Is Your ASC at Risk of Vicarious Liability in a Medical Malpractice Lawsuit?

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This article, written by Keith J. Roberts, describes what ASC owners should do to protect their facility against vicarious liability for a physician’s anesthesia providers or contracted employee’s errors.

Is the phrase “vicarious liability” foreign to you? If you are an ambulatory surgery center administrator, it shouldn’t be.

Generally, people are familiar with the concept of direct liability. It follows logically that a physician is sued for something he or she actually did, or should have done. In this instance, when a patient is able to establish that the physician deviated from the applicable standard of care, which resulted in injuries, the physician is held directly liable for medical malpractice.

In situations concerning vicarious liability, an outpatient ambulatory surgical facility could be held liable for damages as a result of the actions of its subcontractors, such as anesthesia providers. An ASC can be sued not only for the acts of its employees, but also for the acts of its non-employee sub-contractors.

In the ASC setting, it is not uncommon for anesthesia providers, and other service providers, to be engaged as a subcontractor (1099 tax status), rather than an employee (W-2 tax status). Importantly, ASC administrators should realize that the business model here does not insulate the ASC from liability.

An ASC may be held liable if an "apparent agency" relationship exists between the entity and the contractor. In this context, the entity will be deemed the "principal," and the contractor will be deemed the "agent." In the event that a medical malpractice action is filed by a patient, an ASC could be held liable for damages where a patient “reasonably believed” that a subcontractor was acting on the ASC's behalf.

Administrators should be aware that contract employees, such as physicians, assistants, nurses and other individuals subject to the ASC’s control, could expose the ASC to liability.

In order to establish "apparent agency" and assert a claim for vicarious liability, several elements are required. First, the principal (ASC) must communicate with the patient in a manner creating an impression that the independent contractor has the ability to act on the principal's behalf. Here, ASC employees refer to a subcontractor in a manner leading the patient to conclude that the subcontractor is a "staff member" of the center. Second, the patient must rely on the communications or actions of the ASC, leading the patient to conclude that the subcontractor has the authority to act on its behalf. In other words, the actions of the subcontractor alone are insufficient to create apparent agency. Finally, a patient must accept services based upon what he or she believes to be an agency relationship between the subcontractor and the ASC, rather than solely upon the skill level of the person providing the services. The patient must accept services believing that the ASC is providing a staff member to attend to the patient's needs, rather than an independent contractor personally selected by the patient.

The concept of vicarious liability when considering how patients are treated in the ASC context is troublesome. The providers of ancillary services at ASCs are typically selected by the ASC rather than by the patients themselves.

A New Jersey Appellate Court published a decision concerning the subject in the matter of Cordero v. Christ Hospital,
403 N.J. Super. 306, 958 A.2d 101. In Cordero, the court permitted a patient to assert liability against the hospital for the actions of a physician subcontractor acting as an "apparent agent" based upon the totality of circumstances. The Cordero court delineated relevant factors to be considered when determining "the totality of circumstances" in support of liability against the hospital, to include:

- Whether the hospital supplied the physician
- Whether the medical care provided is integral to the medical treatment received
- Any notice of the physician's independence from the hospital
- The patient's opportunity to reject the care or select a different physician
- The patient's contacts with the physician before the incident in question, and;
- Any special knowledge of the physician's contractual arrangement with the hospital

After applying these criteria, it becomes apparent that few facilities would be able to escape liability from an action based upon vicarious liability or "apparent authority."

Unfortunately, there is not a clear solution for ASC protection.

Certainly, patient admission forms should be amended to emphasize the independence of all non-employee personnel. Patients must be aware that certain services will be provided by individuals who are not acting as an "agent" of the ASC.

The imposition of liability for the actions of subcontractor personnel is a valid concern. Therefore, it has become critically important to assess the quality of all personnel providing services on a contract basis in the ASC context, and implement changes to inform patients of the relationship between the ASC and the professionals providing services.

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