercise control after physician has decided to admit patient).

51. *See, e.g.,* Grewe v. Mt. Clemens Gen. Hosp., 273 N.W.2d 429, 433-34 (Mich. 1978) (patient has no duty to inquire as to what contractual relationship exists between hospital and physician); Arthur v. St. Peters Hosp., 405 A.2d 443, 447 (N.J. Super. Ct. 1979) (general public unaware of contractual relationships of various professionals working in modern-day emergency room); Capan v. Divine Providence Hosp., 430 A.2d 647, 649 (Pa. Super. Ct. 1980) (to require patients to inquire as to physician's contractual status with hospital would be unreasonable).

tractor' relationships" including anesthesiologists,[52] surgeons,[53] pathologists,[54] psychiatrists,[55] radiologists,[56] cardiologists,[57] and emergency room

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52. *See* Quintal v. Laurel Grove Hosp., 397 P.2d 161, 162, 41 Cal. Rptr. 577, 578 (1964) (due to anesthesiologist's negligence, six-year old child suffered brain damage with ultimate result of child becoming spastic quadriplegic, unable to speak or see). The California Supreme Court said that since there was an agreement between the hospital and the anesthesiologists' group, there was a question of fact on the issue of whether or not he was the hospital's agent. *See id.* at 168-69, 41 Cal. Rptr. at 578; *see also* Seneris v. Haas, 291 P.2d 915, 922, 45 Cal.2d 811, 816 (1955) (anesthesiologist's negligence in administration of spinal anesthetic during routine obstetrical case resulted in paralysis of mother).

53. *See* Wilson v. Lee Memorial Hosp., 65 So. 2d 40, 41 (Fla. 1953) (summary judgment was reversed in favor of plaintiff after court found surgeons were hospital's agents); Howard v. Park, 195 N.W.2d 39, 40 (Mich. Ct. App. 1972) (surgeon severely lacerated five-year-old girl's arm while removing cast). The *Howard* court based its holding on the facts that the surgeon utilized the medical center services, but was not an employee; that the child was treated at this center; and that the surgeon used the billing services of the center. *See id.* at 41-42; *see also* Gilstrap v. Osteopathic Sanitorium Co., 24 S.W.2d 249, 255 (Mo. Ct. App. 1929) (surgeon caused patient's death after negligently performing tonsilectomy; court held he was servant of hospital); *cf.* Haven v. Randolph, 342 F. Supp. 538, 542 (D. D.C. 1972) (court held surgeon was acting outside scope of his hospital employment when he aided private patient and through his negligence caused child's paralysis), *aff'd,* 494 F.2d 1069 (D.C. Cir. 1974). However, the district court in *Haven* would have held the hospital liable for the surgeon's negligent acts had it been able to find an agency relationship with the hospital. *See id.* at 542; *see also* Smith v. Duke Univ., 14 S.E.2d 643, 647 (N.C. 1941) (surgeon outside scope of employment when he committed negligent acts).

54. *See* Lundberg v. Bay View Hosp., 191 N.E.2d 821, 822 (Ohio 1963) (pathologist negligent in misdiagnosing patient's condition as cancer of cervix resulting in unnecessary removal of her uterus). The Ohio Supreme Court declared that the hospital was estopped from denying responsibility since an employment relationship existed between the hospital and the pathologist. *See id.* at 823.

55. *See* Simmons v. St. Clair Memorial Hosp., 481 A.2d 870, 872 (Pa. Super. Ct. 1984) (patient committed suicide in the bathroom of his hospital room). The hospital held out that "independent-contractor" psychiatrist was the "on-call" emergency psychiatrist for the hospital. *See id.* at 874-75.

56. *See, e.g.,* Beeck v. Tucson Gen. Hosp., 500 P.2d 1153, 1154 (Ariz. Ct. App. 1972) (radiologist's negligence imputed to hospital where patient contracted pneumonia after x-ray machine accidently struck needle which had been inserted into subarachnoid space during routine myelogram); Kober v. Stewart, 417 P.2d 476, 479 (Mont. 1966) (question of fact as to agency status of x-ray department director where hospital supplied space, equipment, and employees, billed patients for x-ray services, and did not allow patients to select which radiologists who rendered treatment); Jenkins v. Charleston Gen. Hosp. and Training School, 110 S.E. 560, 561-62 (W. Va. 1922) (liability for non-salaried radiologists may be imputed to the hospital when physician negligently administers treatment); *see also* Stanhope v. Los Angeles College of Chiropractic, 128 P.2d 705, 708, 54 Cal. App. 2d 141, 142 (Cal. Dist. Ct. App. 1942) (radiologists negligently misinterpreted patient's x-rays stating no bones were broken when in fact patient's back was broken). The court said the institution had done nothing to make the patient aware that the radiologist was not an employee of the hospital. *See id.* at 708, 54 Cal. App. at 146-47. *But see* Trapp v. Cayson, 471 So. 2d 375, 377 (Miss. 1985) (no hospital liability for negligence of radiologist). The Mississippi Supreme Court distinguished earlier cases by the fact that in *Trapp* the radiologists were neither controlled by the hospital, nor

physicians.[58]

Traditionally, Texas courts had refused to impose any form of liability upon a hospital, but this immunity has begun to erode.[59] Recently, a minimum standard of care doctrine based on the hospital's duty to supervise the medical care being given to the patient has emerged.[60] One breach in the

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were the patients of the radiologists billed by the hospital. *See id.* at 384. Thus, the court concluded no ostensible agency was present. *See id.* at 385.

57. *See* Gregg v. National Medical Health Care Serv., 699 P.2d 925, 927-28 (Ariz. Ct. App. 1985) (cardiologists failed to realize extent of patient's problems; patient died from massive myocardial infarction). The Arizona Court of Appeals decided that since the doctor was a paid consultant of the hospital and that the hospital directly billed the patients for him, summary judgment for the defendant hospital was improper. *See id.* at 928-29.

58. *See, e.g.,* Paintsville Hosp. Co. v. Rose, 683 S.W.2d 255, 256 (Ky. 1985) (failure of emergency room physician to recognize skull fracture and apparent subdural hematoma was proximate cause of patient's death); Hardy v. Brantley, 471 So. 2d 358, 361 (Miss. 1985) (patient died from cardiorespiratory arrest after physician failed to adequately treat condition); Benedict v. St. Luke's Hosp., 365 N.W.2d 499, 501 (N.D. 1985) (physicians allowed patient suffering severe chest pains to return home; subsequent severe heart attack resulted in brain damage to patient); *see also* Stewart v. Midoni, 525 F. Supp. 843, 853 (N.D. Ga. 1981) (failure to properly diagnose resulted in death at home); Vanaman v. Milford Memorial Hosp., 272 A.2d 718, 719 (Del. Super. Ct. 1970) (cast applied too tightly, resulting in numerous injuries to ankle); Irving v. Doctors Hosp. of Lake Worth, 415 So. 2d 55, 56 (Fla. Dist. Ct. App.) (negligent diagnosis resulted in serious injury to patient, who was actually suffering from meningitis), *pet. denied,* 422 So. 2d 842 (Fla. 1982); Arthur v. St. Peters Hosp., 405 A.2d 443, 444 (N.J. Super. Ct. 1979) (patient suffered fractured navicular bone in wrist which physician failed to diagnose); Hannola v. City of Lakewood, 426 N.E.2d 1187, 1188 (Ohio Ct. App. 1980) (patient died due to medical malpractice of emergency room "independent-contractor physician"); Themins v. Emanuel Lutheran Charity Bd., 637 P.2d 155, 156 (Or. Ct. App. 1981) (bandages applied too tightly resulting in eventual amputation of foot), *pet. denied,* 644 P.2d 1129 (Or. 1982); Capan v. Divine Providence Hosp., 430 A.2d 647, 647 (Pa. Super. Ct. 1980) (after patient developed delerium tremor, doctor administered various drugs resulting in cardiac arrest and subsequent death of patient); Edmonds v. Chamberlain Memorial Hosp., 629 S.W.2d 28, 29 (Tenn. Ct. App. 1981) (patient died during emergency surgery after physician negligently diagnosed condition); Adamski v. Tacoma Gen. Hosp., 579 P.2d 970, 971 (Wash. Ct. App. 1978) (physician negligently reduced fracture of finger resulting in massive infection to wrist, hand and fingers).

59. *See* Jeffcoat v. Phillips, 534 S.W.2d 168, 170 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.) (doctor selected entirely by patient was "independent-contractor," therefore, no hospital liability could attach); Pearce v. Fort Worth and Denver Ry. Employee's Hosp. Assoc., 488 S.W.2d 903, 905 (Tex. Civ. App.—Fort Worth 1972, no writ) (rejected ostensible agency since patient was not misled by association's conduct into believing that association would be obligated to pay decedent's medical expenses).

60. *See* Valdez v. Lyman-Roberts Hosp., Inc., 638 S.W.2d 111, 114 (Tex. App.—Corpus Christi 1982, writ ref'd n.r.e.) (patient died of ruptured uterus after being turned away from hospital's emergency room). The court held there was a duty to receive patients in case of unmistakable emergency, and that hospital will be liable for refusing to do so after patient has presented himself for treatment. *See id.* at 114; *see also* Air Shields, Inc. v. Spears, 590 S.W.2d 574, 581 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.) (baby sustained permanent blindness due to hospital's failure to set minimum rules concerning administration of oxygen to

veil of hospital immunity occurred when Texas courts rejected the administrative-medical acts dichotomy and began holding hospitals liable for negligent "medical" acts under the doctrine of respondeat superior.[61] Another incursion was made when courts determined that a hospital, as an ultimate health care provider, had a duty to oversee the safety of the patient.[62] The trend toward finding increased hospital liability has been somewhat limited since Texas courts have continually refused to find any form of hospital liability premised on an "independent-contractor" relationship.[63] Furthermore, the theory of ostensible agency had never been affirmatively addressed by a Texas court.[64]

In *Brownsville Medical Center and Valley Community Hospital v.*

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newborns). Medical rules and policies negligently made will result in hospital liability if injury is sustained. *See id.* at 581; *see also* Penn Tanker Co. v. United States, 320 F. Supp. 613, 616 (S.D. Tex. 1970) (opthalmologist negligently prepared eye for surgery and thereafter tore patient's iris and punctured patient's lens resulting in loss of sight in that eye). The hospital in *Penn Tanker* was held corporately liable since an administrator was aware of physician's alcohol problem and breached a standard of care by doing nothing about it. *See id.* at 618.

61. *See, e.g.,* Sparger v. Worley Hosp., Inc., 547 S.W.2d 582, 585 (Tex. 1977) (hospital may be held liable for negligent "medical" acts of agents and employees, including surgeons); Air Shields, Inc. v. Spears, 590 S.W.2d 574, 581 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.) (failure to establish appropriate medical standards to provide for patient's safety may be basis for cause of action against hospital); Harris v. Harris County Hosp., 557 S.W.2d 353, 355 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ) (hospital has duty to protect patient from foreseeable damages and injury). Hospital liability, however, has been slow to develop in Texas. *See* Payne, *Recent Developments Affecting a Hospital's Liability for Negligence of Physicians,* 18 S. TEX. L.J. 389, 390 (1976).

62. *See* Valdez v. Lyman-Roberts Hosp., 638 S.W.2d 111, 114 (Tex. App.—Corpus Christi 1982, writ ref'd n.r.e.) (duty to admit patient with unmistakeable emergency); *see also* TEX. REV. CIV. STAT. ANN. art. 4438a (Vernon 1976 & Supp. 1986) (no person who has been diagnosed as being seriously ill, or injured may be turned away from hospital run by public funds on basis of inability to pay); *id.* art. 4438a (law amended to allow any physician power to admit patients in need of emergency care to any institution having such emergency facilities). Hospitals can be held liable for refusing emergency services to a person in need of care. *See generally* Weigel and Mayor, *Medicine, Money, Morality and Law: Question of Access to Emergency Health Care,* 24 S. TEX. L.J. 125, 138-39 (1983) (discusses liability of hospitals for refusing emergency care services).

63. *See, e.g.,* Hale v. Sheikholesham, 724 F.2d 1205, 1207-08 (5th Cir. 1984) (since doctor was neither officer or employee of hospital, there could be no liability against hospital); McKelvey v. Barber, 381 S.W.2d 59, 62-63 (Tex. 1964) (in attempt to avoid liability, physician alleged he was hospital's agent, but court refused to accept theory); Jeffcoat v. Phillips, 534 S.W.2d 168, 173 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.) (if physician was "independent-contractor," then hospital could not be held liable). *But see* Edwards v. West Texas Hosp., 89 S.W.2d 801, 811 (Tex. Civ. App.—Amarillo 1935, writ dism. w.o.j.) (court upheld liability of hospital, premised on a business relationship, joint venture).

64. *See* Gladewater Mun. Hosp. v. Daniel, 694 S.W.2d 619, 621 (Tex. App.—Texarkana 1985, no writ) (hospital liability will not be imposed for negligence of "independent-contractor" physician in absence of principal-agent relationship); *see also* TEX. REV. CIV. STAT. ANN. art. 6252-19, § 3 (Vernon 1970) (for hospital to be liable for negligent acts of "independent-

Gracia,[65] the Corpus Christi Court of Appeals held that a hospital can be held vicariously liable for the negligent acts of its independently contracted emergency room physicians.[66] The court also held that a hospital can be liable for failing to adequately supervise the medical care of the patient.[67] The court determined that there was sufficient evidence for the jury to have concluded that the death of Fermin Gracia, Jr., was both reasonably foreseeable,[68] and the last link in the chain of events[69] stemming from Dr. Lorenzana's negligence in discharging the child with a flaming appendix.[70] Therefore, the evidence supported the jury's finding that both Brownsville Medical Center[71] and Valley Community Hospital[72] proximately caused the child's death since the chain of causation was continuous.[73] The court con-

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contractor," there must be evidence of master-servant, principal-agent, partnership, or other legal relationship between "independent-contractor" and hospital).

65. 84-369-CV (Tex. App.—Corpus Christi, June 28, 1985, writ pending) (not yet reported).

66. *See id.* at 14-15 (hospital can be vicariously liable for physician's negligent acts). Brownsville Medical Center argued that the Gracias should have inquired as to whether Dr. Lorenzana was an "independent-contractor" emergency room physician or not. *See* Brief for Appellant, Brownsville Medical Center at 52, Brownsville Medical Center and Valley Community Hosp. v. Gracia, 84-369-CV, slip op. (Tex. App.—Corpus Christi, June 28, 1985, writ pending) (not yet reported). Appellant further argued that Gracias did not reasonably rely on any misleading act or omission by Brownsville Medical Center since the Gracias probably would not have gone to another hospital even if they had known of Dr. Lorenzana's "independent-contractor" status. *See id.* at 52.

67. *See* Brownsville Medical Center and Valley Community Hosp. v. Gracia, 84-369-CV, slip op. at 19 (Tex. App.—Corpus Christi, June 28, 1985, writ pending) (not yet reported). Valley Community Hospital's negligence stems from the fact that it prematurely terminated Fermin's medical care and subsequently transferred him to John Sealy causing a delay in care at a critical moment. *See id.* at 19.

68. *See id.* at 11-12. The jury found that Dr. Lorenzana had failed to both diagnose properly and hospitalize Fermin; that child's condition, due to delay of care, became acute; and that failure to properly diagnose hindered further diagnosis and treatment. *See id.* at 11.

69. *See id.* at 11.

70. *See id.* at 12. Brownsville Medical Center never challenged the issue of Dr. Lorenzana's negligence on appeal. *See id.* at 8; *see also* Brief for Appellee at 30, Brownsville Medical Center and Valley Community Hosp. v. Gracia, 84-369-CV, slip op. (Tex. App.—Corpus Christi, June 28, 1985, writ pending) (not yet reported) (only argument advanced by Brownsville Medical Center is lack of evidence sufficient to support vicarious liability findings of jury).

71. *See* Brownsville Medical Center and Valley Community Hosp. v. Gracia, 84-369-CV, slip op. at 12 (Tex. App.—Corpus Christi, June 28, 1985, writ pending) (not yet reported) (Brownsville Medical Center liable for negligent acts of its ostensible agent, Dr. Lorenzana, in prematurely releasing Fermin from the hospital).

72. *See id.* at 19 (Valley Community Hospital liable for breaching duty of care and safety owed to Fermin Gracia, Jr. on grounds of corporate negligence).

73. *See id.* at 10 (Brownsville Medical Center's argument that negligence of Valley Community Hospital and various other health care providers created "independent intervening cause" resulting in Fermin's death rejected).

sidered the issue of ostensible agency[74] in regard to the liability of Brownsville Medical Center and noted that this hospital had "contracted out" for its emergency room staff physicians.[75] The court reasoned that even though Dr. Lorenzana, the negligent physician, was an "independent-contractor," circumstances strongly indicated an apparent agency relationship between Dr. Lorenzana and Brownsville Medical Center.[76] The court found that the Gracias had justifiably relied to their detriment on the hospital's representations that it had a fully staffed emergency room with reasonably competent physicians.[77] Therefore, the court of appeals affirmed the jury's findings that Brownsville Medical Center should be held vicariously liable for the negligent acts of its emergency room physician.[78] The court also considered the possible liability of Valley Community Hospital and imposed liability not on the basis of Dr. Rodriguez's vicarious relationship with the hospital, but on the basis that the hospital breached an independent duty it owed directly to the child.[79] The court found that the hospital was negligent in discharging the patient because his parents were unable to pay for medical treatment.[80] After a determination that this premature discharge was also a proximate cause of Fermin's death, the court found that Valley Community Hospital had breached its independent duty not to negligently terminate medical care and treatment of a patient.[81] The court concluded by finding that Valley

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74. *See id.* at 12.

75. *See id* at 14. The court enumerated several key factors indicating an ostensible agency relationship existed: patients were not allowed to select emergency room physician who treated them; there were no signs within emergency room indicating "independent-contractor" status of emergency room physicians; and hospital was in charge of billing for emergency room physicians. *See id.* at 14.

76. *See id.* at 13-14 (mother of deceased testified they took their son to hospital because they desired most prompt attention for son). The Gracias never had any indication that the physician was not working for the hospital. *See id.* at 14; *see also* Brief for Appellee at 26, Brownsville Medical Center and Valley Community Hosp. v. Gracia, 84-369-CV, slip op. (Tex. App.—Corpus Christi, June 28, 1985, writ pending) (not yet reported) (administrator of Brownsville Medical Center testified at trial that there was nothing done to alert patient of contractual status of its emergency room physicians).

77. *See* Brownsville Medical Center and Valley Community Hosp. v. Gracia, 84-369-CV, slip op. at 12 (Tex. App.—Corpus Christi, June 28, 1985, writ pending) (not yet reported). Mrs. Gracia stated that she took her son to Brownsville Medical Center because she knew a physician would be available to render emergency treatment. *See id.* at 14.

78. *See id.* at 14. The court relied on the following cases in reaching its decision: *Shagrin v. Wilmington Medical Center,* Inc., 304 A.2d 61, 61 (Del. Super. Ct. 1973); *Howard v. Park,* 195 N.W.2d 39, 41-42 (Mich. Ct. App. 1972).

79. *See* Brownsville Medical Center and Valley Community Hosp. v. Gracia, 84-369-CV, slip op. at 16 (Tex. App.—Corpus Christi, June 28, 1985, writ pending) (not yet reported) (hospital owed duty to patient not to prematurely terminate medical treatment).

80. *See id.* at 19 (delay of medical care caused by patient's transfer subjected patient to increased risk of harm).

81. *See id.* at 19; *see also* RESTATEMENT (SECOND) OF TORTS § 323 (1965) (hospital has

Community's breach caused Fermin's death.[82]

The *Gracia* case is consistent with other Texas cases on the issue of ostensible agency.[83] The Corpus Christi Court of Appeals declared that if a hospital "holds out" to the general public that it is operating a fully staffed emergency room with competent physicians, and if patients reasonably rely on this fact to their detriment, the hospital will be held liable for the negligent acts of "independently-contracted physicians."[84] Texas is just now developing hospital liability under such circumstances because of the recent abolition of the doctrine of charitable immunity,[85] therefore, the court was forced to rely predominantly on similar holdings in other jurisdictions to support the application of ostensible agency in a hospital context.[86] In look-

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duty to exercise reasonable care and may be subject to liability if another has reasonably relied and harm results); Weigel and Mays, *Medicine, Money, Morality, and Law: The Question of Access to Emergency Health Care,* 24 S. TEX. L.J. 125 (1983) (general discussion on how the jurisdictions have handled this issue).

82. *See* Brownsville Medical Center and Valley Community Hospital v. Gracia, 84-639-CV, slip op. at 16 (Tex. App.—Corpus Christi, June 28, 1985, writ pending) (not yet reported); *see also* Valdez v. Lyman-Roberts Hosp., Inc., 638 S.W.2d 111, 114 (Tex. App.—Corpus Christi 1982, writ ref'd n.r.e.) (court imposed liability on hospital for refusing to treat unmistakable emergency). *Valdez* is distinguishable from the instant case in that it was not concerned with the duty not to prematurely terminate services, but with the duty to admit patients in situations involving unmistakable emergencies.

83. *Compare* Brownsville Medical Center and Valley Community Hosp. v. Gracia, 84-369-CV, slip op. at 16 (Tex. App.—Corpus Christi, June 28, 1985, writ pending) (not yet reported) (physician/ostensible agent's negligence imputed to hospital) *with* Jorgensen v. Stuart Place Water Supply Corp., 676 S.W.2d 191, 194 (Tex. App.—Corpus Christi 1984) (fact question as to whether assailant was ostensible agent of utility company) *and* Mobil Oil v. Frederick, 615 S.W.2d 323, 325 (Tex. Civ. App.—Fort Worth) (gas station operator was not ostensible agent of oil company and case was subsequently reversed), *rev'd on other grounds,* 621 S.W.2d 595 (Tex. 1981) *and* Sorenson v. Shupe Bros. Co., 517 S.W.2d 861, 864 (Tex. Civ. App.—Amarillo 1974, no writ) (person who submitted orders with seller was ostensible purchasing agent for farmer); *see also* Almar-York, Co. v. Fort Worth Nat'l Bank, 374 S.W.2d 940, 942 (Tex. Civ. App.—Fort Worth 1964, writ ref'd n.r.e.) (lease contract made by corporation's apparent agent binding as to corporation).

84. *See* Brownsville Medical Center and Valley Community Hosp. v. Gracia, 84-639-CV, slip op. at 14-15 (Tex. App.—Corpus Christi, June 28, 1985, writ pending) (not yet reported) (hospital liable for ostensible agent who was independent-contractor emergency room physician); *cf.* Walter E. Heller Co. v. Barnes, 412 S.W.2d 747, 755 (Tex. Civ. App.—El Paso 1967, writ ref'd n.r.e.) (ostensible agency must arise from representations or omissions of principal).

85. *See* Howle v. Camp Amon Carter, 470 S.W.2d 629, 630 (Tex. 1971) (Texas Supreme Court abolished Texas charitable immunity doctrine for all cases after March 9, 1966). *See generally* Payne, *Recent Developments Affecting a Hospital's Liability for Negligence of Physicians,* 18 S. TEX. L.J. 389, 390 (1977) (presents various theories upon which hospital may be held liable); Note, *Theories for Imposing Vicarious Liability Upon Hospitals for Medical Malpractice: Ostensible Agency and Corporate Liability,* 11 WM. MITCHELL L. REV. 561, 568 n.49 (1985) (includes list of cases and legislation from all fifty states abolishing charitable immunities doctrine in respective states).

86. *See* Brownsville Medical Center and Valley Community Hosp. v. Gracia, 84-369-CV,

ing to these other cases, the *Gracia* court adopted a number of factors for deciding the issue of ostensible agency.[87] First, the court applies the presumption that unless otherwise indicated, the patient had no notice of the hospital-physician relationship.[88] Second, the court apparently rejects the traditional argument that the hospital can only be held liable if it has the "right to control" the physician.[89] Third, the court states that if there is

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slip op. at 14-15 (Tex. App.—Corpus Christi, June 18, 1985, writ pending) (not yet reported); *see also* Shagrin v. Wilmington Medical Center, Inc., 304 A.2d 61, 63-64 (Del. Super. Ct. 1973) (court held that it was question for jury to decide as to whether there was ostensible agency involved); Howard v. Park, 195 N.W.2d 39, 40-41 (Mich. 1972) (court refused to impose requirement forcing patient to inquire as to treating doctor's contractual status before patient could bring cause of action based on ostensible agency; Mduba v. Benedictine Hosp., 52 A.D. 450, 384 N.Y.S.2d 527, 529 (N.Y. App. Div. 1976) (courts will disregard contractual relationships held between hospitals and physicians and base findings on whether or not ostensible agency did in fact exist); Adamski v. Tacoma Gen. Hosp., 579 P.2d 970, 979 (Wash. Ct. App. 1978) (no affirmative misrepresentation is necessary before hospital will be held liable for its apparent agents).

87. *See* Brownsville Medical Center and Valley Community Hosp. v. Gracia, 84-369-CV, slip op. at 14 (Tex. App.—Corpus Christi, June 28, 1985, writ pending) (not yet reported).

88. *See* Brownsville Medical Center and Valley Community Hosp. v. Gracia, 84-369-CV, slip op. at 14 (Tex. App.—Corpus Christi, June 28, 1985, writ pending) (not yet reported); *see also* Stewart v. Midani, 525 F. Supp. 843, 853 (N.D. Ga. 1981) (hospital would not be liable if patient was on notice as to hospital-physician relationship); Purcell and Tucson Gen. Hosp. v. Zimbelman, 500 P.2d 335, 344 (Ariz. Ct. App. 1972) (knowledge of prior malpractice of physician is enough to hold hospital liable for physician's negligent acts); Grewe v. Mt. Clemens Gen. Hosp., 273 N.W.2d 429, 432-33 (Mich. 1978) (expanded scope of liability due to presumption of "no notice" being made by court for benefit of patient); Hull v. North Valley Hosp., 498 P.2d 136, 137 (Mont. 1972) (hospital was not aware of physician's incompetence, so hospital was not liable); Arthur v. St. Peters Hosp., 405 A.2d 443, 447 (N.J. Super. Ct. 1979) (absent notice to contrary, patient can assume treatment is being administered by either hospital employee or its agent); Rubbo v. The Hughes Provision Co., 34 N.E.2d 202, 205 (Ohio 1941) (disclaimers of agency relationship is effective notice). If patient is not aware that physician is merely contracting with the hospital, then an ostensible agency is created. *See generally* Comment, *Hospital Liability for the Negligence of Physicians: Some Needed Legal Sutures,* 26 U. FLA. L. REV. 844, 856 (1974) (patient is justified in making assumption that hospital is acting through its agent-physician since patient has not been informed otherwise).

89. *See* Brownsville Medical Center and Valley Community Hosp. v. Gracia, 84-369-CV, slip op. at 14 (Tex. App.—Corpus Christi, June 28, 1985, writ pending) (not yet reported); *see also* Evans v. Bernhard, 533 P.2d 721, 726 (Ariz. Ct. App. 1975) (question of relationship between hospital and physician should have gone before jury as to whether physician was its "ostensible agent"); Rice v. California Lutheran Hosp., 163 P.2d 860, 885,27 Cal.2d 296, 302, (Cal. 1945) ("right of control" theory rejected since physician's services were not considered too technical for him to be considered servant of hospital); Sepaugh v. Methodist Hosp., 202 S.W.2d 985, 990 (Tenn. Ct. App. 1946) (set out list of distinguishing factors between hospital servant and "independent-contractor"); Sparger v. Worley Hosp., Inc., 547 S.W.2d 582, 583 (Tex. 1977) (rejected the "captain of the ship" — "right to control" doctrine). *See generally* Payne, *Recent Development Affecting a Hospital's Liability for Negligence of Physicians,* 18 S. TEX. L.J. 389, 394-95 (1977) (although "right of control" is still being administered in some jurisdictions, it has been rejected in most current case law); Comment, *The Hospital-Physician*

sufficient evidence implicating an ostensible agency relationship, then this should be a question of fact for the jury.[90] And fourth, the court seems to imply that a hospital owes a duty to protect a patient against the foreseeable risks of incompetent emergency room physicians.[91] Although the court was determining Brownsville Medical Center's liability under the doctrine of ostensible agency, strong overtones of the doctrine of corporate negligence were also present.[92]

Relationship: Hospital Responsibility for Malpractice of Physicians, 50 WASH. L. REV. 385, 393 (1975) (test used by courts departs significantly from traditional doctrine of "right of control").

90. *See* Brownsville Medical Center and Valley Community Hosp. v. Gracia, 84-369-CV, slip op. at 14 (Tex. App.—Corpus Christi, June 28, 1985, writ pending) (not yet reported); *see also* Seneris v. Haas, 291 P.2d 915, 926-27, 45 Cal. 2d 811, 832 (1955) (trial court decision in favor of hospital was reversed since evidence posed question of agency which was question of fact for jury); Vanaman v. Milford Memorial Hosp., 272 A.2d 718, 720-21 (Del. Super. Ct. 1970) (court reversed summary judgment for hospital after discovering evidence possibly indicating ostensible agency); Adamski v. Tacoma Gen. Hosp., 579 P.2d 970, 978-79 (Wash. App. Ct. 1978) (material issues of fact concerning status of hospital's emergency room nurses made summary judgment inappropriate). *See generally* Payne, *Recent Developments Affecting a Hospital's Liability for Negligence of Physicians,* 18 S. TEX. L.J. 389, 394-95 (1977) (if there is question as to whether agency relationship exists, such as in emergency rooms, then this should be question of fact for jury to decide.

91. *See* Brownsville Medical Center and Valley Community Hosp. v. Gracia, 84-369-CV, slip op. at 14 (Tex. App.—Corpus Christi, June 28, 1985, writ pending) (not yet reported); *see also* Alden v. Providence Hosp., 382 F.2d 163, 166 (D.C. App. 1967) (hospital has duty to give such reasonable care as patient's condition may require). The proper measure of this duty to protect the patient is based on that level of care, skill, and diligence as supplied by other local hospitals. *See generally* Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts,* 70 YALE L.J. 499, 500 (1961) (goals desired can be achieved on "enterprise tort" doctrine premised on scope of employment much easier than by traditional methods of corporate negligence, respondeat superior, and ostensible agency); Comment, *Hospital Liability for the Negligence of Physicians: Some Needed Legal Sutures,* 26 FLA. L. REV. 844, 856 (1974) (hospital, under all circumstances, should provide protection against foreseeable risks); Comment, *The Hospital-Physician Relationship: Hospital Responsibility for Malpractice of Physicians,* 50 WASH. L. REV. 385, 417-18 (1975) (scope of enterprise would include any service provided by hospital, medical or otherwise).

92. *Cf.* Brownsville Medical Center and Valley Community Hosp. v. Gracia, 84-639-CV, slip op. at 14 (Tex. App.—Corpus Christi, June 18, 1985, writ pending) (not yet reported) (by holding Brownsville Medical Center "vicariously" liable court seems to imply hospital had "duty" to protect patient from incompetent emergency room physicians, "duty" being primary element of corporate negligence); *see also* Fridena v. Evans, 622 P.2d 463 (Ariz. 1981) (hospital liable for failing to adequately supervise Dr. Fridena). The Arizona Supreme Court adopted a merged doctrine of hospital liability by holding the hospital corporately liable for the negligent acts of its agent. *See id.* at 466. Therefore, agency law was applied to a situation resulting from a breach of a duty to oversee patient's care, which clearly falls under the doctrine of corporate negligence. *See id.* at 466. One commentator has suggested the doctrines have merged. *See* Southwick, *Hospital Liability, Two Theories Have Been Merged,* 4 J. LEGAL MED. 1, 46-47 (1983) (in hospital setting, doctrines of respondeat superior, ostensible agency, and corporate negligence have overlapped making them almost impossible to distinguish).

The court in *Gracia,* also followed many other jurisdictions in holding hospitals liable under the doctrine of corporate negligence.[93] In fact, the *Gracia* court even went one step further and created a new duty; the duty not to prematurely terminate care and transfer a patient based solely on financial reasons.[94] Thus, under this newly created duty, the hospitals will have to create rules and regulations on admissions and transfers to govern all individuals working in any manner within the hospital corporate institution and adhere to these directives strictly, or risk liability.[95]

The reasoning behind most rulings on the issue of hospital liability is heavily premised on the belief that patients go to the hospital to receive some form of medical care to improve their condition.[96] Furthermore, courts now

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93. *See* Brownsville Medical Center and Valley Community Hosp. v. Gracia, 84-639-CV, slip op. at 14 (Tex. App.—Corpus Christi, June 18, 1985, writ pending) (not yet reported); *see also* Tucson Medical Center v. Miseuch, 545 P.2d 958, 960 (Ariz. 1976) (duty to supervise medical staff); Candler Gen. Hosp. v. Purvis, 181 S.E.2d 77, 78-79 (Ga. Ct. App. 1971) (duty to maintain safe premises). Several commentators have encouraged the emergence of corporate negligence doctrine as a basis for assigning hospital liability. *See generally* Perdue, *Direct Corporate Liability of Hospitals: A Modern Day Legal Concept of Liability for Injury Occurring in the Modern Day Hospital,* 24 S. TEX. L.J. 773, 788 (1983) (doctrine of corporate negligence has been rapidly evolving over past couple of decades); Note, *Hospital Corporate Liability: An Effective Solution to Controlling Private Physician Incompetence?* 32 RUTGERS L. REV. 342, 343 (1979) (hospital's liability expanding at time when traditional definitions of physicians incompetency have been found ineffective); Comment, *The Hospital-Physician Relationship: Hospital Responsibility for Malpractice of Physicians,* 50 WASH. L. REV. 385, 412 (1975) (contemplates hospital's duties under doctrine of corporate negligence).

94. *See* Brownsville Medical Center and Valley Community Hosp. v. Gracia, 84-369-CV, slip op. at 16 (Tex. App.—Corpus Christi, June 28, 1985, writ pending) (not yet reported).

95. *See, e.g.,* Steeves v. U.S., 294 F. Supp. 446, 454-55 (D. S.C. 1968) (hospital liability may be imposed for negligent failure to supervise medical procedures); Green v. City of St. Petersburg, 17 So. 2d 517, 518 (Fla. 1944) (reasonable rules concerning medical treatments within hospital should be made and failure to do so may result in hospital liability); Pederson v. Dumouchel, 431 P.2d 973, 978 (Wash. 1967) (hospital has duty to establish and enforce reasonable medical procedures). Some commentators have suggested possible sources the court may look to in determining what are reasonable rules and regulations. *See* Perdue, *Direct Corporate Liability of Hospitals: A Modern Day Legal Concept of Liability for Injury Occurring in the Modern Day Hospital,* 24 S. Tex. L.J. 773, 809-10 (1983) (drafts potential checklist courts may use to ascertain minimum standards for hospitals); Spero, *Hospital Liability: Vicarious and Direct Corporate Responsibility for Acts of Professional Negligence,* 15 TRIAL 22, 27 (July 1979) (courts may look to JOINT COMMISSION ON ACCREDITATION OF HOSPITALS, ACCREDITATION MANUAL FOR HOSPITALS published by Joint Commission on Accreditation of Hospitals to determine if medical standards violated). As an example, the Texas Department of Health has recently promulgated strict regulations on hospital and physician duties when transfering patients between health facilities. *See* Tex. Dept. of Health, ch. 11, 1-10 (Dec. 5, 1985) (effective April 1, 1986).

96. *E.g.,* Bing v. Thunig, 143 N.E.2d 3, 8, 163 N.Y.S.2d 660, 661 (N.Y. 1957) (person goes to hospital with expectation that he will be cured by doing so). It is generally recognized that the primary purpose for the hospital's existence is to cure patients. *See* Note, *Theories for Imposing Liability Upon Hospital for Medical Malpractice: Ostensible Agency and Corporate*

seem to believe that the hospital should have an appropriate level of control over all physicians who work within the hospital.[97] This belief stems from the fact that modern hospitals regulate their own staffs and, more often than not, take an active role in the patient's treatment.[98] Therefore, if a patient is injured while at the hospital due to a physician's negligent acts, the patient should be compensated, not only from the negligent physician, but also from the negligent hospital.[99]

Imposing vicarious liability by way of ostensible agency or direct liability through corporate negligence presents two problems that the courts have failed to recognize.[100] The first problem is the realization that most hospital

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Liability, 11 WM. MITCHELL L. REV. 561, 569 (1985) (sound policy reasons exists for holding hospitals accountable since primary reason patient goes to hospital is for improvement of his medical or mental condition).

97. *See, e.g.,* Penn Tanker Co. v. United States, 310 F. Supp. 613, 618 (S.D. Tex. 1970) (administrator of hospital had duty to oversee whether ophthamologist was progressing under alcohol syndrome treatment and breached hospital accreditation standards by not doing so); Tucson Medical Center v. Misevich, 545 P.2d 958, 960 (Ariz. 1976) (hospitals have duty of monitoring competence of physicians on their medical staffs); Pederson v. Dumouchel, 431 P.2d 973, 978 (Wash. 1967) (hospital liable for permitting dentist to operate without supervision of physician resulting in brain damage due to negligent administration of anesthetic).

98. *See, e.g.,* Mitchell County Hosp. Auth. v. Joiner, 189 S.E.2d 412, 414 (Ga. 1972) (hospital has authority to examine physician's qualifications and to reject or limit staff privileges if deemed incompetent); Bilonoha v. Zubritzky, 336 A.2d 351, 354 (Pa. Super. Ct. 1975) (judgment reversed after it was found that hospital could have been negligent in failing to devise adequate rules and regulations); Air Shields, Inc. v. Spears, 590 S.W.2d 574, 581 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.) (hospital negligent in formulating medical policy concerning administration of oxygen to premature infants resulting in plaintiff's blindness); *see also* Pederson v. Dumouchel, 431 P.2d 973, 978-79 (Wash. 1967) (negligent enforcement of medical rules resulting in brain damage to patient). *See generally* Payne, *Recent Developments Affecting A Hospital's Liability for Negligence of Physician,* 18 S. TEX. L.J. 389, 393 (1977) (general public policy assumes that hospitals adequately supervise their medical and non-medical staffs).

99. *See* Brownsville Medical Center and Valley Community Hosp. v. Gracia, 84-369-CV, slip op. at 16 (Tex. App.—Corpus Christi, June 28, 1985, writ pending) (not yet reported); *see also* Mitchell County Hosp. Auth. v. Joiner, 189 S.E.2d 412, 414 (Ga. 1972) (medical staff acts as agent of hospital in overseeing other physicians and acting in supervisory role); *cf.* Sax v. Votteler, 648 S.W.2d 661, 664-65 (Tex. 1983) (Texas Constitution's due process clause guarantees that common law causes of action, such as for torts of physicians, will not be unreasonably denied access to courts); *see also* JOINT COMMISSION ON ACCREDITATION OF HOSPITALS, ACCREDITATION MANUAL FOR HOSPITALS xix (1985) (Purpose of J.C.A.H. is to certify hospitals based on minimum standards of care and safety); Comment, *Piercing the Doctrine of Corporate Hospital Liability,* 17 SAN DIEGO L. REV. 383, 390-91 (1980) (patient has cause of action against hospital if hospital's ostensible agent acts negligently); Note, *Theories for Imposing Liability Upon Hospitals For Medical Malpractice: Ostensible Agency and Corporate Liability,* 11 WM. MITCHELL L. REV. 561, 570 (1985) (if patient injured by negligence of physicians, he should be allowed means of recovery from all available sources including hospitals).

100. *See* Moore, *Medical Staff - Corporate Accountability,* 43 FED. INS. COUN. J. 110, 115

administrators are laypersons with no medical training at all.[101] Oftentimes, they must rely on the medical staff to make judgments about a patient's condition and merely "rubber stamp" the medical staff's suggestions.[102] Another problem is that physicians do not speak out against other physicians' negligence, making it extremely difficult for hospitals to detect physicians' negligent acts.[103] Nonetheless, liability has been premised on the hospital's failure to oversee the care of its patients and ensure their safety since the hospital either knew or should have known of these negligent acts.[104] This is true regardless of whether the physicians are "independent-contractors, ostensible agents or merely physicians with staff privileges."[105]

(1976) (one difficulty arises from hospital administrators lack of medical knowledge and resulting inability to make medical judgments).

101. *See* JOINT COMMISSION ON ACCREDITATION OF HOSPITALS, ACCREDITATION MANUAL FOR HOSPITALS 103 (1979) (medical staff process and evaluate physician's hospital privilege applications, not administrators). Therefore, only means of hospital liability would have to be based on medical staff's negligent acts in processing and evaluating other physicians. *See id.* at 47; *see also* Mills, *Corleto in Perspective,* 5 J. LEGAL MED. 3, 3 (Feb. 1977) (hospitals must rely on blind trust of medical staff in performance of delegated supervisory roles since hospital administrators generally have no medical training); O'Sullivan and Wing, *The Hospital-Based Physician: Current Status and Significance,* 1 J. LEGAL MED. 25, 26 (Sept.-Oct., 1973) (hospital administration is comprised mostly of laymen from surrounding community); Note, *Physician-Hospital Conflict: The Hospital Staff Privileges Controversy in New York,* 60 CORNELL L. REV. 1075, 1077 (1975) (hospital governing board is at center of major controversy since it is composed primarily of laymen).

102. *See* Joiner v. Mitchell County Hosp. Auth., 186 S.E.2d 307, 308 (Ga. Ct. App. 1971) (hospital sought to avoid liability on argument that hospital medical staff was responsible for screening and approving applicants for admission to hospital medical staff and that hospital merely rubber stamped these decisions). However, the court still held the hospital liable for failing to act when it knew or should have known of the physician's incompetency. *See id.* at 309; *see also* Moore, *Medical Staff-Corporate Accountability,* 43 FED. INS. COUN. J. 110, 115 (1976) (hospital boards can no longer act with "smug complacency" and rubber stamp approvals for medical staff privileges).

103. *See* Williams, *The Quandary of the Hospital Administration in Dealing With The Medical Malpractice Problem,* 55 NEB. L. REV. 401, 405-06 (1976) (administrators oftentimes are not aware of problems of physicians' incompetence unless made aware by other "medical" personnel). Patterns of incompetence, while not readily acknowledged by other doctors, is nonetheless common knowledge. *See id.* at 406. Quality control committees may be means of creating confidential relationship with physicians so as to prevent negligent incidents by other physicians. *See id.* at 406-07.

104. *See* Brownsville Medical Center and Valley Community Hosp. v. Gracia, 84-639-CV, slip op. at 16 (Tex. App.—Corpus Christi, June 28, 1985, writ pending) (not yet reported) (hospital breached its duty of care owed patient by prematurely discharging him due to family's lack of funds instead of taking him to surgery). The patient should receive the optimum benefits that medical science can give. *See generally* Moore, *Medical Staff-Corporate Accountability,* 43 FED. INS. COUN. J. 110, 115 (1976) (hospital's governing body responsible for ensuring that patient receives highest quality care possible or be held liable for failing to do so).

105. *See* Note, *Theories for Imposing Liability Upon Hospitals for Medical Malpractice: Ostensible Agency and Corporate Liability,* 11 WM. MITCHELL L. REV. 561, 572 (1985) (theo-

Notwithstanding all of the above considerations, hospital liability as allowed by the courts, seems to be the result of the judicial desire to place liability on the party most able to pay.[106]

The ramifications of the *Gracia* decision are great, especially in their potential to break down the last barrier to hospital liability.[107] First, holding a hospital liable for a physician's negligent acts provides a stronger incentive to the hospital to monitor and control physicians.[108] This will result in higher quality medical care since the hospital is in the best position to enforce strict adherence to policies regarding patient safety, whether it be by rules, regulations, or other means.[109] Second, the *Gracia* decision places the burden of liability on a financially dependable defendant so that an injured patient may receive adequate compensation.[110] There are, however, several

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ries may approach issue of hospital liability from different angles, but they still share same purpose and, in end, achieve similar results).

106. *See* Stanczyk and Moffitt, *Hospitals, Physicians, and Their Liability Carriers: Ostensible Authority, Enterprise Liability, and Beyond,* 31 FED. INS. COUNS. Q. 199, 209 (1981) (hospital has deeper pocket and ability to spread losses). *See generally* Jones, *Professional Liability Insurance: The High Cost of Peace of Mind,* 81 TEX. MED. 70, 70 (1981) (ultimate costs of hospital complacency will be passed on to public).

107. *See* Brownsville Medical Center and Valley Community Hosp. v. Gracia, 84-639-CV, slip op. at 12 (Tex. App.—Corpus Christi, June 28, 1985, writ pending) (not yet reported) (by affirming lower court, court of appeals expanded hospital liability in Texas).

108. *See* Tucson Medical Center v. Misevich, 545 P.2d 958, 960 (Ariz. 1976) (in dicta, stated hospital would be liable if hospital governing body knew of physician's incompetency, but failed to recommend any course of action); Purcell v. Zimbelman, 500 P.2d 335, 341 (Ariz. Ct. App. 1972) (hospital has significant element of control over physicians by threat of removal of medical staff privileges). *See generally* Kahn, *Hospital Malpractice Prevention,* 27 DEPAUL L. REV. 23, 30-31 (1977) (hospitals are in better position to supervise medical staff, including physicians); Roemer, *Controlling and Promoting Quality in Medical Care,* 35 LAW AND CONTEMP. PROB. 284, 297 (1970) (malpractice suits are extremely strong inducement for assuring competent medical care); Comment, *The Hospital's Responsibility for Its Medical Staff: Prospects for Corporate Negligence in California,* 8 PAC. L.J. 141, 149 (1977) (hospital liability can be defined by hospital's rules and regulations).

109. *See, e.g.,* Hilzendager v. Methodist Hosp., 596 S.W.2d 284, 286 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ) (hospital's own rules and regulations were admissible at trial to show that hospital should have utilized a higher standard of care than that of community standard); Air Shields v. Spears, 590 S.W.2d 574, 581 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.) (evidence of hospital's policies and procedures were admissible to prove hospital's negligence in creating such); Pederson v. Dumouchel, 431 P.2d 973, 978-79 (Wash. 1967) (court used hospital's rules to prove that hospital had breached one in allowing operation in absence of physician); *see also* Levin, *Hospital's Liability for Independent Emergency Room Service,* 23 SANTA CLARA L. REV. 791, 797 (1982) (hospital's control contract-physicians by imposing various rules and regulations); Perdue, *Direct Corporate Liability of Hospitals: A Modern Day Legal Concept of Liability for Injury Occurring in the Modern Day Hospital,* 24 S. TEX. L.J. 773, 811 (1983) (hospitals should formulate rules, regulations, and bylaws); Comment, *Hospital Liability for the Negligence of Physicians: Some Needed Legal Sutures,* 26 U. FLA. L. REV. 844, 857 (1974) (hospital liability can be defined by hospital's rules and regulations).

110. *See* Carter v. Sparkman, 335 So. 2d 802, 806 (Fla. 1976) (doctors are forced to

disadvantages which must be taken into consideration.[111] First, and foremost, will be the increase in costs of hospital medical care for all patients due to the increased cost of medical insurance and increase in the number of malpractice claims.[112] A second consideration will be the difficulty a hospital encounters in revoking staff privileges and the requirements of due process in any intrahospital proceeding against a physician.[113] Another point

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narrow their practice to areas which are not as high risk, retire, or practice defensive medicine), *cert. denied,* 429 U.S. 1041 (1977). The Florida Supreme Court went on to say that it would be the consumer who would feel the financial burdens the hardest. *See id.* at 806. *See generally* W. PROSSER, THE LAW OF TORTS § 4, at 23 (4th ed. 1971) (purposes for allowing patient to recover from hospital are to compensate patient and to create strong incentive to prevent repeated harms of a similar nature); Payne, *Recent Developments Affecting A Hospital's Liability for Negligence of Physician,* 18 S. TEX. L.J. 389, 389 (1977) (mistakes are inevitable, only question left to answer is "Who will pay?"); Note, *The Hospital's Responsibility for Its Staff: Prospects for Corporate Negligence in California,* 8 PAC. L.J. 141, 150 (1977) (expanded insurance coverage necessary to cover increased liability of hospitals may not be available); *see also* Note, *Hospital Corporate Liability: An Effective Solution to Controlling Private Physician Incompetence,* 32 RUTGERS L. REV. 342, 378 (1979) (hospital has larger financial base upon which it can spread liability cost).

111. *See* Malone and Hyde, Inc. v. Hobrecht, 685 S.W.2d 739, 753 (Tex. App.—San Antonio 1985, writ withdrawn); *see also* Stanczyk and Moffitt, *Hospitals, Physicians, and Their Liability Carriers: Ostensible Authority, Enterprise Liability, and Beyond,* 31 FED. INS. COUN. Q. 199, 209 (1981) (courts will force hospitals to slide ever deeper into financial crisis to cover their ever expanding liability).

112. *See, e.g.,* Carter v. Sparkman, 335 So. 2d 802, 805-06 (Fla. 1976) (malpractice problem had reached crisis levels in Florida due to high cost of malpractice insurance resulting from skyrocketing numbers of lawsuits being filed), *cert. denied,* 429 U.S. 1041 (1977); Stephens v. Snyder Clinic Assoc., 631 P.2d 222, 235 (Kan. 1981) (medical malpractice crisis is evidenced by the ever increasing cost of malpractice insurance); Attorney General v. Johnson, 385 A.2d 57, 76 (Md. Ct. Spec. App.) (lists various reasons as to why there was malpractice crisis in Maryland including instability of insurance market due to tremendous numbers of malpractice claims being brought against medical practitioners), *appeal dism'd,* 439 U.S. 805 (1978); TEX. REV. CIV. STAT. ANN. art. 4590i, § 1.02 (Vernon Supp. 1985) (outlines current malpractice crisis problems in Texas); *see also* Jones, *Professional Liability Insurance: The High Cost of Peace of Mind,* 81 TEX. MED. 70, 70-71 (1985) (significantly between 1979 and 1984 average amount insurance company gave out for each cause of action escalated 47%). Physicians are being advised not to buy more than the amount necessary to protect his assets so hospitals, with more substantial coverage, can pick up the majority of the damages. *See id.* at 72. The hospital's "pockets" are certainly deeper than individual physicians. *See id.* at 72.

113. *See* Darling v. Charleston Community Memorial Hosp., 211 N.E.2d 253, 256 (Ill. 1965) (hospital argued that it was powerless in controlling physician's acts, but hospital was held liable regardless), *cert. denied,* 383 U.S. 946 (1966); *see also* Slawkowski, *Do the Courts Understand the Realities of Hospital Practices?,* 22 ST. LOUIS U. L.J. 452, 460-61 (1978) (cases which follow *Darling* doctrines require hospitals to supervise appointments of their staff physicians and to restrict or revoke their hospital privileges should it be necessary). Hospitals have encountered tremendous difficulties in restricting or revoking physicians' hospital privileges. *See, e.g.,* Hirsh, *A Fish Without Water: Hospital Admitting Privileges,* CASE AND COMMENT July-Aug. 1979, at 18 (procedural due process severely hampers hospital's efforts to terminate physician's hospital privileges); Note, *Hospital Corporate Liability: An Effective Solution to*

that must be weighed is that indemnity will be of little use if the physician was uninsured or underinsured.[114] Additionally, lawsuits create tension in the hospital workplace and inhibit hospital-physician cooperation.[115] Finally, since hospitals already have a difficult time staffing departments such as the emergency room, increased liability will only aggravate the problem.[116]

Implementation of liability based upon ostensible agency or corporate negligence may force the hospital to choose among several alternatives to prevent frequent liability and the resulting costs.[117] The first alternative,

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Controlling Private Physician Incompetence? 32 RUTGERS L. REV. 342, 383-84 (1979) (hospitals must not act discriminatorily or arbitrarily in its decision to deny, reduce, or terminate medical staff privileges); Comment, *Hospital Medical Staff Privileges: Recent Developments in Procedural Due Process Requirements,* 12 WILLIAMETTE L.J. 137, 139-40 (1975-1976) (hospital staff privileges cannot be reduced at will). *See generally* Trail and Claybrook, *Hospital Liability and the Staff Privileges Dilemma,* 37 BAYLOR L. REV. 315 (1985) (includes a comprehensive discussion of staff privileges and due process difficulties).

114. *See* McGuffey v. Hall, 557 S.W.2d 401, 414 (Ky. 1977) (court held that state could not constitutionally force physicians to acquire malpractice insurance prior to practicing medicine within that state). However, courts in several other jurisidictions have given hospitals the authority to deny hospital staff privileges on the basis of physicians not maintaining professional liability insurance. *See* State *ex rel.* Schneider v. Liggett, 576 P.2d 221, 225 (Kan. 1978) (state statute did not violate equal protection or due process in requiring physicians to obtain medical malpractice insurance), *appeal dism'd,* 439 U.S. 808 (1978); *see also* Note, *Hospital Corporate Liability: An Effective Solution to Controlling Private Physician Incompetence?* 32 RUTGERS L. REV. 342, 384 (1979) (any decision which adversely affects physician's staff privileges should be done with at least minimum of notice and chance to be heard).

115. *See* Stanczyk and Moffitt, *Hospitals, Physicians, and Their Liability Carriers: Ostensible Authority, Enterprise Liability and Beyond,* 31 FED. INS. COUN. Q. 199, 209 (1981) (staff physician and the hospitals would be opposing each other in lawsuits in order to pay least amount of damages for their respective side). One commentator believes that an integrated insurance program covering all parties coming in contact with the hospital institution including staff physicians would be the superior approach to the problem. *See id.* at 210. They feel that this would help alleviate tension in the hospital setting concerning liability, and even reduce attorneys' fees. *See id.* at 210.

116. *See* Levin, *Hospital's Liability for Independent Emergency Room Service,* 22 SANTA CLARA L. REV. 791, 791 (1982) (hospitals face problems both in staffing their emergency departments and purchasing cost prohibitive malpractice insurance). The scope of liability under emergency room - physician contracts does not shield a negligent physician, and thus will not shield the hospital since the hospital is ultimately responsible for monitoring the patient's care. *See id.* at 794. Emergency room hospital care is a rapidly expanding business. *See* Cross, *Transfer of The Emergency Patient: Avoiding Legal Complications,* 35 TEX. HOSP. 1, 1 (Dec. 1979) (recent figures of American Hospital Association indicate that 78.3% of hospitals in United States operate emergency departments). Further, an estimated 80 million people seek some form of emergency medical care each year. *See id.* at 11.

117. *See,* State *ex rel.* Schneider v. Liggett, 576 P.2d 221, 223-24 (Kan. 1978) (discusses public interest in finding solutions to malpractice crisis), *appeal dism'd,* 439 U.S. 808 (1978). The Kansas Supreme Court felt that due to the malpractice situation involving health care providers, any cause of action against them should be treated differently than those against

which all hospitals may be forced to take, is to increase the cost of hospital health care in order to cover the ever-increasing malpractice insurance rates.[118] Requiring all physicians who want to work at the facility to acquire malpractice insurance prior to being granted staff privileges would be a second alternative.[119] A third alternative would be to hold the staff members who are in charge of overseeing particular physicians directly liable should they fail to do anything about a physician's negligence.[120] A fourth alterna-

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other tortfeasors. *See id.* at 223; *see also* Jones, *Professional Liability Insurance: The High Cost of Peace of Mind,* 81 TEX. MED. 70, 74 (1985) (many medical malpractice insurance carriers in California had to discontinue their services because losses were so severe).

118. *See* Pollock v. Methodist Hosp., 392 F. Supp. 393, 396 (E.D. La. 1975) (hospital was justified in refusing to grant staff privileges for not acquiring malpractice insurance inspite of possible health cost increases); Holmes v. Hoemake Hosp., 573 P.2d 477, 478 (Ariz. 1977) (hospitals, regardless of effect on health care cost, may base their decision as to whether or not to grant hospital staff privileges on physician's ability to acquire professional liability insurance), *appeal dism'd,* 439 U.S. 808 (1978); *see also* Stanczyk and Moffitt, *Hospitals, Physicians and Their Liability Carriers: Ostensible Authority, Enterprise Liability and Beyond,* 31 FED. INS. COUN. Q. 199, 210 (1981) (increase cost throughout system by creating integrated insurance program which is mandatory for any health professional who may come in contact with hospital). *See generally* Note, *Tort Law—Corporate Negligence of Hospitals and the Duty to Monitor and Oversee Medical Treatment—Bost v. Riley,* 17 WAKE FOREST L. REV. 309, 326 (1981) (hospital will forward the increased cost due to higher malpractice insurance premiums directly to patient); Note, *Theories for Imposing Liability Upon Hospitals for Medical Malpractice: Ostensible Agency and Corporate Liability,* 11 WM. MITCHELL L. REV. 561, 582 (1985) (physician's insurance may not be sufficient to cover court loss involving excessive damages).

119. *See* Stephens v. Snyder Clinic Assoc., 631 P.2d 222, 234-35 (Kan. 1981) (fear existing that physicians would be unable to obtain malpractice insurance since many insurance underwriters have been forced to leave medical malpractice market due to unprofitability). Another fear is that physicians would refuse to pay the exorbitant premiums, thereby taking their medical practice elsewhere. *See id.* at 235; *cf.* Comment, *The Hospital-Physician Relationship: Hospital Responsibility for Malpractice of Physicians,* 50 WASH. L. REV. 385, 420 (1975) (hospital inevitably will be faced with largest amount of damages in causes of action, whether by respondeat superior, ostensible agency, corporate negligence). Therefore, it seems only logical for hospitals to require some form of malpractice insurance in order to guarantee physician's ability to indemnify the hospital, should the hospital be found liable based on physician's negligence. *See id.* at 420.

120. *See* Corleto v. Shore Memorial Hosp., 350 A.2d 534, 539 (N.J. Super. Ct. 1975) (court refused 141 hospital staff members' motion to dismiss since they either knew or should have known of physician's negligence, but failed to do anything about it). *Corleto* has been criticized because not every hospital staff physician can be responsible for overseeing the practices of his fellow physicians. *See* Comment, *Piercing the Doctrine of Corporate Hospital Liability,* 17 SAN DIEGO L. REV. 383, 397 (1980); *see also* Harty and Mulholland, *The Legal Status of the Hospital Medical Staff,* 22 ST. LOUIS U. L.J. 485, 498-99 (1978) (most reasonable alternative would be to hold staff physicians responsible for approving hospital staff applicants and physicians with duty of review and evaluation of physician's clinical performance liable for negligent acts which may result); Williams, *The Quandary of the Hospital Administrator in Dealing With the Medical Malpractice Problem,* 55 NEB. L. REV. 401, 405 (1976) (negligence does not materialize overnight, but rather, slowly develops over period of years).

tive would be to give the patient adequate notice that the physician is an "independent-contractor" and thereby disclose the physician's liability altogether.[121] Finally, and the most severe alternative of all, would be for the hospitals to eliminate the practice of high-risk specialities at their institutions.[122] No matter which alternative is chosen, the days of hospital nonliability appear to be gone forever.[123]

By implementing a doctrine of ostensible agency to impose liability on

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121. *See, e.g.,* Schagrin v. Wilmington Medical Center, 304 A.2d 61, 64-65 (Del. Super. Ct. 1973) (nonexistence of evidence indicating patient was put on notice of hospital-physician relationship creates presumption of reasonable reliance on ostensible agents authority); Brownsville Medical Center and Valley Community Hosp. v. Gracia, 84-369-CV, slip op. at 14 (Tex. App.—Corpus Christi, June 28, 1985, writ pending) (not yet reported) (court partially based its decision on fact that physician of Brownsville Medical Center testified that no notice was given to Gracias concerning "independent-contractor" status of hospital's emergency room physicians); Sorenson v. Shupe Bros. Co., 517 S.W.2d 861, 866 (Tex. Civ. App.—Amarillo 1974, no writ) (due to absence of sufficient notice that principal had terminated its agency relationship third party reasonably relied and could hold principal liable for agent's failure to act). Notice can be accomplished by posting signs throughout the treatment areas and on consent forms disclaiming an ostensible agency relationship. *See* Levin, *Hospital's Liability for Independent Emergency Room Service,* 22 SANTA CLARA L. REV. 791, 804 (1982) (generally discusses different forms of notice). Also, different uniforms may be worn by non-hospital physicians and perhaps even professional corporation badges and prescription pads may be utilized to indicate physicians non-employee status. *See id.* at 804. No notice is the normal situation in most hospital-patient situations. *See generally* Comment, *Hospital Liability for Negligence of Physicians: Some Needed Legal Sutures,* 26 U. FLA. L. REV. 844, 856 (1974) (patient entering hospital will most likely be unaware of "independent-contractor" status of physicians).

122. *Cf.* Carter v. Sparkman, 335 So. 2d 802, 806 (Fla. 1976) (physicians will be forced to avoid high risk areas of medical practice), *cert. denied,* 429 U.S. 1041 (1977); *cf.* TEX. REV. CIV. STAT. ANN. art. 4590i, § 1.02(a) (Vernon Supp. 1985) (describes in depth, problems hospitals and other health care professionals are facing due to tremendous increase of lawsuits being brought against them); Jones, *Professional Liability Insurance: The High Cost of Peace of Mind,* 81 TEX. MED. 70, 74 (1985) (high risk areas of practice will simply have to be shut down in some hospitals if they are unable to meet demands of litigious public). One commentator has suggested that the legislature should make laws concerning three aspects of hospital liability: first, implement a reasonable statute of limitations; second, set a higher limit on possible damages an injured patient may receive; and third, create a screening panel to separate meritorious and non-meritorious claims. *See id.* at 74.

123. *See, e.g.,* Brownsville Medical Center and Valley Community Hosp. v. Gracia, 84-369-CV, slip op. at 14 (Tex. App.—Corpus Christi, June 28, 1985, writ pending) (not yet reported) (ostensible agency relationships and corporate negligence may be used to make hospital's liability for negligent acts of "independent-contractor physician"); Valdez v. Lyman-Roberts Hosp., 638 S.W.2d 111, 114 (Tex. Civ. App.—Corpus Christi 1982, writ ref'd n.r.e.) (hospital may be found corporately liable if it breaches duty of care to patient); Santa Rosa Medical Center v. Robinson, 560 S.W.2d 751, 757 (Tex. Civ. App.—San Antonio 1977, no writ) (hospital may be liable for negligence of its employees under doctrine of respondeat superior); *see also* Jones, *Professional Liability Insurance: The High Cost of Peace of Mind,* 81 TEX. MED. 70, 74 (1985) (Texas courts have radically changed scope of liability for hospitals).

hospitals for negligent acts of "independent-contractor physicians," the Corpus Christi Court of Appeals has redefined the traditional concept that a hospital will never be liable for the negligent acts of an "independent-contractor." On the other hand, the decision to hold Brownsville Medical Center liable for Dr. Lorenzana's negligence was quite predictable in light of the current trend in other jurisdictions of adopting the doctrine of ostensible agency, especially in cases involving emergency room physicians. Additionally, the decision to hold Valley Community Hospital liable under the doctrine of corporate negligence merely strengthens the fact that hospitals need to recognize their independent duty of care to the patient. The ramifications of this decision will be felt by all parties involved. Hospitals will have to redirect their policies concerning liability and safety to the patient, in other words, become more involved, more rigid.[124] Subsequently, patients will receive higher quality medical care. As for the personal injury plaintiff's attorney, the deep pockets are open and ripe for the picking.[125] One thing is certain, hospital liability will be a hotly litigated topic in the years to come.

Gregory T. Perkes

124. *Cf.* Jones, *Professional Liability Insurance: The High Cost of Peace of Mind,* 81 TEX. MED. 70, 74 (1985) (medical malpractice in Texas is spiraling at tremendous rates).

125. *Cf.* Kohm, *Hospital Malpractice Prevention,* 27 DEPAUL L. REV. 23, 40 (1977) (hospital must obtain both acceptance and compliance of hospital community at large or be ready to meet overwhelming of lawsuits).