Hospital Liability Alert

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Litigation Exposure From A "Cost Over Safety" Attitude

Hospitals today face ever expanding liability exposure as they navigate the day to day complexities of managing health care institutes. In surveying the legal landscape, we have seen some trends which may be instructive for a hospital's governing board and management team in business operations decision-making.

Recent large scale disasters- most notably Katrina and the BP oil spill-have resulted in increased scrutiny of management decisions. The precedent created by these cases may lead to increased liability for management decisions- even when such decisions appear facially reasonable.

The plaintiff's bar has seized upon these two disasters in order to focus upon the decision-making of managers on the issue of whether the cost of a product or device or other expenditure is justified to reduce the risk of harm to persons.

Cost/Profit over Safety

The holy grail for the plaintiff attorney is evidence that a hospital placed considerations of cost and profit over safety in managing the health care facility. Evidence that a safer alternative could have been chosen or, more significantly, was knowingly and consciously disregarded can be fatally expensive when presented to a jury in an injury case.

Padney v. MetroHealth Center—A Road Map For The Plaintiff's Bar?

In bringing suit challenging the decision-making of an entity's administrative board, plaintiff's lawyers and their expert witnesses make use of a variety of sources—for example, by showing the decision was at odds with the entity's own policies

Contributors

Kevin Joseph Burke
Vice Chairman
kburke@hinshawlaw.com
312-704-3488

Thomas R. Mulroy, III
Partner
tmulroy@hinshawlaw.com
312-704-3748

Megan L. Zust
Associate
mzust@hinshawlaw.com
312-704-3468

Contact Us
1-800-300-6812
info@hinshawlaw.com
www.hinshawlaw.com

HINSHAW & CULBERTSON LLP

and procedures, or by revealing evidence of cost-based (at the expense of safety) decisions contained within the entity's own internal emails or memoranda.

Information and statements contained within authoritative or scholarly medical articles can be equally damaging to the defense of a hospital's administrative decision-making. The case of Padney v. MetroHealth demonstrates how plaintiff's lawyers can use this type of evidence to support a claim against hospital administrators.

In *Padney*, a hospital employee was exposed to tuberculosis while assisting with an autopsy. Not only did the employee contract the disease himself, which led to protracted suffering and his ultimate death, but additionally, the employee's wife and daughter were infected with the disease.

The plaintiffs (the surviving wife and daughter) sued the hospital and accused it of having committed *intentional* wrongdoing. The law required that the plaintiffs show 1) that the hospital knew of the existence of a dangerous situation; and 2) that the hospital knew that harm to an employee would be "substantially certain" to occur if the employee were subjected to this danger. The complaint sought recovery for intentional misconduct, loss of consortium and services, emotional distress, and a demand for punitive damages.

In allowing the lawsuit to go forward, the court in *Padney* held that there was sufficient evidence to allow a jury to decide whether the hospital consciously disregarded a known risk. The court determined that the hospital was (or should have been) aware of a publication authored by the Center for Disease Control, in which the CDC published certain findings and guidelines to reduce the transmission of infectious diseases. At the time the decedent was exposed, the hospital autopsy room was not in strict compliance with these guidelines.

Next, the hospital challenged the idea that the hospital knew the harm was "substantially certain." Based on the evidence presented by the plaintiff, the likelihood of infection from one hour of exposure to the "non-compliant" conditions of the autopsy room would have been 25 to 30 percent. However, this 25 to 30 percent figure represented only the "converters"; those who have been infected, but whose immune systems have contained the disease.

Of the 25 to 30 percent of persons who had "converted," plaintiff's expert testified that only 5 to 10 percent of those persons would develop an active disease process. Of this 5 to 10 percent, fewer than half would result in death. Under cross-examination, the plaintiffs' expert further conceded that based on the data, there was only a 1.5 percent chance that the hospital employee would have contracted a fatal illness.

The hospital argued that these percentages could not support the legal requirement that the plaintiff show harm was "substantially" certain to occur.

The court rejected this argument and ruled that statistical assessments were not conclusive on the definition of "substantially." The court applied an analysis which included not only a consideration of the likelihood that harm will occur, but also an assessment of the seriousness of the harm if the risk does come to pass.

In finding that there was sufficient evidence to go to the jury on the question of whether the hospital had committed an intentional tort, the court also permitted the family members' claims for negligent infliction of emotional distress to go forward.

The reported decision did not reveal whether or not the trial involved any explicit claims of cost-cutting at the expense of safety. However, this case can serve as a guideline or road map to plaintiff's attorneys on what kind of evidence might

support an allegation of intentional wrongdoing against a hospital's administration. At the very least, this case serves as a guideline on how plaintiffs can use articles in the public domain to challenge the decision-making of hospital administrators.

Katrina's Wake

A recent case involving a New Orleans hospital provides an example of how hospital administrative business decisions may be subjected to this elevated level of scrutiny in negligence cases. In LaCoste v. Pendleton Methodist Hospital, the plaintiff alleged negligence for the failure to provide an emergency generator which would have prevented the plaintiff's death during the devastation brought by Hurricane Katrina. The plaintiff was an inpatient when the hurricane hit, and the ventilation supporting her respirator shut down.

In the *LaCoste* case, the plaintiff alleged that an emergency submersible generator could have been purchased for less than $10,000 and it would have sustained hospital power pending evacuation. The evidence of management's decision-making played a key role in establishing significant hospital exposure. The evidence produced included a memo authored by the executive vice president of the hospital. In the memo he states, "The first question is, do we have generators placed to accommodate an emergency flood with 15 feet of water? The answer to that question is no." The hospital administrator went on to write that fixing the problem would require relocating the generators, the fuel supply and an underground tunnel, which he estimated would cost $7.5 million dollars.

This case illustrates the dilemma facing hospitals with regard to expenditures and safety. The changing dynamic is that what was once easily defended as "an act of God" hurricane, may now be viewed as administrative willingness to favor expense concerns over safety concerns in the hospital setting.

Gulf Oil Spill

On April 20, 2010, eleven people died when the Deepwater Horizon deep-water oil rig exploded, and more than 4 million gallons of oil spewed into the Gulf of Mexico. This event was widely considered to be the worst ecologic disaster in US history.

In reporting on the investigations and hearings in the months following the explosion, various media reports focused on the claim that BP employed a "save-money" culture. The suggestion that the company had placed profits ahead of safety seemed to resonate with society, and it quickly became a huge seller of media. The media reported that officials were facing potential lawsuits, fines, penalties—even possible jail time.

At a federal hearing the week of October 5, 2010, an investigator revealed that BP's top manager on a drilling rig is given a performance evaluation that includes the category "Every Dollar Counts and Simplification."

Newsweek reported that investigations had revealed "a pattern of neglect and a culture skewed towards silencing whistle-blowers. The investigators described instances in which management flouted safety by neglecting aging equipment, pressured employees not to report problems, and cut short or delayed inspections to reduce production costs."

Since the oil spill, countless lawsuits have been filed, including more than thirty class actions. A multi-district litigation panel has been organized and is active in managing these cases. The significance to hospital administrators and business leaders generally is that the focus of profits over safety will be part of the social consciousness and news reporting for years to come. We assess these trends by determining what issues will impact the jury pool on any anticipated case. As

the public becomes more aware of the injury, fact based or not, it will be influenced.

Factors Recommended For Consideration

In order to present the best defense against challenges to hospital administrative decision-making, hospital administrations are encouraged to adopt the following guidelines:

1. Ensure that any policies or procedures promulgated by the hospital are closely followed, especially when the decision pertains to medical equipment and supplies. Plaintiffs often use deviations from these policies, no matter how trivial, as evidence against the hospital.

2. Avoid communications of any kind which tend to give the misleading impression that cost is a more important factor than safety. This is particularly directed to internal memos and emails, which are often informal and can often be taken out of context.

3. Make sure that the decision makers take into consideration any published literature pertaining to the decision at issue. Any information tending to raise safety issues should be taken into account. Likewise, any information tending to demonstrate there are comparably safer products or methods must also be taken into account. If the published literature is in the public domain, you should assume that plaintiff's attorneys and their experts will use the literature to challenge your administrative decisions. For example, in the *Padney* case, the court ruled that the hospital should have been aware of the findings in the CDC publication, and by failing to implement such findings the hospital may have committed an intentional tort.

4. Seek input from the "front line" employees—those who will actually be directly affected by the decision at issue. Demonstrating compliance with this guideline will not only help to establish that the administrators exercised the proper care before settling on one course of action versus another, but in some cases this step can be required under certain regulatory guidelines.

5. In the case of medical device purchases, establish that the device in question complies with any and all pertinent regulatory requirements and standards, such as those set forth by OSHA and the FDA.

6. When making "cost-based" decisions, especially those involving the purchase of medical equipment or supplies, be realistic about the costs of potential adverse safety events. These costs include enhanced lawsuits and director liability, increased insurance premiums, missed work time, union actions, and negative publicity, which is often overlooked in these decisions. Obviously the focus should always be on preventing the adverse event; even one adverse event can easily wipe out any savings realized from choosing a cheaper product.

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