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Hospital Liability: Implications of Recent Physician's Assistant Statutes

Daniel W. Coyne*

Usually by the time a legitimate problem facing our society is the subject of a one-hour segment of a television series,^A one is generally safe in assuming that that problem has reached crisis-proportions.

THAT THIS COUNTRY IS IN THE MIDST of a serious crisis in health care delivery has been so widely discussed as to have become a matter of common knowledge. The demand for health care services in the next generation has been projected to increase at a faster rate than the corresponding growth in population.¹ The cost of medical care has been skyrocketing and this is in no small sense due to the increase in malpractice litigation.² New methods must be devised to increase the efficient use of the available supply of physicians. "Among the innovations being tried with physicians is the development of new disciplines involving assistants to physicians."³ Increasing utilization of returning medics from the armed forces is being undertaken to help relieve the civilian manpower shortage.⁴ The legal implications of these developments range from problems of licensure to considerations of vicarious liability for an assistant's negligence (malpractice) or for the negligence of the assistant's supervising physician. It is with a species of this latter problem that this paper will be concerned. But one ought to take at least a passing glance at the professional medical development of this latest member of the health care team.

Just how and for what a physician's assistant is to be trained is yet predominantly an unresolved issue. The current status and the issues involved in the training of physician's assistants were examined in a recent article in the *Journal of the American Medical Association*.⁵ Twenty programs were generally described and a number of issues regarding physician's assistants were identified: e.g. role definition; organization of training programs; career development; rela-

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A National Broadcasting Company, "People Against Doctor Chapman," *The Bold Ones* (Dec. 6, 1970). This program dealt with a former Army medic who was charged with the illegal practice of medicine in the State of California.

¹ *Report of the National Advisory Commission on Health Manpower* (Nov. 20, 1967).

² Letter from Kenneth Williamson, Deputy Director of the American Hospital Association to Abraham Ribicoff, in Subcommittee on Executive Reorganization, Senate Comm. on Government Operations, 91st Congress, 1st Sess; *Medical Malpractice: The Patient Versus the Physician* 1005 (Comm. Print 1969).

³ Letourneau, *The Assistant Physician*, 105 *HOSPITAL MANAGEMENT* 55 (April 1968).

⁴ N.Y. Times, Dec. 13, 1970, at 80.

⁵ Kadish & Long, *The Training of Physician Assistants: Status and Issues*, 212 *J.A.M.A.* 1047 (1970).

tionship to costs of medical care; professional and consumer acceptability; etc.⁶ Yet our concern is not with the medical role definition of the physician's assistant,⁷ although it is realized that the precise delineations of that definition will undoubtedly have some legal implications. At the present time there is one central fact to be kept in mind regarding the physician's assistant—he is a dependent entity,⁸ i.e. he may only legitimately function as an extension of, and under the control of, a supervising physician. That fact of subordination to the supervising physician implies automatic liability for the supervisor—yet what does it portend, if anything, for the question of hospital liability arising out of the use of a physician's assistant?

The question raised above will be analyzed in the context of three state statutes which have recently been enacted: the California Physician's Assistant Law adopted in September 1970;⁹ the Colorado Child Health Associate Law adopted in July 1969;¹⁰ and the Florida Exception to the Medical Practice Act authorizing the use of a "physician's trained assistant" adopted in June 1970.¹¹ The California law affirmatively encourages the utilization of physician's assistants by physicians¹² and generally authorizes an assistant "to perform medical services under the supervision of a physician or physicians approved by the board (State Board of Medical Examiners) to supervise such assistant."¹³ The law does not seem to prohibit the employment of physician's assistants by hospitals but it does restrict any one physician to the supervision of no more than two physician's assistants at any one time.¹⁴ The Colorado law authorizes the licensing of a child health associate "as an employee of and under the direction and supervision of a physician whose practice to a substantial extent is in pediatrics."¹⁵ That wording would seem to preclude direct hospital employment of a child health associate, but still allow employment by a hospital employed physician. An exception to this restriction allows employment of a child health associate by a government agency but such an associate must be "individually supervised by a designated and approved physician."¹⁶ Furthermore, the law strongly

⁶ *Id.* at 1049-51.

⁷ For descriptions of the type of work done generally by physicians assistants see: Middleton, *How New Assistants Will Help Hospital Physicians*, *HOSPITAL PHYSICIAN*, Aug., 1968 at 62; Ingles, *A New Health Worker*, 68 AM. J. NURSING 1059 (1968); Wall St. J. April 23, 1970, at 1.

⁸ Estes, *The Duke Physician Assistant Program: A Progress Report*, 17 ARCH. ENVIRON. HEALTH (Chicago) 690 (1968).

⁹ CAL. BUS. & PROF. CODE § 2510 (1971).

¹⁰ COLO. REV. STAT. ANN. § 91-10-1 to-15 (Supp. 1969).

¹¹ FLA. STAT. 458.13 (4) (1970).

¹² CAL. BUS. & PROF. CODE § 2510 (1971).

¹³ *Id.* § 2511.

¹⁴ *Id.* § 2516. A situation could be envisioned in which a hospital employed physician's assistant is assigned to a ward and has been approved for supervision by a number of physicians (both house and staff).

¹⁵ COLO. REV. STAT. ANN. § 91-10-2 (5) (Supp. 1969).

¹⁶ *Id.* § 91-10-13.

implies a one-to-one relationship of physician and assistant.¹⁷ The Florida law is a broadly worded exception to the medical practice act and as such seems to adopt no restrictions except that "such service be rendered under the responsible supervision and control of a licensed physician."¹⁸ The problems raised by the licensure question are numerous and have been,¹⁹ or are being,²⁰ competently discussed elsewhere. To adequately analyze the hospital liability implications of these recent physician's assistant statutes, it is first necessary to examine recent trends in hospital liability law.

Trends In The Law Of Hospital Liability

... whether we are willing to accept it or not, we are practising in an age of expanding liability, and this is true whether we are talking about the legal profession, the medical profession, the government, or charitable organizations.^B

In the past, an injured patient often was prevented from recovering damages from a hospital by the doctrine of charitable immunity (most private hospitals are legally classified as non-profit, or charitable, corporations)²¹ by the doctrine of governmental immunity,²² or by the fact that a hospital was considered to only provide the physical structure wherein members of the medical profession would undertake treatment of patients.²³ Yet those barriers have for the most part been discarded. As early as 1942, in a scholarly opinion, the doctrine of charitable immunity was thoroughly repudiated:²⁴

The incorporated charity should respond as do private individuals, business corporations and others, when it does good in the wrong way.²⁵

¹⁷ *Id.* § 91-10-3 (5).

¹⁸ FLA. STAT. 458.13 (4) (1970). There are three other States which have enacted exceptions to their medical acts that authorize delegation by physicians to assistants: ARIZ. REV. STAT. ANN. §32-1421 (1956); KAN. STAT. ANN. §65-2872 g (1964); and OKLA. STAT. tit. 59 § 492 (1971). This paper will not consider the liability implications of these three statutes. It is the author's intention only to consider the three most recent efforts in the Physician's Assistant area.

¹⁹ Curran, *New Paramedical Personnel—To License or not to License*, N.E.J. M. 232: 1085-1086 (1970) (includes a perceptive criticism of the Colorado Child Health Associate Law); and Department of Community Services, Duke University, *Model Legislation Project for Physician's Assistants* (1970) (an excellent analysis of the issues involved in, and the alternative approaches to, the licensure problem).

²⁰ Address by William J. Curran, *Am. Public Health Ass'n.* Annual Meeting, Houston, Tex., Oct. 26, 1970 (An Evaluation of the Ariz., Cal., Colo., Kan., and Okla. approaches to licensure by a leading authority in the medicolegal field).

^B Mueller, *The Expanding Duty of the Hospital to the Patient*, 47 NEB. L. REV. 337, 338 (1967).

²¹ For a general discussion of the doctrine of charitable immunity see: PROSSER, *HANDBOOK OF THE LAW OF TORTS*, § 127 at 1019-1024 (3rd ed. 1964).

²² *Id.* at 996-1013, for a general discussion of the doctrine of governmental immunity.

²³ *Schloendorff v. The Society of the New York Hosp.*, 211 N.Y. 125, 105 N.E. 92 (1914) discussed *infra* at note 31 is an example of this thinking.

²⁴ *Presidents and Directors of Georgetown College v. Hughes*, 130 F.2d 810 (D.C. Cir. 1942).

²⁵ *Id.* at 828.

Since Judge Rutledge's devastating opinion, there has been a definite trend towards the complete abolition of charitable immunity. Today only a distinct minority of jurisdictions retain even a remnant of the doctrine.²⁶ Governmental immunity has followed somewhat the same course. In 1961, Justice Roger Traynor of the California Supreme Court expressed the prevailing attitude:

After re-evaluation of the rule of governmental immunity from tort liability, we have concluded that it must be discarded as mistaken and unjust.²⁷

The majority of jurisdictions have likewise repudiated the doctrine of governmental immunity, although the repudiation does not seem to be as widespread as the rejection of the charitable immunity doctrine.²⁸ Once over the immunity hurdle, the injured patient had available two legal theories for recovery against a hospital: respondeat superior²⁹ and corporate negligence.³⁰ It is to an examination of developments in these substantive areas that we now turn.

For years the prevailing rule regarding a hospital and its vicarious liability for the negligence of a physician was that which prevailed in a 1914 New York opinion by Justice Benjamin Cardozo:

The wrong was not that of the hospital; it was that of physicians who were not the defendant's servants, but were pursuing an independent calling, a profession sanctioned by a solemn oath, and safeguarded by stringent penalties. If in serving their patient, they violated her commands, the responsibility is not the defendant's; it is theirs. There is no distinction in that respect between the visiting and the resident physicians.³¹

However, since then, great inroads have been made into the above theory. In 1952, the Minnesota Supreme Court, in a case³² wherein a resident physician in a hospital was negligent in inspecting the traction on a broken leg, specifically refused to follow the above theory:

²⁶ LOUISELL & WILLIAMS, *MEDICAL MALPRACTICE*, No. 17.07-17.57, at 528-540.7 (1970). For a summary of the state of the law when written see: Harty, *The Status of the Doctrine of Charitable Immunity in Hospital Cases*, 25 OHIO ST. L. J. 343 (1964).

²⁷ *Muskopf v. Corning Hosp. Dist.*, 55 Cal.2d 211, 213, 11 Cal. Rptr. 89, 90, 359 P.2d 457, 458 (1961).

²⁸ LOUISELL & WILLIAMS, *supra* note 26.

²⁹ "The recognized rule is that an employer is liable to a third person for an injury to either person or property which results from the tortious conduct of an employee acting within the scope of his employment." 35 AM. JUR. *Master and Servant* § 552 at 983 (1941).

³⁰ "Corporate negligence is the failure of those entrusted with the task of providing the accommodations and facilities necessary to carry out the charitable purposes of the corporation to follow in a given situation the established standard of conduct to which the corporation should conform." *Bader v. United Orthodox Synagogue*, 148 Conn. 449, 453 172 A.2d 192, 194 (1961).

³¹ *Schloendoerff v. The Society of the New York Hosp.*, 211 N.Y. 125, 105 N.E. 92, 94 (1914). This case involved a patient who had consented to an examination by a resident but not to an operation. While the patient was under anesthesia, the resident operated and gangrene set in.

³² *Moeller v. Hauser*, 237 Minn. 368, 54 N.W.2d 639 (1952).

While it appears from the record that the staff doctors have the final responsibility for the care of patients and that they supervise the activities of the resident doctor to some extent, there is nothing to indicate that this supervision extends to the duties which the residents perform as a part of the general hospital routine.³³

It does not seem reasonable to us to characterize a resident doctor . . . as an independent contractor while he performs the routine hospital functions for which he is hired . . . it is clear that the residents are paid employees . . .³⁴

The relationship of a resident to a hospital is not unlike that of an interne or nurse. All three groups are specially and highly trained. All three are engaged in supplying the element of trained medical care which distinguishes a hospital from a hotel. Under these circumstances, we must hold that resident doctor who receives his compensation from the hospital while providing medical care as part of regular hospital routine is a servant of the hospital so as to make the hospital liable for his negligence under the doctrine of *respondeat superior*.³⁵

The growing responsibility of a hospital is implicit in the above quoted excerpts from the *Moeller* case.

However, the theoretical foundation for the recent expansion or institutional responsibility for hospitals was set forth in the landmark opinion of Justice Fuld in *Bing v. Thunig*³⁶ (a case which on its facts applied only to nurses):

The conception that the hospital does not undertake to treat the patient, does not undertake to act through its doctors and nurses, but undertakes instead simply to procure them to act upon their own responsibility, no longer reflects the fact. Present-day hospitals, as their manner of operation plainly demonstrates, do far more than furnish facilities for treatment. They regularly employ on a salary basis a large staff of physicians, nurses and internes, as well as administrative and manual workers, and they charge patients for medical care and treatment, collecting for such services, if necessary, by legal action. Certainly, the person who avails himself of "hospital facilities" expects that the hospital will attempt to cure him, not that its nurses or other employees will act on their own responsibility.

Hospitals should, in short, shoulder the responsibilities borne by everyone else. There is no reason to continue their exemption from the universal rule of *respondeat superior*. The test should be, for these institutions, whether charitable or profit-making, as it is for every other employer, was the person who committed the negligent injury-producing act one of its employees and, if he was acting within the scope of his employment.³⁷

³³ *Id.* at 377, 54 N.W.2d at 645.

³⁴ *Id.* at 379, 54 N.W.2d at 645.

³⁵ *Id.*, 54 N.W.2d at 646.

³⁶ *Bing v. Thunig*, 2 N.Y.2d 656, 163 N.Y.S.2d 3, 143 N.E.2d 3 (1957).

³⁷ *Id.* at 666-667, 163 N.Y.S.2d at 11, 143 N.E.2d at 8.

With that opinion the stage was set for the application of the corporate negligence theory to hospitals.

On a November Saturday in 1960 a young man was playing football for his college team, was injured, and the injury was diagnosed as two broken bones below the right knee. A cast (later found to have been too tight) was applied by a 58-year old general practitioner. The patient complained often of severe pain but his complaints were virtually ignored. By the time a specialist was consulted, decay had proceeded to the point where it was necessary to amputate the patient's right leg eight inches below the knee. The treating physician settled out of court, but recovery was sought against the hospital on the theory that the hospital owed a duty to a patient to oversee his care and treatment. The Illinois Supreme Court, in the controversial *Darling v. Charleston Community Memorial Hospital* case,³⁸ held that the failure of the hospital to review the general practitioner's work or to require consultation could reasonably have been found to have been negligence. However, the true significance of the *Darling* case may only be had by an examination of Justice Walter Schaeffer's powerful opinion.

In discussing the standard of care required of a hospital, the Illinois Court cited with approval the above quotation from *Bing v. Thunig*.³⁹ But the court did not stop with a statement of that theory, it went on to approve the introduction into evidence of: (1) the rules and regulations of the Illinois Department of Public Health under the Hospital Licensing Act, (2) the standards for hospital accreditation of the Joint Commission of Accreditation of Hospitals, and (3) the by-laws, rules, and regulations of the defendant hospital; in the determination of the standard of care for determining hospital liability:

The Standards for Hospital Accreditation, the state licensing regulations and the defendant's bylaws demonstrate that the medical profession and other responsible authorities regard it as both desirable and feasible that a hospital assume certain responsibilities for the care of the patient.⁴⁰

The decision also held that conformity with the standard of care customarily followed by hospitals generally in its community was not to be conclusive in the determination of whether or not the defendant hospital had met the applicable standard of care. In other words, such conformity was only evidence of the observation of the required reasonable conduct as determined by the jury.

³⁸ *Darling v. Charleston Community Memorial Hosp.*, 33 Ill.2d 326, 211 N.E.2d 253 (1965), cert. denied, 383 U.S. 946 (1966). A full comprehension of the aggravated nature of the negligence in this case can only be had by a reading of the opinion of the lower appellate court, 50 Ill. App.2d 253, 200 N.E.2d 149 (1964). For a critical commentary on the *Darling* Case see: Note, *Hospital Liability—A New Duty of Care*, 19 MAINE L. REV. 102 (1967).

³⁹ *Id.* at 332, 211 N.E.2d at 257.

⁴⁰ *Id.*

The reaction of the American Medical Association to the *Darling* case was quickly and clearly expressed;

The effect of this decision is unfortunate, since it appears to place a hospital in the position where it must exercise control over the practice of medicine by physicians on its attending staff to avoid liability. This is apt to encourage control of the practice of medicine by persons who are not licensed physicians. The decision is also unfortunate because it is apt to discourage the adoption of high standards which are intended to improve the level of hospital care, but which may now be misinterpreted as a basis for liability.⁴¹

The hospital has clearly been given a new standard of care to which it will be held responsible (at least in Illinois). Two writers have expressed the method by which courts will judge hospitals:

The effect of the *Darling* decision, when considered with the *Bing* case and others, is to state that the hospital has a direct duty to the patient to provide medical services consistent with regulatory and professionally accepted standards . . .⁴²

The State of Michigan has even gone so far as to apparently express this new duty by statute: "The governing board of each hospital shall be responsible for the operation of the hospital, the selection of the medical staff, and for the *quality of care rendered* in the hospital."⁴³

It should be evident that there is a definite trend towards holding a hospital liable either for the negligence of an employee or for its failure to have properly overseen patient care on its premises.

Defense counsel faced with a malpractice charge against a hospital would be unwise to rely too strongly on earlier decisions holding that a hospital cannot be made liable for the results of improper medical treatment administered by a non-employee physician. If it is true that hospitals do, under the modern practice, effectively guide and control the actions of the doctors using their facilities, it is almost inevitable that, sooner or later, responsibility will follow this power.⁴⁴

The structure and operation of a modern hospital have brought about increased legal responsibility. "The fundamental trends in the law of hospital liability clearly show that the institutionalization of medical care results in the institutionalization of liability."⁴⁵

⁴¹ 12 *Citation* 82 (1965).

⁴² Shain & Southwick, *State Licensing Regulations and Hospital Liability*, PUBLIC HEALTH REPORTS 582 (July 1966).

⁴³ MICH. COMP. LAWS ANN. § 331.422 (1968), (Emphasis supplied). As of January 8, 1971, there were no regulations adopted which further defined the above duty. Letter from Hermann A. Ziel Jr., M.D., Chief of Bureau of Health Facilities, Department of Public Health, State of Michigan, to author, Jan. 8, 1971.

⁴⁴ Annot., 14 A.L.R.3d 873 at 879 (1967).

⁴⁵ Southwick, *The Hospital's New Responsibility*, 17 CLEVE. MAR. L. REV. 146 at 159 (1968).

Hospital Liability and the Physician's Assistant⁴⁶

Will the emergence of the physician's assistant as a separately sanctioned member of the health care delivery team increase the potential liability of a hospital? As noted above, the liability implications of three recent physician's assistant authorization statutes will be examined. A comparative approach, on the basis of issues involved, to this analysis has been chosen. It is intended that this approach will aid in the development of conclusions as to what the law ought to be in this matter. However within the discussion of each issue, the section that deals with each State will be readily identifiable by the reader so that he might more easily examine each State by itself.

Trends in the Law of Hospital Liability

California

California had completely abandoned the doctrine of charitable immunity in 1951.⁴⁷ The doctrine of governmental immunity was discarded in 1961.⁴⁸ Following the judicial repudiation of governmental immunity, the California legislature enacted a statute providing that all government hospitals are generally subject to tort liability.⁴⁹ That statute, and its exceptions, is of course the controlling law.

The emphasis in California has been on liability via *respondeat superior* rather than under a theory of corporate negligence. The noted case of *Seneris v. Haas*⁵⁰ is indicative of this inclination. In that case, a patient, who had been admitted to the hospital as a routine obstetrical case, had an uncomplicated delivery of a baby girl, had undergone a spinal anesthetic, and had awakened the next morning unable to move her legs, sought damages from the hospital for the alleged negligence of the anesthesiologist. The hospital was held liable under a theory of *respondeat superior* as the defendant anesthesiologist practiced at no other hospitals, had no office of his own, and was found to be an "ostensible agent" of the hospital. Yet there are limits to the application of *respondeat superior* for the negligence of a physician. In *Mayers v. Litow*,⁵¹ the appellate court affirmed a nonsuit against a hospital for the alleged negligence of two doctors who were on its staff and had allegedly damaged the recurrent larynx-

⁴⁶ This discussion assumes: that the Physician's Assistant would be properly qualified and licensed; that the hospital was not negligent in employing or extending staff privileges to the supervising physician; any negligence of the Physician's Assistant would occur in his role as Physician's Assistant (i.e. not driving an ambulance or doing some non-medical care related task); and that the patient involved has given his informed consent to be cared for by a Physician's Assistant, cf. *Inderbitzen v. Lane Hospital*, 124 Cal.App. 462, 12 P.2d 744 (1932). (Medical students examined patient without her consent). These assumptions apply throughout this study.

⁴⁷ *Malloy v. Fong*, 37 Cal.2d, 356, 232 P.2d 241 (1951).

⁴⁸ *Muskopf v. Corning Hosp. Dist.*, 55 Cal.2d 211, 213, 11 Cal. Rptr. 89, 90, 359 P.2d 457, 458 (1961).

⁴⁹ CAL. GOVT. CODE § 815.2 (1966).

⁵⁰ *Seneris v. Haas*, 45 Cal.2d 811, 291 P.2d 915 (1955).

⁵¹ *Mayers v. Litow*, 154 Cal.App.2d 413, 316 P.2d 351 (1957).

geal nerve in the course of a thyroidectomy. "Normally the question of agency is one of fact for the jury . . . But in this case there is nothing in the record from which it may legitimately be inferred that defendant Litow or Dr. Feinstein was an agent or employee of the hospital."⁵² Thus although it appears that the California courts are willing to invoke *respondeat superior* against a hospital, there must be some connection between the physician and the hospital other than mere staff privileges for the doctrine to apply.

No reported cases in California were found which held a hospital liable for the negligence of a physician under a theory of corporate negligence. Nor were any statutes or regulations located which might serve as a basis for a finding of a breach of an institutional duty of a hospital to a patient for the quality of care rendered. However, there have been cases involving the responsibility of a hospital to ensure adequate nursing care,⁵³ but those have all been founded on a theory of *respondeat superior*. Thus, it would seem, that to hold a hospital liable in California as a result of deficient medical care, the negligence must be on the part of an employee, or an agent, of the hospital.

Colorado

The state of the law of hospital liability in Colorado is in marked contrast to that of California. Colorado still retains a remnant of the charitable immunity doctrine in that no execution of a judgment may be had upon any property or funds dedicated to a hospital's charitable purpose.⁵⁴ But note that a suit may be maintained and a judgment rendered against a hospital which is a charitable institution. The doctrine of governmental immunity is still in force: "... in the absence of a statute creating such liability, the state and its instrumentalities are not liable in tort."⁵⁵ No statutes were discovered which waived such immunity and in 1967 a Colorado court specifically refused to deal with the question of the effect of liability insurance on the liability of a unit of government.⁵⁶ Thus, it appears as if there remain substantial immunity obstacles to recovery against a hospital in Colorado.

Perhaps as a result of the above roadblocks to a suit, Colorado has refused to hold a hospital liable for the negligence of its employee-physicians. The judicial reasoning of Colorado was clearly expressed in the dismissal of a complaint against a mining company (which was not a charitable institution) which had operated a hospital and

⁵² *Id.* at 417-18, 316 P.2d at 354.

⁵³ *E.g.*, *Rice v. California Lutheran Hosp.* 27 Cal.2d 296, 163 P.2d 860 (1945) and *Mundt v. Alta Bates Hospital*, 223 Cal. App.2d 413, 35 Cal. Rptr. 848 (1963).

⁵⁴ *Hemenway v. Presbyterian Hosp. Ass'n. of Colorado*, 161 Colo. 42, 419 P.2d 312 (1966).

⁵⁵ *Faber v. State*, 143 Colo. 240, 242, 353 P.2d 609, 610 (1960).

⁵⁶ *Valdez v. County of Moffat*, 161 Colo. 361, 423 P.2d 7 (1967).

had employed a surgeon who had negligently left a large gauze pad within the patient's abdomen.

The relation between doctor and patient is personal. That a hospital employs doctors on its staff does not make it liable for the discharge of their professional duty, since it is powerless, under the law, to command or forbid any act by them in the practice of their profession. Unless it employs those whose want of skill is known, or should be known, to it, or by some special conduct or neglect makes itself responsible for their malpractice it cannot be held liable therefor.⁵⁷

Note that the last sentence of the above quotation appears to allow for the possibility of holding a hospital liable for the negligence of a physician under exceptional circumstances.

Yet even in Colorado the national trend towards increased institutional liability for hospitals is beginning to have an effect. The landmark case of *Bernardi v. Community Hospital Association*⁵⁸ held a hospital liable under the heretofore rejected theory of *respondeat superior* for the negligence of a nurse-employee in giving an injection to a patient into or near the sciatic nerve thereby causing the patient to lose the normal use of her right foot.

In this day and age a hospital should be responsible for the acts of its nurses within the scope of their employment, irrespective of whether they are acting administratively or professionally.⁵⁹

However, the court went on to comment: "Expressly this opinion relates only to nurses. Also, it should be borne in mind that this decision relates only to the case in which the nurse acts out of the presence of the doctor."⁶⁰ On its facts the decision can be said to be a quite narrow ruling, however, one must often look to the dictum to comprehend the development of the law. The Court not only cited the *Bing*⁶¹ case with approval, it quoted more than a full page in the reports from the *Bing* opinion.⁶² Yet, for the purposes of this paper, it must be noted that it was the hospital, and not the doctor, that was in the position of supervision and control over the negligent nurse.

Florida

Charitable immunity in Florida was abolished as to paying patients in 1940⁶³ and stated to have been wholly abandoned by 1953.⁶⁴ The question as to whether or not a government hospital is answerable in tort depends on which level of government operates the

⁵⁷ *Rosanne v. Senger*, 112 Colo. 363, 366, 149 P.2d 372, 374 (1944). This reasoning was followed in a 1962 case alleging hospital responsibility for the negligence of a surgical resident. *Moon v. Mercy Hospital*, 150 Colo. 430, 373 P.2d 944 (1962).

⁵⁸ *Bernardi v. Community Hosp. Ass'n.*, 443 P.2d 708 (Colo. 1968).

⁵⁹ *Id.* at 713.

⁶⁰ *Id.*

⁶¹ *Bing v. Thunig*, 2 N.Y.2d 656, 163 N.Y.S.2d 3, 143 N.E.2d (1957).

⁶² *Bernardi v. Community Hosp. Ass'n.*, 443 P.2d at 711-713.

⁶³ *Nicholson v. Good Samaritan Hosp.*, 145 Fla. 360, 199 So. 344 (1940).

⁶⁴ *Wilson v. Lee Memorial Hosp.*, 65 So.2d 40 (Fla. 1953) (dictum).

hospital. Municipal hospitals are subject to tort liability to all persons;⁶⁵ county hospitals are subject to tort liability to paying patients;⁶⁶ while State hospitals enjoy immunity unless the State seeks to recover damages in tort in which case it would be subject to a counterclaim arising out of the same transaction or occurrence (a highly unlikely, though not impossible, situation in a case involving a Physician's Assistant).⁶⁷ After one works his way through the above maze, he is welcomed by a sensible set of rules devised by the courts of Florida on the subject of hospital liability.

Florida is in accord with the afore-discussed national trend towards a greater potential for hospital liability. Although the Florida courts have been expanding the scope of vicarious liability for the hospital, something more than the mere use of its premises must be alleged in order to state a legitimate cause of action.⁶⁸ Yet the Florida judiciary is willing to hold a hospital liable where it is determined that the negligent professional was an employee or an agent of the defendant hospital: "... the rule that under the doctrine of *respondeat superior* a hospital, private or charitable, is liable for the torts of its employees. Such is the rule in this state.⁶⁹ In other words, *respondeat superior* is applied whenever an employment or agency relationship has been determined to exist.

Perhaps the most significant case for Physician's Assistants and hospital liability involved an intern who allegedly was negligent in the treatment of the patient of a private physician.⁷⁰ The significant fact is that in Florida interns are not required to be licensed to practice in a hospital⁷¹ and in this case the intern was not licensed. While admittedly the activities of the intern were most likely much more extensive than those which would be undertaken by a Physician's Assistant, the reasoning of the court is nevertheless relevant in assessing how it would handle a problem involving a Physician's Assistant:

The important question is not whether or not he remains the servant of the general employer as to matters generally, but whether or not, as to the act in question, he is acting in the business of and under the direction of one or the other.⁷²

Thus, the test seems to be broader than solely a question of who is the employer. The fact of control is significant, if not dispositive, of an allegation of vicarious liability for the negligence of one assisting an independent physician.

⁶⁵ *City of Miami v. Simpson*, 172 So.2d 435 (Fla. 1953).

⁶⁶ *Suwanee County Hosp. Corp. v. Golden*, 56 So.2d 911 (Fla. 1952).

⁶⁷ Fla. Extraordinary Session House Bill No. 49-XX, Ch. 67-2204 (1967).

⁶⁸ *Snead v. LeJeune Road Hosp. Inc.*, 196 So.2d 179 (Fla. 1967).

⁶⁹ *Wilson v. Lee Memorial Hosp.*, 65 So.2d 40, 41 (Fla. 1953).

⁷⁰ *Parmerter v. Osteopathic General Hosp.*, 196 So.2d 505 (Fla. 1967).

⁷¹ FLA. STAT. 458.13 (4) (1970).

⁷² *Parmerter v. Osteopathic General Hosp.*, 196 So.2d 505, 507 (1967), citing RESTATEMENT OF AGENCY 2d § 227 (1958).

The courts of Florida while having restricted their hospital liability law to *respondeat superior* in the final disposition of any case, have nonetheless expressed concepts which might someday find themselves the basis of an opinion holding a hospital liable under a theory of corporate negligence. In 1966 a Florida appellate court reversed a directed verdict in favor of the defendant hospital in a wrongful death action wherein the deceased had been discharged from the hospital and died within eleven hours of an subdural hematoma.⁷³ The court said that the hospital employees might not have exercised "such reasonable care toward the deceased as his known condition required." In 1967, in another wrongful death action, a Florida court reversed the granting of a motion for summary judgment in favor of the defendant hospital.⁷⁴ The deceased had expired within one month after receiving an injection of demerol and scopolamine as prescribed by her physician. The physician had not sought consultation which might have led to a cesarean section rather than the ill-fated inducement of labor. The court observed that the amount of care to be exercised by a hospital "is measured by the capacity of the patient to care for herself." The seed for the future emergence of the doctrine of corporate negligence for hospitals has been sown in Florida. When and if the doctrine will be adopted is a topic for another paper.

Liability Implications of the Physician's Assistant Statute Itself

California

The California Physician's Assistant Law requires that a Physician's Assistant be supervised by a physician who has been approved by the State Board of Medical Examiners to supervise such assistant.⁷⁵ Yet that section and other provisions of the law do not seem to preclude the employment of a Physician's Assistant by a hospital. But if a hospital intends to employ a Physician's Assistant it should ensure: (1) that any physician who might utilize an assistant's services has been approved to supervise such assistant;⁷⁶ (2) that any potential supervising physician not supervise more than two Physician's Assistants at any one time;⁷⁷ and (3) that any task performed by a Physician's Assistant be within the job description submitted to the State Board of Medical Examiners.⁷⁸ Violation of any one of these above provisions would constitute admissible evidence of departure from a statutory requirement, but it would not be conclusive as to negligence and causation in any given liability suit. Furthermore, there is a brief list of medical services which may not be per-

⁷³ *Reeves v. North Brownard Hosp. Dist.*, 191 So.2d 307 (Fla. 1966).

⁷⁴ *Lab v. Hall*, 200 So.2d 556 (Fla. 1967).

⁷⁵ CAL. BUS. & PROF. CODE § 2510 (1971).

⁷⁶ *Id.*

⁷⁷ *Id.* at § 2516.

⁷⁸ *Id.* at § 2516 (c).

formed by any Physician's Assistant;⁷⁹ a hospital should make it clear to all involved with such assistants that these prohibitions are to be strictly observed.

The heart of the California Physician's Assistant Law for liability purposes is §2512 which sets forth the general authorization for this latest category of health professional:

"Notwithstanding any other provision of law, a physician's assistant may perform medical service when such services are rendered under the supervision of a licensed physician or physicians approved by the board.⁸⁰

Responsibility has been placed in the hands of the supervising physician and there seems to be little doubt but that such physician would be held liable for the negligence of an assistant-supervisee or for his own negligent supervision of the assistant. Yet what of a hospital which employs an assistant? of the hospital whose physician-employee employs the assistant? or of the hospital where a physician with staff privileges whose assistant is negligent?⁸¹

Colorado

The Colorado Child Health Associate Law is a fine example of much that is wrong with medical licensure laws. Although the Colorado legislature is to be applauded for its concern for the protection of patients, this complex statute certainly appears to be a case where the cure may be worse than the problem it was designed to attack. The law is not only overly detailed, but it is also overly restrictive regarding the activities of the Child Health Associate.⁸² The liability implications for an employing physician are evident and are even somewhat set forth in the statute itself:

Nothing in this article shall be construed to relieve the physician of the professional or legal responsibilities for the care and treatment of his patients . . . a physician . . . shall not delegate to a child health associate the performance of, or permit a child health associate to perform, any act or duty not authorized by this article, and such physician shall exercise such direction, supervision, and control over such child health associate as will assure the patients under the care of such child health associate will receive medical care and treatment of high quality.⁸³

That would appear to create a rather high standard of care regarding the duty of a physician to his patient when utilizing a Child Health Associate. But what of the hospital which might become involved, what is its potential liability?

⁷⁹ *Id.* at 2514.

⁸⁰ *Id.* at § 2512.

⁸¹ Various hypothetical situations will be considered later in this paper.

⁸² For an excellent evaluation of the Colo. law see: Curran, *New Paramedical Personnel—to License or Not to License?* N.E.J.M. 282: 1085-86 (1970).

⁸³ COLO. REV. STAT. ANN., 91-10-4 (Supp. 1969).

The implications of the Colorado law are that a private (profit or non-profit) hospital may not directly employ a Child Health Associate as the act consistently speaks of the "employing physician."⁸⁴ In addition, there is a specific exclusionary provision which allows a federal, state, county, or municipal agency to employ a Child Health Associate if he is individually supervised by a designated and approved physician who shall supervise only one such Child Health Associate.⁸⁵ Furthermore, the section on limitation on practice provides that:

A child health associate may render pediatric services outside the professional offices of the employing physician if such services either are rendered in the direct and personal presence of such physician, or consist of the follow up care of a patient pursuant to the specific directions of such physician related to that particular patient.⁸⁶

Thus, it appears as if the Colorado law contemplates no significant involvement by a hospital with the practice of Child Health Associates. Even the exception for government hospitals contemplates individual supervision and control by a licensed physician. What appears to be potential sword of liability against supervising physicians, would also appear to be a shield against the liability of hospitals (assuming no repeated and flagrant violations of the statute within a particular hospital).

Florida

As the Florida Physician's Assistant legislation is in the form of an exception to the Medical Practice Act, space permits its full quotation:

Nothing in this act shall be so construed as to prohibit service rendered by a physician's trained assistant . . . , if such service be rendered under the responsible supervision and control of a licensed physician.⁸⁷

The Florida law is an enabling act which on its face merely removes the prohibition against the use of unlicensed personnel. Accordingly, there is nothing which indicates that a Physician's Assistant may not be employed by a hospital and at least have the hospital subject preliminarily to an allegation of *respondeat superior* for its employee's negligence. However, does the statutory requirement that the service "be rendered under the responsible supervision and control of a licensed physician" necessarily operate to make the assistant the "borrowed servant" of the physician—thus relieving the hospital of liability if the physician himself is not its employee or agent? Both the "borrowed servant" rule and the question of hospital liability for

⁸⁴ *Id.* at 91-10-3 (1) (4) (5) (6) (7).

⁸⁵ *Id.* at 91-10-13 (d).

⁸⁶ *Id.* at 91-10-3.

⁸⁷ FLA. STAT. 458.13 (4) (1970).

Physician's Assistant in the context of current law will be considered below.

*The Physician's Assistant and the Borrowed Servant Rule*⁸⁸

The borrowed servant rule has been defined as:

The rule is plain that when the general employer assigns his servant to duty for another and surrenders to the other direction and control in relation to the work to be done, the servant becomes the servant of the other insofar as his services relate to the work so controlled and directed. His general employer is no longer liable for the servant's torts committed in the directed and controlled work.⁸⁹

It should be noted that in the case of personnel who have independent as well as dependent functions, such as nurses, the question as to when responsibility of the controlling physician began is one of fact usually left to the jury.⁹⁰ But also note that the Physician's Assistant by definition is a dependent individual—subordinate to a licensed physician. It would thus appear that the "borrowed servant" rule would most often operate to relieve a hospital from liability for one of its own Physician's Assistants. In fact, the only situation in which the application of the borrowed servant rule would be applied to a hospital would be where one of its employee-physicians borrowed an independent physician's subordinate and the law was inclined to hold the hospital responsible for the negligence of a physician under *respondeat superior*. The law with respect to borrowed servants and Physician's Assistants in California, Colorado, and Florida will now be examined.

California

As discussed above, §2513 of the California Physician's Assistant Law directs that the services of a Physician's Assistant are to be "rendered under the supervision of a licensed physician . . . approved by the board." The law does not contemplate the lending of assistants amongst physicians as a physician must be prospectively approved to supervise any Physician's Assistant. Thus it would appear that under the California law the borrowed servant problem really does not exist for the law usually assigns responsibility where affirmative approval of a power (here the power to supervise x assistant) has been sought. It is this author's contention, in the light of the present law of hospital liability in California, that vicarious liability for California hospitals in cases involving Physician's Assistants will not turn on who employed the assistant, but rather on who employed the supervising physician.

⁸⁸ Generally regarding the borrowed servant rule and medical personnel, see: *Liability of Operating Surgeon for Negligence of Nurse Assisting Him*, 12 A.L.R.3d 1017 (1967).

⁸⁹ *St. Paul-Mercury Indemnity v. St. Joseph's Hosp.*, 212 Minn. 558, 561, 4 N.W.2d 637, 638 (1942).

⁹⁰ *Beadles v. Metayka*, 135 Colo. 366, 311 P.2d 711 (1957).

Colorado

As noted above, Colorado's Child Health Associate Law does not contemplate direct involvement of hospitals with Child Health Associates. The Colorado law strongly implies a one-to-one relationship between the physician and his new subordinate. As in California, supervising physicians must receive prospective approval to legitimately supervise a Child Health Associate. In addition, the Colorado law explicitly states that "Nothing in this act shall be construed to relieve the physician of . . . legal responsibility for the treatment of his patients."⁹¹ Considering the stringent requirements of prospective individual approval of a supervising physician under the Colorado law, the borrowed servant problem does not seem to be able to occur without a violation of the statute. Such a violation would have grave liability implications for the illegally supervising physician and would appear to protect even an employer-hospital—unless it had reason to know of the violation in time to stop it.

Florida

The borrowed servant situation would be most likely to occur under the Florida statute as it is the only one of the three statutes examined which does not require some form of prospective approval in order to legitimately supervise a Physician's Assistant. Assuming a borrowed servant situation occurs and negligence ensues, what sort of an analysis will the Florida courts employ to assign liability? The statute speaks in terms of "responsible supervision and control" and the general legal maxim is that responsibility follows control. Usually the question of right to control is left to the fact-finder,⁹² however when a statute imposes a duty to control then the question of right to control becomes one of law, not of fact. Thus, it would appear as if the decisive question as to the vicarious liability of a hospital for negligence involving a Physician's Assistant would not be who controlled the assistant (by law the physician had a duty to control the assistant), but rather was the supervising physician an employee (or agent) of the defendant hospital, and was the hospital subject to liability if one of its employee-physicians was held accountable in a case involving a Physician's Assistant?

Hospital Liability in Four Cases Involving Physician's Assistants

The four hypothetical cases considered below will be analyzed in the context of the relevant law in each of the three jurisdictions whose Physician's Assistant Statutes have been under consideration. The reader is strongly advised to reread the sections reviewing the trends in the law of hospital liability in each of the three States. The negligence in these cases could have occurred either by the Physician's Assistant himself or in the course of the supervision by the physician.

⁹¹ COLO. REV. STAT. ANN., 91-10-4 (Supp. 1969).

⁹² *Buzan v. Mercy Hosp., Inc.*, 203 So.2d 11 (Fla. 1967).

(1) The Physician's Assistant who was acting under the supervision and control of a physician who is not an employee (or agent) of the defendant hospital but does have staff privileges at the hospital.

California

As has been observed, the California courts have tended to base hospital liability on the existence or non-existence of an employment or agency relationship between the physician and the hospital. In the instant case, the courts would be most likely not to hold the hospital liable on the basis of the reasoning expressed in *Mayers v. Litow*,⁹³ which held that a hospital was not liable for the negligence of an independent physician who merely used the hospital's facilities. This would appear to be the result whether it was the Physician's Assistant himself who was negligent or whether it was the physician who was found to have been negligent in his supervisory duties. Even if the Physician's Assistant were an employee of the hospital in this case (as unlikely as that may be under the present law), the application of the borrowed servant doctrine would operate to relieve the hospital of any liability for the negligence of an assistant who was under the control of an independent physician.

Colorado

There is no doubt that Colorado would not hold a hospital liable on the facts presented (assuming the immunity barriers could be overcome). The language of the Child Health Associate Law itself,⁹⁴ as well as the prevailing case law in Colorado⁹⁵ would dictate the granting of a motion for summary judgment on the facts presented. Even the far-reaching *Bernardi* case⁹⁶ could not be cited as a basis for hospital liability in this case as that case involved a nurse-employee who although acting pursuant to the orders of a physician, was acting out of his presence and in her authorized independent professional status. In the unusual case where the Child Health Associate would be the employee of a government hospital, the hospital would avoid liability on the theory that the Associate was under the statutorily imposed supervision and control of an independent physician whose professional activities, as we have seen, the hospital could not control. Of course, this all assumes that the government hospital would be open to suit, which is not at all assured in Colorado.⁹⁷

Florida

The courts of Florida would be most likely on these facts to follow the reasoning expressed in *Snead v. LeJeune Road Hospital Inc.*⁹⁸ wherein an action was dismissed against a hospital because it was

⁹³ *Mayers v. Litow*, 154 Cal. App2d 413, 316 P.2d 351 (1957).

⁹⁴ See the discussion of the liability implications of the statute itself, *supra* note 32-36.

⁹⁵ The judicial thought in Colorado was examined *supra* note 54-62.

⁹⁶ *Bernardi v. Community Hosp. Ass'n*, 443 P.2d 708 (Colo. 1968).

⁹⁷ See discussion of governmental immunity in Colorado, *supra* note 55-56.

⁹⁸ *Snead v. LeJeune Road Hosp. Inc.*, 196 So.2d 179 (Fla. 1967).

based on the alleged negligence of an independent physician whose only connection with the hospital was that he possessed staff privileges. While it is quite possible for a Physician's Assistant to be employed by a hospital under the Florida law, the decisive fact in this question is that such an assistant would be under the supervision and control of an independent physician who would be held singularly responsible in the event of any negligence in the supervision or actions of the assistant. In other words, if the Physician's Assistant were an employee of the hospital, that fact would be more than offset by the independent status of the supervising physician and the operation of the borrowed servant doctrine.

(2) The Physician's Assistant who was acting under the supervision and control of a physician who is neither a resident nor an intern but has been determined to be either an employee or an agent of the defendant hospital.

California

Since the California courts appear to determine hospital liability on the basis of whether or not there was an employment relationship, it would be most likely that they would hold the hospital liable on these facts. The hospital could argue that it is unable to control the professional actions of a licensed physician, and thus should not be held liable for something it is not able to direct and control. Yet, the California courts have rejected that very argument. The California judiciary has not based its application of the doctrine of *respondeat superior* on the right to control, but rather on the existence of an employer-employee relationship. In other words, if a physician-employee (agent) is liable for something arising out of or in the course of his employment by the defendant hospital, then the hospital-employer (principal) ought to be held vicariously liable as would any other employer. The California courts have clearly rejected any notion that a salaried physician is an independent contractor.

Colorado

Colorado would not hold the hospital liable on these facts. The Colorado courts have consistently without exception considered a physician to be at all times an independent contractor in pursuit of an independent profession. Thus, a hospital is not in a position to control his actions and should correspondingly not be held responsible for his professional shortcomings. The addition of the Child Health Associate and his enabling legislation only serve to reinforce the above rationale as the physician is personally charged by the statute with responsibility for the care and treatment of patients when utilizing a Child Health Associate.⁹⁹

⁹⁹ COLO. REV. STAT. ANN. 91-10-4 (Supp. 1969).

Florida

The law in Florida on these facts would most likely result in liability for the defendant hospital. Given the existence of an employment or agency relationship, the Florida courts have held a hospital liable for the negligence of its physician-employees.¹⁰⁰ The addition of the Physician's Assistant does not appear to alter the result as the main thrust of the activity would be that the physician and the Physician's Assistant were acting on behalf of the defendant hospital. However, it is this author's impression that the Florida courts do not seem as wedded to the application of the doctrine of *respondeat superior* in these circumstances as do the courts of California. Accordingly, it would appear as if a hospital would have at least some chance of avoiding liability if it argued that since it had no control over the Physician's Assistant it should not be held liable for his negligence. But note that even if that argument were to succeed (which is unlikely), if the negligence were that of the supervising physician, the original analysis of *respondeat superior* on the basis of an employment relationship would be applicable.

(3) The Physician's Assistant who was acting under the supervision and control of a resident or intern who was in the employ of the defendant hospital.

California

The law would appear to be even clearer in this case than it was in fact situation No. 2 above. The defendant hospital would most likely be held liable for the reasons expressed therein. Note that a resident or intern is much more subject to the control of the institution wherein he does his residency or internship than is the salaried physician subject to the control of his employing hospital.

Colorado

The result in Colorado would likewise appear to be the same as in fact situation No. 2 above. However, it must be observed that the *Bernardi* case, while on its face definitely does not indicate institutional liability in this situation, has strong implications for hospital liability in the future. Yet even the expansive thinking expressed in the dictum of the *Bernardi* case has been negated by the structure of the Child Health Associate licensing law. Thus, while the *Bernardi* case may have long-range implications for the liability of hospitals for the negligence of residents and/or interns, the language of the Child Health Associate law would most probably operate to insulate a hospital from liability in a case involving a Child Health Associate.

¹⁰⁰ *Miami v. Brooks*, 70 So.2d 306 (Fla. 1954). Hospital was held liable for an overdose of an X-ray treatment by a physician employee who was acting on behalf of the hospital.

Florida

The law in Florida would appear to indicate liability for the defendant hospital on these facts for the same reasons enunciated above in fact situation No. 2. This case is more likely to result in liability as, by definition, it involves an employment relation and excludes the less connective agency relationship.

(4) The Physician's Assistant and potential hospital liability under a theory of corporate negligence.¹⁰¹

California

As has been previously noted,¹⁰² no reported cases were discovered which held a California hospital liable on a theory of corporate negligence. The dispositive question in hospital liability cases in California appears to be the existence or non-existence of an employment relation between the involved physician and the defendant hospital. Thus, corporate negligence would only seem to be critical in a case involving an independent physician, although it may be relevant in terms of aggravation in other cases. Corporate negligence could be alleged if a pattern of malpractice or incompetence were established, but those are not the types of case with which we are concerned. Our concern is with the one-time occurrence of negligence (the usual malpractice case which is the unusual medical case).

Since that is our framework, it would appear as if corporate negligence could only be argued with any hope of success if statutory or self-imposed rules were shown to have been violated. Yet even if such violations were established, it would be necessary to demonstrate that the hospital had taken no precautions to prevent their occurrence, the hospital had reason to know of their probable occurrence, the hospital had not made certain statutory or institutional duties clear to all involved with Physician's Assistants (such as the prohibitions expressed in Section 2514 of the California law), or the hospital had not ensured that the patient ostensibly knew of and had consented to treatment involving a Physician's Assistant. Corporate negligence as applied to hospitals for medical maltreatment is yet a fairly recent doctrine. Accordingly, it is most likely that it will only be in cases of flagrant or repeated violation of statutory or self-imposed rules that a hospital will be held liable on a theory of corporate negligence in a case involving a Physician's Assistant under the present California Physician's Assistant Law.

¹⁰¹ Note that this discussion must of necessity be in general terms for each fact situation would be significantly affected by the individual peculiarities, regulations, and bylaws of the hospital involved.

¹⁰² *E.g.*, *Rice v. California Lutheran Hosp.*, 27 Cal.2d 296, 163 P.2d 860 (1945); *Mundt v. Alta Bates Hosp.*, 223 Cal. App.2d 413, 35 Cal. Rptr. 848 (1963).

Colorado

Corporate negligence of a hospital for medical maltreatment of a patient is a non-existent doctrine in Colorado. As has been previously observed, the hospital in Colorado is not thought of as being institutionally responsible for the medical care afforded patients on its premises (although *Bernardi* has begun to make inroads into this theory). Assuming no flagrant or repeated violations of statutory or self-imposed rules, a Colorado hospital will most likely not be held liable on a theory of corporate negligence in a case involving a Child Health Associate. This is not to say that a Colorado hospital need not be concerned with the specifics of the Child Health Associate Law, for the pitfalls in that statute are many.

Florida

Presently no cases have been found that have held a Florida hospital liable on a theory of corporate negligence. But as noted above,¹⁰³ there has been suggestions of potential liability for a hospital for failure to provide care commensurate with the capacity of the patient to care for himself. However, these cases involved only preliminary dispositions of initial defense motions and are too vague to lend much support to a corporate negligence argument. Thus it would appear that, at least at the present time, hospital liability for medical maltreatment on a theory of corporate negligence is not a likelihood in Florida. Furthermore, there are no statutory rules regarding Physician's Assistants aside from the requirements that their "service be rendered under the responsible supervision and control of a licensed physician," and that they be "physician's trained assistants."¹⁰⁴ If those mandates are observed (what a "trained assistant" is is something that would probably be determined by custom and usage), then a hospital would apparently only need further observe any self-imposed standards to avoid liability under a theory of corporate negligence in a case involving a Physician's Assistant. Again it would appear as if the relationship of the supervising physician to the defendant hospital would be the critical factor in determining institutional liability.

Conclusion

By now it is evident that the liability issues raised by the emergence of the physician's assistant are quite different from the issues raised by the prior licensing question. Licensure by definition is concerned with prospective protection of the public, whereas the question of who ought to be liable if something goes wrong is of a *post facto* nature. Given the fact that the physician's assistant statutes are written in terms of "supervision and control by a licensed physician",

¹⁰³ *Reeves v. North Broward Hosp. Dist.*, 191 So.2d 307 (Fla. 1966); *Lab v. Hall*, 200 So.2d 556 (Fla. 1967).

¹⁰⁴ FLA. STAT. 458.13 (4) (1970).

there is little doubt that the supervising physician is legally accountable for any mishap involving a physician's assistant whom he is supervising. However, the chief concern of this paper has been the potential liability of the involved hospital in three states with recent physician's assistant legislation. Does their projected handling of the hospital liability question in cases involving physician's assistants withstand analysis?

It is this author's contention that no significant changes in the law of hospital liability ought to result from the introduction of an ancillary member of the health care delivery team—particularly one who has solely dependent functions. If new doctrines of hospital liability are to be put into effect, let it be done either directly through legislation or at the least in a case involving a primary health professional—preferably a physician. A literal application of *respondeat superior* ("let the master respond") would limit liability to the controlling physician;¹⁰⁵ however, as we have seen, *respondeat superior* has an alternative theoretical foundation—the existence of an employment relationship regardless of the right to control. This latter theory embodies the concept that he whose business is being furthered ought to bear all the costs and responsibilities of that enterprise. To base liability on either foundation would be acceptable and defensible result as long as consistency in its application was maintained.

California would most probably be internally consistent in determining its law of hospital liability in a case involving a physician's assistant as it would most likely make decisive the existence or non-existence of an employment, or agency, relationship between the hospital and the supervising physician. That is the same analysis applied in a case involving only a physician and a hospital. Colorado also appears to be internally consistent in its determination of the question at issue as its general attitude has been that responsibility ought to follow the right to control. Accordingly, Colorado has consistently refused to hold a hospital liable for the negligence of even an employee-physician as he is conceived of as independent professional. Because of that theory as well as the language of the Child Health Associate law, Colorado most likely would impose liability in a case involving a child health associate solely on the supervising physician and not on the hospital. Florida appears to have adopted the same analysis as California—i.e. making the existence of an employment relation between the supervising physician and the defendant hospital decisive. Superficially, there appears to be a conflict

¹⁰⁵ This is a view which has also been expressed to the author by the Chief of the Health Facilities Service of the Oklahoma State Department of Health. "... the potential institutional liability for permitting the Physician's Assistant to function with and for his supervising physician should be ameliorated under the doctrinal defense of *Respondeat Superior*." Letter to the Author from W. Howard Miles, Jan. 13, 1971.

between California and Florida on the one hand and Colorado on the other. However, the three states are quite consistent with one another in their projected determination of a rule of hospital liability law in a case involving a physician's assistant. Furthermore, their method of resolving the issue is not only reasonable, but should be applauded.

All three states will make one question paramount in their determination of whether or not a hospital should be held liable in a case involving a physician's assistant: under the law of this state, would the hospital be held liable for the negligence of this (the supervising) physician? In other words, look to the law of hospital liability for the negligence of a physician to determine liability. Admittedly that question has a different answer in Colorado than it has in California and Florida. But what the response to that inquiry happens to be is not what is most significant; what is most important analytically is the question itself. The necessary corollary to that question is that, absent flagrant or repeated violations of a physician's assistant statute or regulations, the fact of the introduction of the physician's assistant to the health care team will not alter the rules of law of hospital liability.¹⁰⁸ And that is as it should be, for the law ought to facilitate, not complicate, the utilization of emerging categories of health professionals.

¹⁰⁸ Note that the potential liability of the supervising physician will be increased significantly and he ought to confirm that his individual malpractice insurance covers him in a case involving a Physician's Assistant.