

# *Nova Law Review*

---

*Volume 14, Issue 3*

1990

*Article 15*

---

## Hospital Liability in View of *Insinga v. LaBella*: No Relief in Sight

Leslie H. Friedland\*

\*

Copyright ©1990 by the authors. *Nova Law Review* is produced by The Berkeley Electronic Press (bepress). <https://nsuworks.nova.edu/nlr>

# Hospital Liability in View of *Insinga v. LaBella*: No Relief in Sight

Leslie H. Friedland

## **Abstract**

During the past five decades, the health care industry in the United States has undergone a great transformation as liability and the respective responsibilities of health care providers have been shifted and reapportioned.

## Notes & Comments

### Hospital Liability in View of *Insinga v. LaBella*: No Relief in Sight

---

#### I. Introduction

During the past five decades, the health care industry in the United States has undergone a great transformation as liability and the respective responsibilities of health care providers have been shifted and reapportioned. Consequently, the country's health care providers, both individual physicians and hospitals have had to adjust to their changing roles.

Today, the privately retained physician is no longer considered to be the major health care provider; rather, the hospital has assumed this role because the public views it as the responsible and controlling force behind the quality of health care in our society.<sup>1</sup> As such, the public has come to rely on the hospital as an integral part of the healing process.<sup>2</sup> Due to this reliance and the general belief that the hospital is in the best position to assure quality health care to patients, hospitals' duties toward their patients have been broadened by both developments in common and statutory law.<sup>3</sup>

No longer can the hospital escape liability for the negligent acts of independent staff physicians. Hospitals can now be held liable for offering their facilities to an incompetent physician under the doctrine of corporate negligence.<sup>4</sup> One must wonder if the hospitals' potential for liability is limitless when a patient is injured within their walls.

This Comment will discuss the increasing duties imposed upon hospitals via the judiciary and the legislature, with a particular focus on the recently-recognized direct duty which hospitals owe to their pa-

---

1. Comment, *The Hospital and the Staff Physician - An Expanding Duty of Care*, 7 CREIGHTON L. REV. 249, 263-64 (1974).

2. *Id.* at 249.

3. These judicial and legislative developments are the basis of this Comment. See *infra*, Sections II and III.

4. *Insinga v. LaBella*, 543 So. 2d 209 (Fla. 1989).

tients under the corporate negligence doctrine. First, the Comment will discuss the judicial development of duties imposed upon Florida hospitals which result in vicarious liability. Second, after discussing derivative duties imposed upon hospitals, the Comment will focus on judicially-formulated direct duties which hospitals owe to patients. In so doing, it will introduce the concept of corporate negligence and discuss the tort's historical development, focusing on the duties to which the corporate negligence theory has been applied in various jurisdictions across the country. Third, the Comment will discuss the common law duties imposed upon hospitals by discussing the Florida Supreme Court's recent recognition of corporate negligence in *Insinga v. La-Bella*.<sup>5</sup> Fourth, the Comment will address the legislatively-imposed direct duties which Florida hospitals owe to their patients. Finally, the Comment will conclude by considering the medical profession's licensing and continuing education requirements, and by recommending changes to the current licensing system which are designed to increase the quality of health care in Florida without further increasing hospital liability.

## II. Hospitals' Duties Toward Patients: Judicial Development

### A. Development of Hospital Vicarious Liability in Florida

In the early 1900's, Florida hospitals were essentially a "doctor's workshop" wherein hospitals merely provided facilities in which physicians could treat their patients.<sup>6</sup> The first indication that Florida hospitals' role in providing health care services would expand beyond maintenance of a "doctor's workshop" came in 1933 when the Florida Supreme Court applied the doctrine of *respondeat superior* in a hospital setting. In *Parrish v. Clark*,<sup>7</sup> the court held the hospital liable for the negligence of a salaried nurse who continued to inject saline into a patient even after it became evident the patient reacted adversely to the treatment.<sup>8</sup>

However, not all hospitals were subject to liability on a *respondeat*

5. *Id.*

6. See, Mulholland, *The Evolving Relationship Between Physicians and Hospitals*, 22 *TORT & INS. L.J.* 295 (1987) [hereinafter Mulholland, *Evolving Relationship*]; Note, *Hospital Corporate Liability: An Effective Solution to Controlling Private Physician Incompetence?*, 32 *RUTGERS* 342 (1979) [hereinafter Note, *Corporate Liability*].

7. 107 Fla. 598, 145 So. 848 (1933).

8. *Id.* at 598, 145 So. at 850.

*superior* theory. In several states those hospitals organized for charitable purposes, created for the public's benefit and operating as not-for-profit organizations,<sup>9</sup> could possibly be immune<sup>10</sup> from tort liability under the doctrine of charitable immunity.<sup>11</sup> Similarly, in several states, hospitals organized for governmental purposes, created as subdivisions of the state and performing public functions,<sup>12</sup> could enjoy immunity from tort liability under certain circumstances pursuant to the doctrine of governmental immunity.<sup>13</sup>

While other states addressed the viability and conditions under which charitable and governmental immunity would apply, whether such immunity existed in Florida remained an open question. Finally, the Florida Supreme Court considered and rejected the doctrine of charitable immunity in 1940 in *Nicholson v. Good Samaritan Hospital*,<sup>14</sup> thus further increasing Florida hospitals' exposure to tort liability.

The plaintiff in *Nicholson* was a paying patient who was badly burned due to a hospital nurse's negligence.<sup>15</sup> Stressing the public policy considerations which guarantee every person a remedy for injuries inflicted upon them, the court concluded that patients of a charitable

---

9. W. PROSSER, LAW OF TORTS 992 (4th ed. 1971).

10. "Immunity" means exemption from liability which, but for the charitable or governmental nature of the tortfeasor, would attach. It does not mean non-liability after trying to apply general rules of tort law. Annotation, *Immunity of Nongovernmental Charity from Liability for Damages in Tort*, 25 A.L.R. 2d 29, 45 (1952).

11. See *Nicholson v. Good Samaritan Hosp.*, 145 Fla. 360, 361, 199 So. 344, 346 (1940) (court cites cases from numerous states which exempted charitable institutions from tort liability). See also Annotation, 25 A.L.R. 2d, at 79-82 (organizations were completely immune from tort liability simply because they were considered charities in the following states: Arkansas, Illinois, Kansas, Kentucky, Maine, Maryland, Massachusetts, Missouri, Oregon, Pennsylvania, South Carolina, and Wisconsin).

12. W. PROSSER, *supra* note 9, at 977.

13. See Annotation, *Immunity from Liability for Damages in Tort of State or Governmental Unit or Agency in Operating Hospital*, 25 A.L.R. 2d 203, 211-13 (governmental hospitals received immunity from tort liability provided they were operated in performance of governmental functions in Alabama, California, Colorado, Georgia, Illinois, Indiana, Kansas, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New York, Ohio, Oklahoma, Pennsylvania, Puerto Rico, Tennessee, Texas, Virginia, and West Virginia). But see *id.* at 213-14 (governmental hospitals were not immune from liability if they were performing corporate or proprietary functions despite the fact they were subdivisions of the state in Alabama, California, Georgia, Idaho, Maine, Michigan, Minnesota, New York, and Oklahoma).

14. 145 Fla. 360, 199 So. 344 (1940).

15. *Id.* at 361, 199 So. at 345.

hospital are entitled to rely on the careful performance of services which the hospital undertakes to perform.<sup>16</sup> The *Nicholson* court recognized that while the public had an interest in maintaining charitable institutions, it had an overriding interest in ensuring that corporations which offered health care services performed them with due care.<sup>17</sup> Accordingly, the court found the hospital liable on a *respondeat superior* theory.<sup>18</sup>

Not only were Florida hospitals unable to successfully claim charitable immunity, but in 1942 it became evident government-run hospitals were not automatically immune from tort liability.<sup>19</sup> In *City of*

16. *Id.* at 367, 199 So. at 348. (The court noted that paying and non-paying patients alike were entitled to rely on the fact the hospital would use due care).

17. *Id.* at 368, 199 So. at 348. By the mid-1970s, almost every jurisdiction in the country followed suit by either rejecting or abolishing the charitable immunity doctrine in its entirety. *Ray v. Tucson Medical Center*, 72 Ariz. 22, 230 P.2d 220 (1951); *Tunkl v. Regents of Univ. of California*, 60 Cal. 2d 92, 32 Cal. Rptr. 33, 383 P.2d 441 (1963); *Durney v. St. Francis Hosp., Inc.*, 46 Del. 350, 83 A.2d 753 (1951); *Georgetown College v. Hughes*, 76 App. D.C. 123, 130 F.2d 810 (1942); *Darling v. Charleston Community Memorial Hosp.*, 33 Ill. 2d 326, 211 N.E.2d 253 (1965); *Haynes v. Presbyterian Hosp. Ass'n*, 241 Iowa 1269, 45 N.W. 2d 151 (1950); *Noel v. Menninger Found.*, 175 Kan. 751, 267 P.2d 934 (1954); *Mullikin v. Jewish Hosp. Ass'n*, 348 S.W.2d 930 (Ky. 1961); *Parker v. Port Huron Hosp.*, 361 Mich. 1, 105 N.W.2d 1 (1960); *Mulliner v. Evangelischer Diakonniessenverein*, 144 Minn. 392, 175 N.W. 699 (1920); *Abernathy v. Sisters of St. Mary's*, 446 S.W.2d 599 (Mo. 1969); *Howard v. Sisters of Charity*, 193 F. Supp. 191 (Mont. Dist. Ct. 1974); *Myers v. Drozda*, 180 Neb. 183, 141 N.W.2d 852 (1966); *Welch v. Frisbie Memorial Hosp.*, 90 N.H. 337, 9 A.2d 761 (1939); *Bing v. Thunig*, 2 N.Y. 2d 656, 163 N.Y.S. 2d 3, 143 N.E. 2d 3 (1957); *Rabon v. Rowan Memorial Hosp., Inc.*, 269 N.C. 1, 152 S.E.2d 485 (1967); *Rickbeil v. Grafton Deaconess Hosp.*, 74 N.D. 525, 23 N.W.2d 247 (1946); *Avellone v. St. John's Hosp.*, 165 Ohio St. 467, 135 N.E.2d 410, 60 Ohio Op. 121 (1956); *Hungerford v. Portland Sanitarium & Benevolent Ass'n*, 235 Or. 412, 384 P.2d 1009 (1963); *Flagiello v. Pennsylvania Hosp.*, 417 Pa. 486, 208 A.2d 193 (1965); *Porto Rico Gas & Coke Co. v. Frank Rullan & Assoc., Inc.*, 189 F.2d 397 (P.R. 1st Dist. Ct. App. 1951); *Hodge v. Osteopathic Gen. Hosp.*, 107 R.I. 135, 265 A.2d 733 (1970); *Sprague v. Memorial Baptist Hosp. Sys.*, 580 S.W.2d 1 (Tex. Ct. App. 1979); *Pierce v. Yakima Valley Memorial Hosp. Ass'n*, 43 Wash. 2d 162, 260 P.2d 765 (1953); *Adkins v. St. Francis Hosp.*, 149 W. Va. 705, 143 S.E.2d 154 (1965); *Christy v. Schwartz*, 49 Wis. 2d 760, 183 N.W.2d 81 (1971). See, Annotation, *Tort Immunity of Nongovernmental Charities - Modern Status*, 25 A.L.R. 4th 517, 525-27 (1983).

18. *Nicholson*, 145 Fla. at 368, 199 So. at 350.

19. While some states granted automatic immunity to governmental hospitals, Florida was not alone in refusing to grant hospitals blanket immunity from tort liability merely because they were subdivisions of the state. See *supra*, note 13, which lists the jurisdictions falling into these respective categories.

*Miami v. Oates*,<sup>20</sup> plaintiff sued the city of Miami after she entered the hospital for a cauterization of an old incision and was severely burned when an intern saturated sponges with alcohol, set them on the wound, and brought a red hot iron in close proximity.<sup>21</sup> As authorized by statute,<sup>22</sup> Miami was operating the municipal hospital with tax proceeds and paying its interns for services rendered.<sup>23</sup>

In finding the city liable for plaintiff's injuries, the *Oates* court's decision impacted hospital liability in two ways. First, a hospital's potential liability increased as the Florida Supreme Court set precedent, indicating that the state would not recognize or grant absolute governmental immunity from tort liability. The *Oates* court viewed the character of the hospital's operations and concluded it was acting in a municipal corporate capacity,<sup>24</sup> rather than a governmental capacity, because the city was not required to maintain the hospital for the benefit of its citizens.<sup>25</sup> Consequently, the court found the city liable, reasoning that it was in the same category as a charitable hospital which, based upon *Nicholson*, would not receive immunity from such negligent acts.<sup>26</sup>

Second, a Florida court distinguished for the first time between "medical" and "administrative" acts in *Oates*.<sup>27</sup> The distinguishing feature between these two categories was that an administrative act was characterized as ministerial whereas a medical act required the exercise of professional skill and judgment.<sup>28</sup> This distinction was significant because if the negligence occurred while one was performing an "administrative" act, then the tortfeasor's status as either an independent contractor or employee was irrelevant because the hospital was liable regardless.<sup>29</sup> However, if the act was categorized as a "medical" act, then the tortfeasor's status was relevant because courts would only

20. 152 Fla. 21, 10 So. 2d 721 (1942).

21. *Id.* at 23, 10 So. 2d at 722.

22. See 1929 Fla. Laws 14234 § 23(a).

23. *Oates*, 152 Fla. at 23, 10 So. 2d at 722.

24. W. PROSSER, *supra* note 9, at 977 (municipal corporations have a dual character where they are subdivisions of the state and corporate entities with special interests not generally shared by the state).

25. *Oates*, 152 Fla. at 26, 10 So. 2d at 723.

26. *Id.* at 27, 10 So. 2d at 724.

27. *Id.* at 28, 10 So. 2d at 724.

28. Annotation, *Liability of Hospital or Sanitarium for Negligence of Physician or Surgeon*, 69 A.L.R. 2d 305, 317 (1960).

29. *Id.*

impose liability if the person was an employee.<sup>30</sup>

In *Oates*, the court further supported its finding of liability by noting the act was administrative because it did not require any medical knowledge or skill to know that the combination of alcohol and a red hot iron would start a fire.<sup>31</sup> The supreme court concluded the hospital was liable because the intern was performing an administrative act.<sup>32</sup>

After the courts initially expanded hospital liability, the legislative branch took the next step. Hospitals were forced to comply with statutes after the Federal government enacted the Hill-Burton Act in 1946 which was the first major federal program involving the health care industry.<sup>33</sup> The Act sought to ensure available health care treatment by providing financial assistance for construction and renovation of hospital facilities for states which implemented hospital licensure laws.<sup>34</sup> "These new licensure laws soon gave rise to the realization that hospitals as institutions—and not just physicians—had specific duties and responsibilities with respect to the provision of health care services."<sup>35</sup> The Hill-Burton Act provided such a great financial impetus that Florida began licensing and regulating hospitals within its boundaries in 1947.<sup>36</sup>

After the legislature took its initial step, the courts once again came to the forefront in regulating hospitals in the 1950s. The courts expanded hospital liability in Florida even further, as *respondeat supe-*

30. *Id.* (Courts could justify holding hospitals liable for an employee's tortious act under the *respondeat superior* theory, but not an independent contractor's acts).

31. *Oates*, 152 Fla. at 28, 10 So. 2d at 724.

32. *Id.*

33. 42 U.S.C. § 291 (1986). Part A, section 601 of the bill, entitled the Hospital Construction Act (known as Hill-Burton Act because it was introduced into the Senate in 1945 by Lister Hill and Harold Burton) indicated that its purpose was to assist state governments to inventory existing hospitals, survey needs for construction of hospitals, develop programs for such construction and for creating programs to establish the necessary physical facilities for furnishing adequate hospitals, clinics and similar services to all people.

An important condition of this legislation was the mandate for each state to establish an organization which would be responsible for assessing the need for new hospital facilities. States were required not only to submit a plan detailing priorities for meeting health care needs, but also to establish minimum operation standards for institutions receiving funds. K. POPKO, REGULATORY CONTROLS 4 (1976).

34. 42 U.S.C. § 291c (1986).

35. Mulholland, *Evolving Relationship*, *supra* note 6, at 295 (emphasis in the original).

36. FLA. STAT. §§ 395.001-395.006 and § 395.008 (1989).



rior, which was previously applied to hold hospitals liable only for non-physician employee's acts, was first applied to the hospital-physician relationship in *City of Miami v. Brooks*.<sup>37</sup> In *Brooks*, the Florida Supreme Court found the hospital vicariously liable when a patient sustained injuries from an overdose of x-ray therapy treatment due to its physician's and attendant's negligence.<sup>38</sup> In a conclusory opinion unsupported by analysis, the *Brooks* court found the treating physician and attendants to be acting on behalf of the hospital.<sup>39</sup> Consequently, the court impliedly utilized a *respondeat superior* theory to establish the defendant hospital's liability.<sup>40</sup> Florida's application of *respondeat superior* to the hospital-physician relationship followed a number of jurisdictions which imposed liability upon hospitals for the negligent acts of physicians, so long as they were "employees" of the hospital and acting within the scope of employment.<sup>41</sup>

After the *Brooks* decision established that hospitals could in fact be held liable for a physician's negligence, the Florida Supreme Court decided *Roth v. Dade County*,<sup>42</sup> wherein it explained that imposing vicarious liability on a hospital was justified by the hospital's right to control its employee.<sup>43</sup> In *Roth*, while plaintiff was unconscious, a nurse gave her hot applications, which burned her skin and caused permanent

---

37. 70 So. 2d 306 (Fla. 1954). Traditionally, physicians had highly specialized skill and knowledge which could not be controlled by a layperson such as a hospital administrator. Consequently, Florida hospitals were not previously held liable under the theory of *respondeat superior* for a physician's acts because the element of control was lacking. Annotation, 69 A.L.R. 2d, at 322.

38. 70 So. 2d at 306.

39. *Id.* at 307.

40. *Id.*

41. The jurisdictions deciding cases in accord with this view are: California, District of Columbia, Georgia, Iowa, Kansas, Kentucky, Minnesota, Missouri, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Virginia, West Virginia, and Wisconsin. See Annotation, 69 A.L.R. 2d, at 310.

The other viewpoint is a narrower liability theory which held physicians, whether salaried employees or not, were independent contractors. Therefore, the physician's negligence could not be imputed to the hospital unless they held themselves out as the hospital's employee. Then, the hospital could be liable under an apparent agency theory. See *infra*, notes 76 to 82 and accompanying text for a discussion of this agency theory. The jurisdictions following this viewpoint are: Arkansas, California, Colorado, Georgia, Indiana, New York, North Carolina, Oklahoma, Oregon, Rhode Island, Virginia, and West Virginia. See Annotation, 69 A.L.R. 2d, at 315.

42. 71 So. 2d 169 (Fla. 1954).

43. *Id.* at 170.

scarring.<sup>44</sup> In its defense, the hospital pointed out that plaintiff requested and received group nursing whereby the hospital simply contracted the nurses for the patient, but did not control their employment.<sup>45</sup> The Florida Supreme Court agreed with the hospital and found that it could not be held liable for the patient's injuries because it had no control over either the patient or the group nurses.<sup>46</sup> Consequently, the court reasoned that, without control, there was no employee relationship from which to impute liability.<sup>47</sup>

In defining when *respondeat superior* was appropriate to hold a hospital derivatively liable, Florida courts eventually developed the principle<sup>48</sup> that if the physician was an "independent contractor," the hospital was shielded from vicarious liability.<sup>49</sup> As in *Roth*, the independent contractor defense was asserted since it provided a viable way for hospitals to avoid tort liability.<sup>50</sup>

Relying on the courts' interpretation, the issue of control continued to play a large part in the 1960s in establishing hospital liability as well as non-liability. Hospitals sought to avoid liability by claiming they relinquished their right to direct and control their "employee's" activities,<sup>51</sup> thus essentially making that person an independent contractor

44. *Id.*

45. *Id.* (The hospital claimed that although it contracted the group nurses for its patients and supervised them, it did not hire or fire them and therefore did not control their employment).

46. *Id.*

47. 71 So. 2d at 170.

48. See *infra*, notes 146 to 155 and accompanying text for a discussion of cases wherein courts held hospitals were not liable for an independent contractor's negligence.

49. *Irving v. Doctors Hosp. of Lake Worth Inc.*, 415 So. 2d 55, 56 (Fla. 4th Dist. Ct. App. 1982).

To determine whether a physician is hired to do certain work as an independent contractor or employee, courts focus on how much control the employer has over the person's work. 41 AM. JUR. 2d *Independent Contractors* § 6 (1968).

50. *Roth*, 71 So. 2d at 170. See *Public Health Trust of Dade County v. Valcin*, 507 So. 2d 596 (Fla. 1987); *Reed v. Good Samaritan Hosp. Ass'n, Inc.*, 453 So. 2d 229 (Fla. 4th Dist. Ct. App. 1984); *Snead v. LeJune Road Hosp., Inc.*, 196 So. 2d 179 (Fla. 3d Dist. Ct. App. 1967). *But see*, *Webb v. Priest*, 413 So. 2d 43 (Fla. 3d Dist. Ct. App. 1982) (court found hospital liable under an agency theory for a physician's negligence even though he was not a hospital employee).

51. See *Roth*, 71 So. 2d at 170; *Hudmon v. Martin*, 315 So. 2d 516 (Fla. 1st Dist. Ct. App. 1975); *Parmeter v. Osteopathic Gen. Hosp.*, 196 So. 2d 505 (Fla. 3d Dist. Ct. App. 1967); *Beaches Hosp. v. Lee*, 384 So. 2d 234 (Fla. 1st Dist. Ct. App. 1980).

for agency purposes and rendering the doctrine of *respondeat superior* inapplicable. In such instances, the employee is considered a borrowed servant of the physician who obtains the right to control and therefore assumes all liability.<sup>52</sup>

However, these efforts to minimize control over employees and shift the corresponding liability to physicians were partially negated by *Buzan v. Mercy Hospital, Inc.*<sup>53</sup> In *Buzan*, plaintiff sued the physician and hospital for injuries sustained after the assisting nurse incorrectly counted the sponges used during the surgery, causing one to be left in the patient's abdomen.<sup>54</sup> The hospital claimed that since its nurse was under the physician's orders and subject to his control during the operation, the physician, rather than the hospital, should be held directly responsible.<sup>55</sup> The Third District Court of Appeal relied on the medical-administrative distinction<sup>56</sup> originally set forth in *Miami v. Oates* to decide the case.<sup>57</sup> In so doing, the court held the nurse's acts of counting sponges did not require professional skill which would be controlled solely by the physician.<sup>58</sup> Instead, the court considered the acts administrative functions which the hospital controlled and could thus be held liable for under the doctrine of *respondeat superior*.<sup>59</sup> Consequently, the court concluded the nurse was not a borrowed servant, but was acting on behalf of the hospital.<sup>60</sup>

Another area in which hospitals were further exposed to liability concerned implied warranties of merchantability and fitness for a particular purpose as applied to blood used in blood transfusions. Tradi-

52. 2 FLA. JUR. 2d *Agency and Employment* § 205 (1977).

53. 203 So. 2d 11 (Fla. 3d Dist. Ct. App. 1967).

54. *Id.* at 12.

55. *Id.*

56. *Id.* at 13. See *supra*, notes 27 to 30 and accompanying text for a discussion of the medical-administrative distinction. Although this distinction has been found unworkable in hospital settings in most jurisdictions, Southwick, *Hospital Liability: Two Theories Have Been Merged*, 4 J. LEGAL MED. 1, 48 (1983) [hereinafter Southwick, *Hospital Liability*], Florida courts continue to recognize the distinction. *Beaches*, 384 So. 2d at 237 (Fla. 1st Dist. Ct. App. 1980).

57. *Buzan*, 203 So. 2d at 13.

58. *Id.* at 14.

59. *Id.*

60. *Id.* at 11. (The court's holding reflects the rule that acts performed by hospital employees under the control and direction of a private physician are not within the spectrum of *respondeat superior*). See also, *Hudmon*, 315 So. 2d at 516; *Parmarter*, 196 So. 2d at 505; *Roth*, 71 So. 2d at 169.

tionally, these warranties applied only to transactions in goods<sup>61</sup> and not to transactions which primarily involved the rendering of a service.<sup>62</sup> This "sale versus service" distinction was aptly drawn by Florida courts in *Russell v. Community Blood Bank, Inc.*<sup>63</sup> and *Mercy Hospital v. Benitez*.<sup>64</sup>

In *Russell*, the Second District Court of Appeal held that an independently operated blood bank could be held liable for breaching the implied warranties of merchantability and fitness for a particular purpose when blood it sold was infected with serum hepatitis.<sup>65</sup> The court's holding is based upon the fact that the blood bank, which originally collected and distributed blood in exchange for consideration, made a "sale" which was subject to a cause of action for breach of the implied warranties.<sup>66</sup> However, the court stated that a hospital which supplied blood to a patient for use in a transfusion was considered to be rendering a "service."<sup>67</sup> Consequently, the court indicated that when the blood is merely incidental to the medical service performed by the hospital, it does not make any implied warranties and can therefore not be held liable for any such breach.<sup>68</sup>

Nonetheless, hospitals in Florida were not protected by this sale-service distinction for very long. In *Mercy*,<sup>69</sup> the Third District Court of Appeal was presented with a situation not considered by the *Russell* court—the defective blood used in the transfusion came from a blood bank created and maintained by the hospital itself.<sup>70</sup> Based upon *Russell*, the *Mercy* court reasoned that the blood supplied by the hospital's own blood bank constituted a sale of goods and therefore the hospital could be liable for breaching the implied warranties of merchantability and fitness for a particular purpose.<sup>71</sup>

61. FLA. STAT. § 672.102 (1989) essentially provides that the chapter, which addresses implied warranties, applies to transactions in goods. FLA. STAT. § 672.105(1) defines "goods" as "all things . . . which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid . . ."

62. See *Russell v. Community Blood Bank, Inc.*, 185 So. 2d 749, 750-51 (Fla. 2d Dist. Ct. App. 1966), *aff'd*, 196 So. 2d 115 (Fla. 1966).

63. *Id.* at 752.

64. 257 So. 2d 51 (Fla. 3d Dist. Ct. App. 1972).

65. 185 So. 2d at 753.

66. *Id.* at 752-53.

67. *Id.* at 751.

68. *Id.* at 752.

69. 257 So. 2d 51.

70. *Id.* at 52.

71. *Id.*

In *Williamson v. Memorial Hospital of Bay County*,<sup>72</sup> Florida's First District Court of Appeal held that a hospital could be found liable for breaching the implied warranties of merchantability and fitness for a particular purpose for injuries caused by blood, even if that blood is supplied by an independently owned commercial blood bank.<sup>73</sup> The *Williamson* court noted that when the legislature enacted Florida Statute section 672.316(5), it made implied warranties, which were traditionally only applicable to the sale of goods, also applicable to the law of negligence.<sup>74</sup> The court concluded that by enacting Florida Statute section 672.316(5), the legislature intended all persons and entities using blood for medical transfusions to be held liable under both negligence and breach of implied warranty theories if the defect in the blood was detectable or removable by reasonable scientific procedures.<sup>75</sup> In view of *Williamson*, hospitals involved in the administration and use of medical transfusions were thereafter subject to liability for breaching the implied warranties of merchantability and fitness for a particular purpose.

Florida hospitals have seen no relief from the trend toward increasing exposure to litigation and liability in the 1980s as their most desirable defense of lack of control over an independent contractor began to erode. In 1982, the Fourth District Court of Appeal of Florida in *Irving v. Doctors Hospital of Lake Worth, Inc.*<sup>76</sup> acknowledged that the agency doctrines of apparent authority and estoppel could be used to hold a hospital liable for the acts of independent contractors.<sup>77</sup> In *Irving*, the plaintiff brought suit against the hospital to recover damages for the negligence of an emergency room physician in failing to diagnose her daughter as suffering from meningitis.<sup>78</sup> The hospital con-

72. 307 So. 2d 199 (Fla. 1st Dist. Ct. App. 1975).

73. *Id.*

74. *Id.* at 201. FLA. STAT. § 672.316(5) (1989) provides in part:

The procurement, processing, storage, distribution, or use of whole blood . . . and blood derivatives for the purpose of injecting or transfusing . . . into the human body for any purpose . . . is declared to be the rendering of a service by any person participating therein and does not constitute a sale . . . and the implied warranties of merchantability and fitness for a particular purpose are not applicable as to a defect that cannot be detected or removed by a reasonable use of scientific procedures or techniques.

75. *Williamson*, 307 So. 2d at 202.

76. 415 So. 2d 55 (Fla. 4th Dist. Ct. App. 1982).

77. *Id.* at 57.

78. *Id.* at 56.

tended the physician was an independent contractor, rather than an employee, effectively protecting it from liability due to the theory of *respondeat superior*.<sup>79</sup>

However, the court found the "independent contractor-employee" distinction irrelevant and eschewed the *respondeat superior* theory because under the doctrine of apparent authority, an employer who holds one out as his employee is estopped to deny the employee's authority.<sup>80</sup> Under this agency doctrine, a hospital can be found liable, even if there is no employment relationship between the hospital and the physician. Essentially, the hospital could be derivatively liable under a finding of apparent authority or estoppel if the following three elements are present: (1) the person dealing with the agent reasonably believes in the agent's authority; (2) the belief is generated by some act or neglect on the part of the principal; and (3) the person who justifiably relies thereon is not guilty of negligence.<sup>81</sup>

Because there was nothing to put the plaintiff on notice that the emergency room physicians were not hospital employees and all appearances suggested the emergency room was in fact an integral part of the hospital, the *Irving* court noted that all the requisite elements were met.<sup>82</sup> Therefore, the hospital was liable regardless of whether the physician was an independent contractor or an employee. The implications of this decision were detrimental to Florida hospitals because injured plaintiffs had yet another avenue from which to attempt to recover damages while hospitals could no longer avoid liability simply by retaining independent contractors.

Given the evolution of hospital liability since the *Parrish* decision<sup>83</sup> in 1933, it is not surprising Florida has recently recognized yet another theory upon which to impose hospital liability—corporate negligence.<sup>84</sup> While this is a novel theory in Florida, the seminal case establishing the precedent for holding a hospital directly liable to a patient for its

79. *Id.* To establish the physician was an independent contractor, the hospital required the physician to demonstrate that the physician: operated as a professional association, worked only at that hospital, had no patients of his own, kept no records, sent no bills, was required to see all patients entering the emergency room, was supplied all support personnel, all equipment, and all medications, and was paid an hourly rate by the hospital. *Id.*

80. *Irving*, 415 So. 2d at 57.

81. 3 AM. JUR. 2d *Agency* § 80 (1986).

82. *Irving*, 415 So. 2d at 59.

83. 107 Fla. 598, 145 So. 848 (1933).

84. *Insinga*, 543 So. 2d at 209.

own negligence dates back to 1965.<sup>85</sup>

## B. Background of Direct Duty—Corporate Negligence

Historically, a hospital's liability for the negligent acts of a physician has been predicated upon some theory of vicarious liability, based upon the application of *respondeat superior*, an agency principle.<sup>86</sup> Recently, however, public policy considerations have caused courts to expand liability and make hospitals legally responsible for all care provided on their premises, even if such care is rendered by licensed physicians in their capacity as independent contractors.<sup>87</sup> Rather than upset existing law by extending the principle of vicarious liability to the independent contractor situation, courts have applied the doctrine of corporate negligence whereby a hospital is held liable for breaching a duty owed directly to its patients.<sup>88</sup>

The doctrine of corporate negligence was first applied in 1965 by Illinois courts to hold a hospital liable for its negligence in relation to a staff physician in *Darling v. Charleston Community Memorial Hospital*.<sup>89</sup> In *Darling*, the plaintiff brought an action against the defendant hospital for injuries caused by negligent treatment of his broken leg.<sup>90</sup> The plaintiff sought treatment from the hospital's emergency room after he broke his leg playing football.<sup>91</sup> The general practitioner on call that day treated plaintiff by applying a plaster cast.<sup>92</sup> Plaintiff remained at the hospital for fourteen days during which time he frequently complained of pain in his leg.<sup>93</sup> Despite his complaints, the hospital did not check the cast which had been applied too tightly and was

85. *Darling v. Charleston Community Memorial Hosp.*, 33 Ill. 2d 326, 211 N.E.2d 253 (1965), *cert. denied*, 383 U.S. 946 (1966).

86. See Southwick, *Hospital Liability*, *supra* note 56, at 2, 9.

87. Note, *Corporate Liability*, *supra* note 6, at 343. See also Gwynn, *Hospital Liability in Florida: The Nondelegable Duty Doctrine*, FLA. B.J., Feb. 1990, at 14, 18 (1990) (discusses an employer's exposure to liability in Florida under various exceptions to the independent contractor rule, including when the employer: (1) assumes a duty by contract or agreement; (2) is under a duty created by statute or ordinance; (3) hires another to perform inherently dangerous work; or (4) is aware or should be aware of hazardous conditions concerning the work performed).

88. Southwick, *Hospital Liability*, *supra* note 56, at 17.

89. 33 Ill. 2d 326, 211 N.E.2d 253.

90. *Id.* at 328, 211 N.E.2d at 255.

91. *Id.*

92. *Id.*

93. *Id.*

impairing plaintiff's circulation.<sup>94</sup> As a result, dead tissue accumulated and plaintiff's leg had to be amputated.<sup>95</sup> At trial, plaintiff alleged the defendant hospital was negligent by: (1) permitting the general practitioner to perform such work when it did not require him to update his operative skills in the 33 years since he graduated medical school; (2) failing to adequately supervise the general practitioner during this treatment; and (3) failing to require consultations after complications developed.<sup>96</sup>

The trial court rendered a judgment in favor of plaintiff and the appellate court affirmed.<sup>97</sup> In affirming this decision, the Illinois Supreme Court broke with tradition by holding the hospital itself was negligent for failing to supervise the staff physician.<sup>98</sup> *Darling* is a landmark case because it changed the relationship between independent physicians and hospitals by circumventing the independent contractor limitation placed upon hospitals' vicarious liability—suddenly, the corporate negligence doctrine emerged and hospitals owed a direct duty to patients to ensure quality health care.

Although the *Darling* decision is well known for its recognition of the corporate negligence doctrine, it did not clearly outline the actual, direct duties owed by hospitals to their patients.<sup>99</sup> Consequently, according to some commentators, the scope of duties to which corporate negligence applies has been misinterpreted.<sup>100</sup> While *Darling* appears to have based its application of corporate negligence on a duty to supervise and review staff physicians, many jurisdictions<sup>101</sup> have based their application on a wholly separate and distinct duty to exercise due care in selecting and retaining staff physicians.

This notion that hospitals could be held directly liable for their negligence in granting staff privileges was initially set forth in the dic-

94. *Darling*, 33 Ill. 2d at 329, 211 N.E.2d at 255.

95. *Id.* at 329, 211 N.E.2d at 256.

96. *Id.*

97. 50 Ill. App. 2d 253, 200 N.E.2d 149 (1964).

98. *Darling*, 33 Ill. 2d at 333, 211 N.E.2d at 261.

99. See, e.g., Zaremski, *Liability of a Hospital as an Institution: Are the Walls of Jericho Tumbling?*, 16 FORUM 225, 236 (1980).

100. *Id.*

101. These jurisdictions include: California, Delaware, Georgia, Montana, Nebraska, New Jersey, North Carolina, Rhode Island, Texas, Wisconsin and Wyoming. See generally, Annotation, *Hospital's Liability for Negligence in Selection or Appointment of Staff Physician or Surgeon*, 51 A.L.R. 3d 981 (1973 & Supp. 1989).



tum of *Fiorentino v. Wenger*.<sup>102</sup> In *Fiorentino*, the New York appellate court made it incumbent upon hospitals to deny or revoke staff privileges to physicians "it had reason to know" would commit malpractice.<sup>103</sup> Because the *Fiorentino* court ultimately dismissed the charge against the hospital on other grounds,<sup>104</sup> it was not until five years later that a jurisdiction actually found a hospital liable for granting staff privileges to an incompetent physician.

In *Joiner v. Mitchell County Hospital Authority*,<sup>105</sup> a staff physician treated plaintiff's husband in the emergency room of a Georgia hospital for chest pains.<sup>106</sup> However, the physician on call did not think the condition was serious so he gave the patient a prescription and sent him home.<sup>107</sup> Less than two hours later the pain became more severe and the patient started back to the hospital.<sup>108</sup> Tragically, the patient, plaintiff's husband, died of a heart attack enroute to the hospital.<sup>109</sup> Plaintiff sued the hospital alleging, *inter alia*, that it was negligent in failing to conduct an adequate investigation into the physician's background to ascertain his competence.<sup>110</sup>

While the trial court granted the defendant hospital's motion for summary judgment, the Georgia appellate court reversed.<sup>111</sup> The appellate court held that a hospital has a duty to exercise due care in investigating each applicant's competency, and that this duty is not discharged because the applicant is licensed by the state or is recommended by staff members.<sup>112</sup> The Georgia Supreme Court affirmed the appellate court's decision, making hospitals responsible for

102. 19 N.Y.2d 407, 227 N.E.2d 296, 280 N.Y.S.2d 373 (1967).

103. *Id.* at 415, 227 N.E.2d at 299, 280 N.Y.S.2d at 378.

104. The court dismissed the hospital from the suit, stating that liability does not attach where malpractice is performed by a physician retained by the plaintiff himself, *id.* at 414, 227 N.E.2d at 299, 280 N.Y.S.2d at 378, and where a hospital had no reason to know informed consent was lacking. *Id.* at 418, 227 N.E.2d at 301, 280 N.Y.S.2d at 381. In fact, the court said third parties like hospitals should not get involved with the physician's decision regarding informing the patient. *Id.* at 416, 227 N.E.2d at 300, 280 N.Y.S.2d at 379.

105. 125 Ga. App. 1, 186 S.E.2d 307 (Ga. Ct. App. 1971), *aff'd* 229 Ga. 140, 189 S.E.2d 412 (1972).

106. *Joiner*, 125 Ga. App. at 1, 186 S.E.2d at 308.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Joiner*, 125 Ga. App. at 5, 186 S.E.2d at 307.

112. *Id.* at 3, 186 S.E.2d at 309.

undertaking their own competency investigations.<sup>113</sup>

Nonetheless, exercising due care in selecting staff and granting privileges may not be adequate for hospitals to avoid liability. In *Purcell v. Zimbelman*,<sup>114</sup> an Arizona hospital was found liable for retaining a staff physician.<sup>115</sup> Plaintiff, the patient's administratrix, sued the surgeon and hospital for injuries caused by improper treatment of the patient's condition.<sup>116</sup> This negligence caused the patient to suffer from urinary problems, loss of a kidney prior, and to require a permanent colostomy prior to his death.<sup>117</sup>

The trial court concluded the hospital had actual knowledge of the surgeon's incompetence because both he and the hospital were sued on four other occasions for medical malpractice.<sup>118</sup> Consequently, the court found the hospital could be liable for failing to protect other patients by not taking action against the surgeon.<sup>119</sup> In affirming the trial court's decision for the plaintiff, the Arizona Appellate Court found the hospital was subject to liability due to its inaction when it had sufficient notice of the surgeon's incompetence which warranted further review.<sup>120</sup>

Up until 1972, hospital liability appeared to be grounded to a great extent, in a hospital's negligent selection and retention of staff physicians. However, in this same year the Supreme Court of Nevada handed down an opinion well known for its recognition of a hospital's expanding role in the community. In *Moore v. Board of Trustees of Carson-Tahoe Hospital*,<sup>121</sup> the court asserted that because the hospital's purpose is to provide the highest quality patient care, "[t]he role of the hospital vis-a-vis the community is . . . no longer limited to the furnishing of physical facilities . . . ."<sup>122</sup> In its decision, the *Moore* court articulated that hospitals have a responsibility to create a "workable system"

113. *Joiner*, 229 Ga. 140, 189 S.E.2d 414.

114. 18 Ariz. App. 75, 500 P.2d 335 (1972).

115. *Id.* at —, 500 P.2d at 335.

116. *Id.* at —, 500 P.2d at 340.

117. *Id.*

118. *Id.* at —, 500 P.2d at 343. This, however, does not seem to be an appropriate basis to use in litigious states such as Florida.

119. *Purcell*, 18 Ariz. App. at —, 500 P.2d at 343.

120. *Id.* at —, 500 P.2d at 335.

121. 495 P.2d 605 (Nev. 1972).

122. *Id.* at 608.

whereby the medical staff of the hospital continually reviews and evaluates the quality of care being rendered within the institution. The staff must be organized with a proper structure to carry out the role delegated to it by the governing body. All powers of the medical staff flow from the board of trustees, and the staff must be held accountable for the control of quality.<sup>123</sup>

The same year, a California court imposed liability upon a hospital for failure to establish the type of evaluation system outlined in *Moore* whereby it could discover a physician's incompetence. In *Gonzales v. Nork & Mercy Hospitals*,<sup>124</sup> a staff physician performed spinal surgery on a young man who had been injured in an automobile accident.<sup>125</sup> Plaintiff sued the physician for the unsuccessful and allegedly unnecessary surgery after complications developed.<sup>126</sup> Because evidence disclosed the physician had performed almost 50 other negligent or unnecessary operations, the trial court found the hospital could be liable.<sup>127</sup> In its opinion, the court acknowledged the hospital had no knowledge of the physician's propensity to commit malpractice but supported its decision by finding the hospital was negligent because it lacked a "workable system" which would allow it to discover a physician's shortcomings.<sup>128</sup>

Since 1972, courts have continued to cite the public's increased reliance upon and perception of the modern hospital as a full-service health care facility as reasons for their willingness to adopt corporate negligence.<sup>129</sup> Most recently, Florida's judiciary displayed its commitment to ensuring hospitals provide only quality health care to its patients by applying the corporate negligence doctrine in *Insinga v. LaBella*.<sup>130</sup>

123. *Id.*

124. Memorandum of Decision No. 228566 (Cal. Super. Ct., Sacramento County, filed Nov. 19, 1983) (cited in Kahn, *Hospital Malpractice Prevention*, 27 DE PAUL L. REV. 23, 31-34 (1977)).

125. Kahn, *Hospital Malpractice Prevention*, 27 DE PAUL L. REV. 23, 32 (1977).

126. *Id.*

127. *Id.* at 32-33.

128. *Id.* at 34 (citing *Gonzales*, Memorandum of Decision No. 228566).

129. *Insinga*, 543 So. 2d at 214; *Pedroza v. Bryant*, 101 Wash. 2d 226, 231, 677 P.2d 166, 169 (1984); *Beeck v. Tucson Gen. Hosp.*, 18 Ariz. App. 165, 500 P. 2d 1153 (1972).

130. 543 So. 2d 209.

## C. Direct Hospital Liability Arrives as Florida Courts Recognize Corporate Negligence In *Insinga v. LaBella*

### 1. Facts

On January 19, 1981, 68 year old Mildred Insinga was admitted to Biscayne Medical Center, a hospital owned by Humana, Inc.<sup>131</sup> Insinga was admitted to Humana by her selected physician, Dr. Michelle LaBella, who had been treating her for at least six months.<sup>132</sup> LaBella wrongfully diagnosed and treated Insinga, resulting in her death on February 6, 1981 while she was a patient at Humana.<sup>133</sup>

It was subsequently discovered that Dr. LaBella was not a medical doctor, but was instead Morton Canton, a Canadian fugitive indicted for the manufacture and sale of illegal drugs.<sup>134</sup> Canton assumed the identity of LaBella, a deceased Italian physician, and fraudulently obtained a medical license from the State of Florida.<sup>135</sup> Using this license, he obtained medical staff privileges at Humana.<sup>136</sup>

### 2. Procedure

Insinga's husband filed a wrongful death action in the Eleventh Judicial Circuit (Dade County) against Humana for corporate negligence in granting LaBella medical staff privileges.<sup>137</sup> Humana, a Delaware Corporation, removed the case to the United States District Court for the Southern District of Florida.<sup>138</sup> The trial court directed a verdict in favor of Humana before Insinga even presented his case.<sup>139</sup> Although the court agreed Humana was negligent in screening LaBella, it

---

131. *Id.* at 210.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Insinga*, 543 So. 2d at 210.

136. *Id.*

137. *Id.* Plaintiff also filed charges against: (1) Dr. LaBella a/k/a Canton, for negligently diagnosing and treating his wife; (2) the Florida Board of Medical Examiners for negligently licensing LaBella/Canton; and (3) the Department of Professional Regulation of the State of Florida for negligently licensing LaBella/Canton. However, Humana was the only remaining defendant in the suit because plaintiff did not pursue charges against Canton who was extradited to Canada, plaintiff voluntarily dismissed the Department from the suit, and the Board was granted sovereign immunity. *Id.*

138. *Id.*

139. *Id.* at 211.

entered a judgment in favor of Humana because there was no basis in Florida law establishing that the hospital owed a duty to *Insinga* to exercise care in granting staff privileges to independent physicians.<sup>140</sup>

On appeal, the United States Court of Appeals for the Eleventh Circuit found the issue to be unanswered by controlling precedent<sup>141</sup> and certified the following question to the Florida Supreme Court: "Whether Florida law recognizes the corporate negligence doctrine and whether it would apply to the facts of this case."<sup>142</sup>

### 3. Supreme Court's Reasoning

On April 20, 1989, the Florida Supreme Court answered the certified question in the affirmative and recognized the corporate negligence doctrine.<sup>143</sup> Thus, the Supreme Court held Humana owed an independent duty to *Insinga* to exercise reasonable care in the selection and retention of physicians on its staff.<sup>144</sup>

Before addressing *Insinga's* case, the court discussed cases<sup>145</sup> which disclosed that hospital liability in Florida has traditionally been based on either the theory of vicarious liability or agency. The three cases which the court discussed appear also to expressly establish that hospitals do not have to guarantee the competence of its staff physicians.

The first case discussed by the Florida Supreme Court was *Snead v. LeJune Road Hospital, Inc.*, a 1967 case from the Third District Court of Appeal.<sup>146</sup> In *Snead*, plaintiff brought a medical malpractice suit against an independent physician and hospital for injuries sustained from an operation performed at the hospital.<sup>147</sup> Because the physician was not an employee, the district court affirmed the circuit court's grant of summary judgment in favor of the hospital, reasoning that it could not be liable under the theory of *respondeat superior*.<sup>148</sup> In addition, the court stated that the hospital could not be found negli-

140. *Insinga*, 543 So. 2d at 211.

141. 845 F.2d 249, 255 (11th Cir. 1988).

142. *Id.*

143. *Insinga*, 543 So. 2d at 209.

144. *Id.* at 214.

145. *Id.* at 212.

146. 196 So. 2d 179 (Fla. 3d Dist. Ct. App. 1967).

147. *Id.*

148. *Id.*

gent for simply permitting the physician to operate on its premises.<sup>149</sup> Next, the Supreme Court cited *Reed v. Good Samaritan Hospital Association, Inc.*,<sup>150</sup> a case which occurred 17 years after *Snead* and reiterated the rule that a hospital is not vicariously liable for the acts of an independent contractor.<sup>151</sup> In *Reed*, a young child suffering from sickle-cell anemia was rushed to the defendant hospital's emergency room.<sup>152</sup> Although her private physician was contacted immediately, he delayed in admitting her to the hospital which allegedly contributed to her death a few hours later.<sup>153</sup> Based upon these facts, the Fourth District Court of Appeal held the hospital was not liable for the negligence of a patient's independent physician merely because the physician had staff privileges, and the acts were committed within the hospital's walls.<sup>154</sup> In so doing, the court stated "the law is clear that if the doctor is 'an independent contractor, that [status] shield[s] the hospital from vicarious liability'."<sup>155</sup>

The final case mentioned by the Supreme Court was *Beam v. University Hospital Building, Inc.*,<sup>156</sup> a 1986 case which was the first Florida decision to mention the corporate negligence doctrine by name.<sup>157</sup> In *Beam*, the plaintiff sued the hospital alleging it was negligent in selecting a financially incompetent physician who did not carry malpractice insurance.<sup>158</sup> While the Fourth District Court of Appeal acknowledged that some jurisdictions recognized a tort concerning hospital selection of *medically* incompetent physicians under the doctrine of corporate negligence,<sup>159</sup> it affirmed dismissal of the case because no jurisdiction imposed liability for failing to select a fiscally-sound staff physician.<sup>160</sup>

---

149. *Id.*

150. 453 So. 2d 229 (Fla. 4th Dist. Ct. App. 1984).

151. *Id.* at 230.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Reed*, 453 So. 2d at 230, (quoting *Irving v. Doctors Hosp. of Lake Worth, Inc.*, 415 So. 2d 55, 56 (Fla. 4th Dist. Ct. App. 1982)).

156. 486 So. 2d 672, 673 (Fla. 1st Dist. Ct. App. 1986).

157. *Id.* at 673.

158. *Id.* at 672.

159. *Id.* at 673.

160. *Id.* However, FLA. STAT. § 458.320(1) (1989) has since been enacted. This provision states in part that:

[a]s a condition of licensing and prior to the issuance or renewal of an active license or reactivation of an inactive license for the practice of

After discussing the foregoing cases, the Supreme Court took note of the fact that the recognition and adoption of the corporate negligence theory had broad implications.<sup>161</sup> Nonetheless, the court then proceeded to set forth the public policy it believed justified expanding hospital responsibilities.<sup>162</sup> Essentially, the court attempted to fortify its decision to recognize corporate negligence by referring to two oft-cited considerations. First, it noted the public's increased reliance on and perception of the hospital as espoused in *Moore*<sup>163</sup>— that of a “multifaceted health care facility . . . responsible” for the quality of medical care rendered on its premises.<sup>164</sup> Second, the court stated that because hospitals are in a much better position to monitor and control physician performance, it is “the only entity that can realistically provide quality control.”<sup>165</sup>

Although the Florida Supreme Court increased a hospital's responsibilities to include selection and retention of competent physicians for staff privileges, it wisely limited the holding to the specific facts of *Insinga*. Consequently, the hospital's independent duty does not extend to a physician's actions outside the hospital.<sup>166</sup> The court omitted to impose upon hospitals the duty to supervise physicians while they are treating patients. However, considering the trend of hospitals' expanding exposure to liability in Florida,<sup>167</sup> it seems likely the imposition of this duty to supervise is soon to follow.

While the Florida Supreme Court adopted the corporate negligence doctrine, it did so independent of the fact this tort was codified in 1985 in Florida Statute section 768.60.<sup>168</sup> Although it mentioned the

---

medicine, an applicant shall . . . demonstrate to the satisfaction of the board and the department financial responsibility to pay claims and costs ancillary thereto arising out of the rendering of, or the failure to render, medical care or services.

161. *Insinga*, 543 So. 2d at 213.

162. *Id.* at 213-14.

163. 495 P.2d at 608. See *supra*, notes 122-23 and accompanying text for a discussion of hospitals' responsibilities.

164. *Insinga*, 543 So. 2d at 214.

165. *Id.*

166. *Id.* As noted in *Pedroza*, no jurisdiction recognizing corporate negligence has been willing to extend a hospital's duty to include the protection of patients treated by a staff physician in a private office. 101 Wash. 2d at 235, 677 P.2d at 171.

167. See *supra*, notes 6 to 84 and accompanying text for an analysis of Florida hospitals' expanding exposure to liability.

168. *Insinga*, 543 So. 2d at 214. This provision has been renumbered as FLA. STAT. § 766.110 (1989). While Chapter 766 deals with “negligence” concerning “med-

statute,<sup>169</sup> the court failed to discuss it or the other Florida Statutes which codify duties the hospital owes directly to its patients.<sup>170</sup>

### III. Legislative Duty Imposed upon Hospitals to Patients

To comprehend fully the duty imposed upon hospitals in Florida to provide quality health care, a discussion of pertinent legislative enactments is necessary. Since its initial regulatory efforts in 1947,<sup>171</sup> Florida's legislature has amended or enacted several statutes designed to force hospitals to take more responsibility in providing direct patient care.

The legislature originally responded to Florida's medical malpractice crisis by enacting the Medical Malpractice Reform Act of 1975 (the MMRA).<sup>172</sup> One of the primary goals of this legislation was to reduce the incidence of malpractice through "house-keeping" programs designed to eliminate incompetent physicians and increase the quality of health care.<sup>173</sup>

The MMRA was amended by the Comprehensive Medical Malpractice Reform Act of 1985 (the CMMRA) whereby the legislature launched a comprehensive attack on minimizing the occurrence of medical injuries.<sup>174</sup> This plan included delineating hospital responsibility between the governing board and medical staff.<sup>175</sup>

---

ical malpractice and related matters," this specific section addresses liability of health care facilities such as hospitals. See *infra* Section III of text.

169. *Insinga*, 543 So. 2d at 211.

170. These duties are primarily codified in Chapter 766 of the Florida Statutes which deals with medical malpractice occurring in hospitals and in Chapter 395 which sets forth hospital licensing requirements and regulations. See *infra* Section III.

171. Ch. 24091, §§ 1-18, 1947 Fla. Laws (current version at FLA. STAT. §§ 395.001-395.006 and § 395.008 (1989)).

172. See generally, Comment, *Medical Malpractice in Florida: Prescription for Change*, 10 FLA. ST. U.L. REV. 593 (1983).

173. *Id.* at 595. "House-keeping" programs were implemented pursuant to FLA. STAT. § 768.41 (1989). This provision required all Florida hospitals to establish an internal risk management program. Comment, *Medical Malpractice*, *supra* note 172, at 600. However, since this is a prerequisite to hospital licensing and not a duty owed to the patient *per se*, the internal program requirement is beyond the scope of this article.

174. See generally, Hawkes, *The Second Reformation: Florida's Medical Malpractice Law*, 13 FLA. ST. U.L. REV. 747 (1985).

175. *Id.* at 749. While a hospital's governing board is legally responsible for the overall operations, the medical staff has the duty to carry out the medical aspects of patient care. The governing board relies on the medical staff to monitor and make



Believing that its goal could be accomplished through hospital risk management and monitoring of physician quality, the Florida legislature continues to increase hospital statutory responsibilities.<sup>176</sup> By reviewing the current statutes, it is evident that health care legislation codifies the corporate negligence concept as it imposes three primary, direct duties upon hospitals to their patients. These duties are: (a) to create and administer bylaws;<sup>177</sup> (b) to screen and select medical staff carefully;<sup>178</sup> and (c) to terminate medical staff privileges when necessary.<sup>179</sup>

### A. Duty to Create and Administer Bylaws

Hospitals in Florida have a very definite duty to establish written procedures as evidenced by the fact that Florida's statutes expressly impose this duty in three separate provisions.<sup>180</sup> First, the "governing board of each [hospital is required to] set standards and procedures to be applied by . . . its medical staff in considering and acting upon applications for staff membership . . ." <sup>181</sup> Not only do hospitals have a duty to create bylaws, but also to create bylaws which require, at a minimum, there be an investigation as required by Florida Statute section 395.011(5).<sup>182</sup> Second, hospitals are required to "develop written, binding procedures by which peer review [of physicians] shall be conducted."<sup>183</sup> This requirement, which forces hospitals to utilize their medical staff as a tool in their comprehensive internal risk management program, was the legislature's solution in 1988 to continued problems

---

recommendations regarding the granting and revoking of staff privileges. R. MILLER, PROBLEMS IN HOSPITAL LAW 116 (1983).

176. See *supra*, notes 172 to 175 and accompanying text for a discussion of Florida's Medical Malpractice Reform Act of 1975 and Comprehensive Medical Malpractice Reform Act of 1985 which expand hospitals' statutory duties.

177. FLA. STAT. § 395.011(6) (1989); § 395.0115(2) (1989); § 766.110(1)(a) (1989).

178. FLA. STAT. § 395.011(5) (1989); § 766.101(2) (1989); § 766.110 (1989).

179. FLA. STAT. § 395.0115(3) (1989).

180. FLA. STAT. § 395.011(6) (1989); § 395.0115(2) (1989); § 766.110(1)(a) (1989).

181. FLA. STAT. § 395.011(6) (1989).

182. See *infra*, notes 190 and 191 and accompanying text for an explanation of what type of investigation hospitals are obligated to perform when physicians apply for staff privileges.

183. FLA. STAT. § 395.0115(2) (1989).

with the quality of health care in Florida.<sup>184</sup> Third, hospitals are required to adopt written procedures "for the selection of staff members and a periodic review of the medical care and treatment rendered to patients by each member of the medical staff."<sup>185</sup>

While Florida's statutes require hospitals to create written bylaws, these written procedures are also necessary to obtain accreditation from the Joint Commission on Accreditation of Hospitals.<sup>186</sup> Implicit in these statutes is the duty to abide by the bylaws. After a hospital develops such written procedures for promoting quality health care, it is likely Florida courts will require it to, at least, follow these rules in making decisions as other jurisdictions have done.<sup>187</sup>

Because these bylaw requirements concern procedures for selecting or reviewing physicians for hospital medical staff, it is evident that Florida's legislature believes such an approach will reduce the incidence of medical injuries. Nonetheless, one thing is sure, failure to develop and abide by such bylaws would result in a breach of that hospital's corporate duty to its patients.

#### B. Duty to Screen and Select Medical Staff Carefully

After reviewing the statutory requirements concerning written procedures, it is apparent that Florida hospitals owe a direct duty to their

184. See FLA. STAT. ANN. § 395.011 (West 1989) (historical note contains the following clause: "WHEREAS, medical injury can often be prevented through comprehensive risk management programs and monitoring of physician quality . . .").

185. FLA. STAT. § 766.110(1)(a) (1989) (This provision was part of the Reform Act of 1985).

186. The JCAH was formed in 1953 in part by the American Medical Association, the American College of Surgeons, and the American College of Physicians. It was formed to help standardize medical practices and administration of hospitals across the country and has since been one of the strongest forces in raising hospital quality standards. Not only has the JCAH established accreditation requirements concerning hospital administration, plant facilities, medical record services, and emergency room services, but also it has raised its standards to include responsibilities of the governing board and the hospital's review process. K. PORKO, *supra* note 33, at 8 and 27-28. Florida statutorily imposes JCAH standards upon all hospitals via FLA. STAT. § 395.0115(3) (1989).

187. See, e.g., *Jackson v. Powers*, 743 P.2d 1367, 1383 (Alaska 1987) (court found hospital had a duty to provide non-negligent emergency room services based, in part, on the fact its bylaws provided for the establishment of an emergency room); *Pederson v. Dumouchel*, 431 P.2d 973, 978 (Wash. 1967) (court held hospital liable for patient's injuries because it allowed the doctor to operate under conditions which were in violation of the hospital's bylaws).

patients to screen prospective medical staff members and to grant privileges carefully. This duty is also found codified in three separate sections of Florida's statutes.<sup>188</sup>

In one statutory provision, the hospital's governing board is required to bear the ultimate burden for investigating an applicant's background and deciding whether to grant the applicant staff privileges.<sup>189</sup> Although this section merely authorizes the hospital's medical staff to review all applications, it requires the governing board to assess each physician's quality by determining their medical competence before granting staff privileges.<sup>190</sup> While the statute allows the governing board to consider the applicant's professional ethics, reputation, and ability to work with others, it requires the investigation include a check of each person's experience, health, training, and competency.<sup>191</sup>

Because some physicians have contested their denial of staff privileges, Florida courts have had to determine what criteria would be acceptable for the governing board to consider. In *Sarasota County Public Hospital Board v. Shahawy, M.D.*,<sup>192</sup> the Second District Court of Appeal of Florida declared a hospital's criteria is:

[l]imited only by the constitutional requirement that the standards . . . be reasonably related to furthering the goal of providing high quality patient care, that the power of the hospital not be exercised in an unreasonably arbitrary and capricious manner and that the decisions of the hospital be subject to judicial review.<sup>193</sup>

While the hospitals are required to determine each applicant's demonstrated competency, another Florida statute requires hospitals assure their competence through the selection and review process.<sup>194</sup>

Finally, Florida hospitals are also required by statute to organize a medical review committee which screens and evaluates the professional competence of applicants.<sup>195</sup> Because the hospital is responsible for administering and supervising the medical staff to ensure that review and risk management processes are being diligently carried out, this too is a

188. FLA. STAT. § 395.011(5) (1989); § 766.101(2) (1989); § 766.110(1) (1989).

189. FLA. STAT. § 395.011(5) (1989).

190. *Id.*

191. *Id.*

192. 408 So. 2d 644 (Fla. 2d Dist. Ct. App. 1981).

193. *Id.* at 647.

194. FLA. STAT. § 766.110 (1989) (emphasis added).

195. FLA. STAT. § 766.101(2) (1989).

direct duty upon the hospital as an entity.

Florida's legislature has been careful to reiterate in various statutes that each organizational level of the hospital has the responsibility to screen out prospective staff physicians who are likely to injure patients. Consequently, it appears the legislature realizes that accomplishing its goal of high quality medical care will require a concerted effort by all in the industry.

### C. Duty to Terminate Medical Staff Privileges

Not only do hospitals have the power to terminate a staff member, but the Florida Statutes demand they do so to protect the welfare of patients. The imposition of this third and final statutory duty can be found in two provisions.<sup>196</sup>

One section requires the hospital's governing board be responsible for disciplining medical staff members when necessary.<sup>197</sup> The governing board is expected to terminate privileges or take appropriate action against the physician after considering the medical review committee's recommendation.<sup>198</sup> A reading of this section reveals the legislature's reliance upon the bifurcated organizational structure to reduce the incidence of medical injury.

This section was amended in 1988 to require hospitals to report any disciplinary action taken, and the reason therefor, to the Division of Medical Quality Assurance.<sup>199</sup> While this new provision requests hospitals' assistance in the disciplinary process, the statute enables the Division to determine whether the incident involved conduct by the hospital itself which warrants disciplinary action.<sup>200</sup> Such a provision is likely to be self-defeating because it will discourage hospitals from reporting problem physicians to avoid any further scrutiny of its practices than currently exists.

This duty to review for continued competence is codified in another provision of the Florida Statutes.<sup>201</sup> Essentially, this statute embodies the doctrine of corporate negligence as applied to the selection and retention of staff physicians. The hospital can be found liable for

---

196. FLA. STAT. § 395.0115(3) (1989) and § 766.110(1) (1989).

197. FLA. STAT. § 395.0115(3) (1989).

198. *Id.*

199. FLA. STAT. § 395.0115(4) (1989).

200. FLA. STAT. § 395.0115(4) (1989).

201. FLA. STAT. § 766.110(1) (1989).

failure to periodically review the medical competence of "each member of the medical staff" when such failure is a proximate cause of injury to a patient.<sup>202</sup>

#### D. Statutory Standard of Care

Unless a hospital is in direct violation of a statute, whether it breached the duties set forth above will be tested against the statutorily-defined standard of care. Pursuant to Florida Statute section 766.102(1), hospitals and physicians alike are held to "that level of care, skill and treatment which in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers."<sup>203</sup> This "prevailing professional standard of care" is the underlying measurement in determining whether hospitals' actions were acceptable. Because the provision considers surrounding circumstances, the standard inevitably fluctuates with each situation.

However, one thing is clear. Hospitals must exercise "appropriate" professional judgment in providing health care.<sup>204</sup> By looking at the latest judicial decisions construing the medical negligence standard of care, one can tell that what is "appropriate" is necessarily determined by custom. This is evidenced by the Fourth District Court of Appeal of Florida's decision in *DeAlmeida v. Graham*.<sup>205</sup> In *DeAlmeida*, the court considered evidence which disclosed that leaving a clamp in a patient's abdomen "deviates and departs from the *customary* standards of medical care and treatment commonly exercised . . . ."<sup>206</sup>

Due to the numerous medical-related statutes enacted by Florida's legislature,<sup>207</sup> hospitals have been forced to alter customary practices to a higher standard in order to reduce the amount of medical injuries. Consequently, albeit in an indirect manner, Florida's legislature has progressively imposed a higher standard of care.<sup>208</sup>

Meanwhile, what is "unacceptable" in terms of hospital monitor-

202. *Id.*

203. FLA. STAT. § 766.102(1) (1989).

204. *Id.*

205. 524 So. 2d 666 (4th Dist. Ct. App. 1987), *rev. denied*, 519 So. 2d 988 (Fla. 1987).

206. *Id.* at 669 (emphasis added).

207. *See supra*, notes 177 to 179 and accompanying text for a list of particular statutory duties imposed upon Florida hospitals.

208. *See supra*, notes 177 to 179, *Second Reformation*, *supra* note 174, at 776-77.

ing of its medical staff will only be better defined as plaintiffs take their cases to the courts. This is due in part to the fact that this direct duty is new in Florida and the statutes leave room for judicial interpretation.

#### IV. Recommendation

Understandably, Florida hospitals have long been concerned about medical malpractice and hospital administration litigation.<sup>209</sup> In light of *Insinga* and Florida's medical malpractice statutory scheme, hospitals must wait and see whether their exposure to liability will continue to expand. Because *Insinga* was an obvious case of hospital negligence and the courts have not yet applied the Florida statute which apparently codifies<sup>210</sup> the corporate negligence doctrine, it is still questionable as to how flagrant the situation must be before there is a breach of duty. Nevertheless, one thing is certain — hospitals may not rely on the fact a physician is licensed.

Within this mandate, that hospitals not rely on the fact a physician is licensed, which other jurisdictions also recognize,<sup>211</sup> lies a potential solution to the problems with the quality of health care services in this country. It is indisputable that the rendering of quality health care services remains a high priority across the country.<sup>212</sup> However, to accomplish this goal, both the judiciary and legislature have continually shifted the responsibility for providing quality health care services to hospitals and other health care institutions. Moreover, the hospitals' duties have expanded in lockstep with their responsibility, causing them to be increasingly exposed to liability.

But, why impose such a great burden upon the hospitals while refusing to allow them to rely to some extent on state licensing procedures? After all, states have developed a complex system of licensing in an attempt to assure that only qualified physicians practice medicine.<sup>213</sup> Florida has mandatory licensing laws which require physicians to secure a license before practicing medicine.<sup>214</sup> Florida's legislature has

209. Kelaher, *The Legislative Immunization of the Florida Medical Community*, 56 FLA. B.J. 616 (1982).

210. FLA. STAT. § 766.110 (1989).

211. See, e.g., *Joiner*, 125 Ga. App. at 3, 186 S.E.2d at 309.

212. ANNUAL REPORT OF THE PROSPECTIVE PAYMENT ASSESSMENT COMMISSION 4 and 45 (U.S. Dept. of Health and Human Services Mar. 1, 1989) (as required by § 1886(e)(4) of Social Security Act, as amended by Public Law 98-21).

213. R. MILLER, PROBLEMS IN HOSPITAL LAW 145 (1983).

214. Under Florida's licensing scheme, persons attempting either to obtain an

continually amended its licensing statutes in an attempt to reduce the incidence of medical malpractice and in so doing has developed what appears on paper to be a comprehensive licensing scheme. However, the way things look on paper can be very deceiving and different from their operation and application in the real world. A perfect example of this is demonstrated by *Insinga*, where a Canadian fugitive obtained a license to practice medicine in Florida, displaying how Florida's licensing requirements are virtually meaningless despite the legislature's efforts.

While hospitals are in the best position to perform certain screening duties, the state should not be able to use this excuse to abdicate its role as a licensor and regulator of the medical profession. Shifting these responsibilities to the hospitals is detrimental to the public as they are exposed to a greater risk of injury because there is effectively only one stopgap between incompetent physicians and their practice in the hospitals—the hospital itself. Ironically, the state's abdication of its licensing role contributes to the vicious medical malpractice spiral that it originally intended to curb through enactment of the Comprehensive

---

initial license as a physician or to renew their license must apply to the Department of Professional Regulation and fulfill certain requirements.

FLA. STAT. § 458.311(1) (1989) contains the criteria which physicians must meet to obtain an initial license, including that they: (1) be at least 21 years of age; (2) be of good moral character; (3) have not committed any crimes; (4) have graduated from medical school; and (5) have met certain medical education and postgraduate training requirements. The Department of Professional Regulation and the Board of Medicine are responsible for investigating and assuring that applicants fulfill these requirements and receive a passing examination score prior to being licensed. FLA. STAT. § 458.311(4) (1989). However, even applicants who have not met these licensure requirements may obtain the board's certification. This is because FLA. STAT. § 458.311(9) allows the board to restrict the scope of a physicians' practice or to place physicians on probation while certifying them for licenses.

FLA. STAT. § 458.319 (1989) governs the renewal of a physician's license which is required every two years. To obtain renewal, FLA. STAT. § 458.319(1) requires physicians submit a renewal application and fee, along with evidence that the applicant has actively practiced or taught at an accredited medical school within the previous four years. However, applicants who have not actively been involved with medicine for the requisite period may obtain renewal of their licenses provided they work under the supervision of another physician for a stated period.

In addition to this renewal criteria, FLA. STAT. § 455.213(5) (1989) requires applicants to complete educational courses approved by the Board of Medicine in order to "periodically demonstrate their professional competency." Applicants must complete at least 40 hours of continuing education every two years, of which five hours must ad-

Medical Malpractice Reform Act of 1985<sup>215</sup> which imposed screening duties upon the hospitals in the first place. Thus, the state must accept its role and actually enforce the current statutory licensing scheme as it exists on paper so that it has a meaningful regulatory effect and the public has two gatekeepers to rely upon.

In addition to enforcing the current licensing system, the state should develop new tools and programs through which it can improve the quality of health care in our state. These developments include: (1) auditing physicians' current practices; and (2) requiring physicians pass "practical" examinations to fulfill their mandatory continuing education requirement.

Florida should restructure its licensing statutes to insure that all initial and renewal applicants are periodically audited. Since a license is supposed to indicate that one has the credentials and competence to practice medicine, all physicians should actually be required to demonstrate continued competence to retain their license. This could be accomplished by creating an audit committee of physicians who would review the licensee's treatment of a number of patients. Field teams could perform annual audits whereby they would observe certain aspects of the physician's practice and ask oral questions of the physician or specialist.<sup>216</sup> Indeed, the state currently employs auditors for banking purposes<sup>217</sup> and surely the public's health is at least as important as its fiscal well-being.

If Florida creates a true licensing system which acts as a screening mechanism to weed out incompetent and unqualified applicants, the benefits to the public will certainly outweigh any bureaucratic burdens. Although implementing an "audit" system will cost (taxpayers) money, this cost will be offset by an overall decline in medical costs. The reason for this decline is twofold. Initially, the overall quality of health care will increase as a direct result of the new licensing system and audit procedures because only proven, competent physicians will continue to treat patients. Second, as the quality of health care improves, malpractice insurance costs will decline because the insurer's risk of physician error will be significantly reduced.

In addition to field audits, the state should require physicians to

---

215. See generally, Hawkes, *Second Reformation*, *supra* note 174, at 747.

216. Such field teams could be utilized in response to specific complaints about certain practicing physicians.

217. See FLA. STAT. § 655.045 (1989) (sets forth the requirement for the periodic examination of all state financial institutions).



participate in meaningful education programs in their practice areas, which programs culminate in a test. Today, Florida's statutes merely require physicians who would like to renew their license to observe a specified number of hours of educational courses.<sup>218</sup> By sitting through the required hours of courses, physicians are purportedly "demonstrat[ing] their professional competency." To actually make physicians "demonstrate" such competency, the state should create tests to be administered at the conclusion of every continuing education course. The examination could test practical aspects of medicine, such as presenting certain symptoms to the physicians and requesting them to supply the corresponding possible diagnoses or the proper steps in a particular type of surgery.

Should physicians not pass the initial examination, two events would occur. First, such physicians would be required to re-take the examination until they receive a passing score. Second, all physicians' names would be flagged in the state licensing records, possibly subjecting them to more frequent audits during the ensuing two year period. Creating and implementing this system would merely require the state to alter its current continuing education requirement.

While this education requirement would cause physicians to bear the burden of remaining current on day-to-day procedures, this is surely the least we can ask of those who reap tremendous monetary rewards by undertaking "one of mankind's most critically important and delicate fields of endeavour."<sup>219</sup>

## V. Conclusion

Hospitals are justifiably concerned with the current trend of hospital law. Rather than just shifting the responsibility to various institutions which has resulted in an added problem of escalating medical care costs, our policy makers must effectively enforce the current licensing system and implement new programs. Although the audit and testing procedures recommended herein may not be a panacea, such added mechanisms would benefit the public greatly while achieving the goal of quality health care.

*Leslie H. Friedland*

---

218. FLA. STAT. § 455.213(5) (1989).

219. *Beeck*, 18 Ariz. App. at \_\_\_, 500 P.2d at 1157.