June 1992

Hospital Liability Related to Understaffing of Nursing Services: Walking the Fine Line between Respondeat Superior and Corporate Negligence

Carmen D. Rasmussen
West Virginia University College of Law

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

Part of the Agency Commons, Labor and Employment Law Commons, and the Torts Commons

Recommended Citation

This Student Work is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.
HOSPITAL LIABILITY RELATED TO UNDERSATFFING OF NURSING SERVICES:
WALKING THE FINE LINE BETWEEN RESPONDEAT SUPERIOR AND CORPORATE NEGLIGENCE

I. INTRODUCTION.......................................................... 1083

II. THE EVOLUTION OF HOSPITAL LIABILITY ...................... 1086
A. The Expanded Role of the Nurse ................................. 1087
B. America's Aging Population ........................................ 1088
C. Technological Advances ............................................. 1089
D. The Nursing Shortage.................................................. 1090
E. Need for Maximum Cost Containment ............................ 1090

III. RESPONDEAT SUPERIOR.............................................. 1091

IV. CORPORATE NEGLIGENCE ............................................. 1095

V. SIGNIFICANCE OF CORPORATE NEGLIGENCE ................. 1101

VI. CONCLUSION........................................................... 1102

I. INTRODUCTION

It is well settled that the hospital corporation is held vicariously liable for the negligent conduct of its nurse employees committed within the scope of employment. The basis of liability is the employment relationship and action is brought under the doctrine of respondeat superior.1 There may be, however, instances of negligent omissions by nurses that are, in fact, not grounded in this doctrine. Specifically, when nurses fail to act in circumstances entirely beyond their control, and that failure results in harm to a patient, the proper cause of action may fall under the doctrine of corporate negligence.2

1. See Lundburg v. State, 255 N.E.2d 177 (N.Y. 1969). Under the doctrine of respondeat superior, an employer is held liable for the negligence of employees committed while the employee is acting in the scope of employment. "An employee acts within the scope of his employment when he is doing something in furtherance of the duties he owes to his employer and where the employer is, or could be, exercising some control, directly or indirectly, over the employee's activities." Id. at 179.

2. See Darling v. Charleston Community Memorial Hosp., 211 N.E.2d 253 (1965), cert. denied, 383 U.S. 946 (1966). Darling is the lead case concerning the doctrine of corporate negligence. It considered the liability of the modern hospital for the provision of patient care and placed certain nondelegable duties on the hospital for the care given.
Both nursing and hospitals owe duties to the public regarding adequate patient care. The care that hospitals must provide is highly regulated. The legal standard of care is determined by state and federal laws, community standards, regulatory and licensing agencies and the hospital's own policies and procedures. When the hospital fails to provide care that comports with the legal standard, it is held liable for any injury that results from that failure.

Nurses owe a duty to provide reasonable, ordinary care, skill and diligence in the performance of their functions as practitioners in good standing in the profession, in similar situations, ordinarily have and provide. Nurses must meet state licensure requirements and tailor practice in compliance with the nurse practice act in the state where the nurse is employed. Nurses must also practice according to the policies and procedures and within the constraints of the employing hospital. These separate obligations create a dichotomy that can be of utmost concern to the nurse and hospital.

The entire health care industry is being confronted with the probability of serious changes for a myriad of reasons. The cost of health care is now an issue of national concern. This concern has made it necessary for health care providers to practice cost efficiency and this practice has led to, among other things, a cut back in hospital personnel. Any cut back in personnel tends to affect the

3. George J. Annas et al., American Health Law, 377-79 (1990) (Discussing how quality of care is defined and enforced and the role of the legal and financing systems in that process. State and federal laws, judicial opinions and legal scholarship regarding law and health policy play a part in the definition of quality of care.)

4. See Darling v. Charleston Community Memorial Hosp., 211 N.E.2d 253 (N.Y. 1965), cert. denied, 383 U.S. 946 (1966). The court held that although none of the criteria listed as proper evidence in determining the standard of care was dispositive, each was a factor to be considered.

5. Id.

6. For discussions regarding nursing duties and legal liability, see generally Elizabeth Hogue, Nursing and Legal Liability 3-16 (1985). Mary D. Hemelt & Mary E. Mackert, Dynamics of Law in Nursing and Health Care. (2d ed. 1982).


8. Annas, supra note 3. Health care presents a series of conflicting problems involving access and adequacy of health services. These problems have drawn us into personal and political controversies of what measures need to be taken to address the problems.

9. Id. at 211. "[S]pending for hospital services during the last forty years has, with a few interesting exceptions, increased rapidly and measurably faster than the rest of the economy as measured by GNP growth."
ability of nursing services, which provides most patient care within the hospital, to practice according to the legal standard. When nursing is unable to practice according to standard it gives rise to threats to patient safety, and nurse and hospital liability. In addition to legal liability to patients for damages incurred because of nursing and hospital negligence, reimbursement, accreditation and even licensure are jeopardized when patient care falls below the legal standard.¹⁰

In today's health care environment, hospitals find it necessary to trim costs at a time when regulation of their services is at an all time high. Hospital administration and nursing often fail to agree on strategies that will be both cost effective and meet requirements to provide safe, quality care. Nurses find themselves in a professional dilemma by practicing within the constraints of the hospital which has exclusive control over hiring and assigning personnel. They find that often they are unable to practice according to professional and legal standards because the employer/hospital fails to provide a sufficient number of nursing personnel.

A failure to resolve the problem of inadequate staffing by hospitals can result in catastrophic consequences to the hospital, the nursing profession and ultimately the public. This failure could lead to the nurse/employee becoming the prime witness of the plaintiff in actions brought against the hospital for corporate negligence.

This article begins with a brief history of the evolution of the hospital into an actual provider of health care services and discusses current factors that impact on the modern hospital's ability to provide adequate patient care. Section II discusses nursing negligence and the doctrine of respondeat superior. Section III discusses nursing negligence and the doctrine of corporate negligence. Section IV is an analysis of the significance of a hospital being found liable for corporate negligence as opposed to respondeat superior and concludes that the doctrine of corporate negligence will naturally expand to include some negligent nursing omissions when the hospital fails to staff nursing services according to the legal standard.

¹⁰. Id. at 505.
II. THE EVOLUTION OF HOSPITAL LIABILITY

In the early part of this century, the hospital was not considered to be an actual provider of health care. The hospital was a physical structure utilized by others in the provision of care, particularly care to the poor. Since the hospital itself was not the health care provider, the courts did not hold it liable for negligent acts that led to injury or harm to patients, and because the hospital existed as a form of charitable care for those who otherwise could not afford it, the courts extended charitable immunity to the hospital against liability for negligence.

In 1914, Justice Cardozo defined the role of the hospital and its relation to physicians and nurses who practiced therein in Schloendorff v. Society of New York Hosp. In Schloendorff, the plaintiff brought suit against two surgeons who had performed his surgery negligently. He also sought action for negligence against the hospital. Justice Cardoza’s opinion announced the doctrine of charitable immunity for hospitals which were “simply a physical place consisting of bricks, mortar, beds and equipment.” Both physicians and nurses were deemed independent contractors who practiced their skills in the hospital without supervision or control by the hospital itself.

In 1917 the case of Morrison v. Henke was decided. In that case, a patient received injuries when the nursing staff placed a hot water bottle on him resulting in a burn. The court ruled that the hospital was not liable for the negligent action of nurses because the nurse was an agent of the physician and not the hospital.

The nature of the hospital itself has changed drastically. The hospital is no longer a facility designed to provide a place for the poor to receive charitable care, but is now a facility that actually

13. Id.
14. Id. at 97.
15. 160 N.W. 173 (Wis. 1917).
16. Id.
17. Id.
provides care to people of all classes and economic standing. Because health care services can be very profitable to the provider, hospitals now compete with one another for the business of the health care consumer.\(^\text{18}\)

It was this change in the nature of the hospital that led to the doctrine of corporate negligence. This doctrine was first announced in *Darling v. Charleston Community Memorial Hosp.*,\(^\text{19}\) which placed certain non-delegable duties regarding patient care directly upon the hospital corporation.\(^\text{20}\)

As a result of this evolution from mere facility to actual provider, most courts have virtually abandoned the doctrine of charitable immunity.\(^\text{21}\) Thus, hospitals are called to account for the negligent provision of care to its patients.

As previously stated, hospitals are finding it increasingly difficult to meet the legal care standards within the current financial constraints. Additionally, nurses are becoming extremely concerned about potential liability for failure to practice according to standard because of insufficient staffing.

Due to various factors, both hospital and nurse are exposed to an increased potential for finding themselves in liability creating situations. Some factors in today's health care environment that impact on liability are the expanded role of the nurse, the aging population, the nursing shortage, and the need for maximum cost containment. Following is a brief discussion of these factors and how each serves to increase the liability potential.

A. The Expanded Role of the Nurse

Today, the nurse's role is difficult to define. Nursing responsibilities have increased greatly and so has the level of the nurse's accountability. Nursing has evolved from a profession that merely

\(\text{18. Steinberg, Marketing Budgets Grow "Respectfully" During 1989 HOSPITAL, Nov. 20, 1989 at 48.}$1.54 billion was spent, in 1989, by hospitals on advertising and marketing their services to the public. This was a 15% increase over the previous year.\)

\(\text{19. See generally 211 N.E.2d 253 (Ill. 1965).}\)

\(\text{20. Id.}\)

\(\text{21. ANNAS, supra note 3, at 444-45 (1990).}\)
carried out orders of physicians to one that assesses the patient's condition, makes judgments based upon that assessment and acts according to professional judgement. Immediate recognition of potential threats to patient health and safety has now become an important role in nursing. Failure to do so can lead to charges of negligence if there is any resultant harm to a patient.

Nurses employed in specialty care areas that purport to provide a higher level of specialized care are held accountable for having the required knowledge and skill to provide a higher level of care. Because nursing undergraduate programs do not prepare the nurse for employment in specialty care areas, the responsibility rests upon the hospital for providing the nurse with the knowledge and skill necessary for these areas.

The nursing profession has responded to the increasing responsibilities through its educational curriculum and ongoing education. It has also placed emphasis on the potential for liability because of nursing actions or inactions in hospitals where there is, all too often, staffing inadequate to allow the nurse to practice according to the legal standard.

B. America's Aging Population

America is an aging population and, as a result, there are more elderly to be cared for in hospitals. Slips and falls are the types of accidents reported most often in hospitals and the highest percentage of injury from slips and falls occur in the elderly. There are factors inherent in the aging process such as decreased mobility, fluctuations in mental acuity and decreased circulation that con-

22. W. VA. CODE § 30-7-1 (1986).
23. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 32 at 185-93 (5th ed. 1984). If a person has a skill or knowledge or intelligence superior to the ordinary person, the law will hold that person to a higher standard of conduct. This is particularly true with health care professionals and one who claims to give specialized care above that available from others.
24. N. MOTTET, GERONTOLOGY: ENCYCLOPEDIA OF SCIENCE AND TECHNOLOGY (6th ed. 1984) (although the life span of humans has not increased, scientific and sociological advances now allow more humans to reach the upper limits of their life-span which is an average of 72 years).
25. See generally K. Peutz, Development of an Incident Reporting System, JCOAH Quality Review Bulletin, 245-50 (1988) (discussing the high number of slips and falls and contributing factors, i.e. advanced age).
tribute to the high number of falls, with resultant injury, in the elderly population. These same factors, coupled with decreased metabolism, are also responsible for injuries incurred by the elderly being far more complicated.

In addition to injuries from falls, informed consent can become an issue when the patient’s mental condition is such that he/she cannot fully comprehend the significance of a proposed procedure. In 1914, Justice Cardozo opined that every individual has a right to determine what is to be done with his body, making it necessary for physicians and other health care professionals to obtain the informed consent of the patient or his/her appointee prior to performance of a procedure.

The elderly patient presents special problems for the hospital and nurse. They require additional supervision and frequent assessment to ascertain their physical and mental status with planning to meet their needs accordingly. Failure to do so can lead to injury to the patient and resultant liability for the providers.

C. Technological Advances

Technological advances in health care have resulted in diagnosis, treatment, and cure of patients who, twenty years ago, might well have died. Although these advances are invaluable to the patient, they are partly responsible for the increased liability of hospitals and nurses.

Hospitals have a duty to provide, and maintain in good condition, equipment to be used in the provision of health care. Nurses have a duty to check equipment prior to utilizing it in patient care to assure that it is in proper working order. A good understanding of the principles involved in the operation of equipment and the purpose for which it is being used is mandatory. Failure to check

26. See Schloendorff v. Society of New York Hospital, 105 N.E. 92 (N.Y. 1914). Justice Cardozo opined that each individual had the right to determine what is to be done with his own body and as a result of this opinion a great body of law involving informed consent has evolved.
27. Id. at 93.
28. HEMELT, supra note 6, at 175 (2d ed. 1982).
29. Id.
the equipment and to use it properly can lead to injury of the patient for which the hospital and nurse could be held liable.

**D. The Nursing Shortage**

The health care system entered the nineties faced with a national nursing shortage.\[^{30}\] The factors involved are pertinent to the issue of nursing and hospital liability. Some factors that have a great impact on creating the shortage of nurses are lack of input by nurses in the decision-making process, inadequate staffing in hospital facilities, and insufficient compensation for services rendered.

The Department of Health and Human Services formed a committee charged with studying the reasons for the shortage and recommending strategies to address the problem.\[^{31}\] The Commission concluded it would take 137,000 full time nurses to fill vacancies in hospitals and nursing homes alone.\[^{32}\]

It is hardly necessary to expound on how serious the shortage can be to hospitals and nurses charged with providing patient care according to professional and legal standards. If either fails to meet these standards and harm results to the patient, one or both, directly or indirectly, will be held legally accountable. Both nursing and hospitals ability to provide safe, quality care is directly affected by the decreasing number of nurses available in the work-force.

**E. Need for Maximum Cost Containment**

Hospitals are in the midst of financial crisis while concurrently, nursing personnel are demanding increased monetary compensation for their services.\[^{33}\] While nursing certainly seems justified in its demands, it serves to further increase the hospital’s need for available funds. The financial crisis has led to cut backs in staffing at a time when regulation of health care is at an all time high.

---

30. See generally Department of Health and Human Services, Blue Ribbon Report, Nurses Must Be Part of Policy-Making Bodies, Receive More Educational Assistance (1984) [hereinafter HHS Report] (discussing the shortage and problems that have led to it and suggesting strategies to increase the number of nurses in the work-force).

31. Id.

32. Id.

33. See HHS Report, supra note 30.
It is difficult to reconcile these competing factors; one, to decrease costs of health care to the consumer and the other to provide a high standard of care. Hospitals and nurses must be alert to these factors and practice cost efficiency while remaining acutely aware of potential liability related to understaffing. Even when there is insufficient staffing, the nurse has been charged with acting according to standard and has been held accountable for any failure to do so.\textsuperscript{34} However, there may be factors beyond the nurse’s control that are ultimately the cause of the nurse’s failure to perform according to the legal standards.

Several legal issues stem from the interplay between nursing care and today’s health care environment. First, under what legal doctrines is the employer/hospital held accountable for the negligent actions of nursing services? When is that liability primary, that of the employer itself, and when is it imputed to the hospital as employer of the nurse? Second, when a nurse fails to act, resulting in harm to the patient and the hospital has insufficient staff available to provide care that meets the legal standard, is the nurse still accountable, as the primary tortfeasor, for the harm based on the doctrine of respondeat superior in every set of circumstances? Third, does the primary liability for nursing’s failure to act shift back to the hospital under the doctrine of corporate negligence, if the hospital has been notified in a proper and timely manner that a danger, due to insufficient staffing, existed and failed to take remedial measures? Fourth, if so, what impact will this shift have on health care providers and the nursing profession?

Two doctrines utilized by the courts to hold hospitals liable for negligent actions are corporate negligence and respondeat superior.

\section*{III. Respondeat Superior}

The doctrine of respondeat superior is based on the liability of the employer for the negligent actions of its employee committed

\textsuperscript{34} See generally Hogue, supra note 6, at 3-16.
within the scope of employment. The doctrine is policy based and imputes liability to the hospital because of the employment relationship. That is, the law creates a deliberate allocation of risk. The risks are placed on the hospital since it is involved in an enterprise which can cause harm to others through the negligent acts of its employees, has profited from it, and is in the best position to bear the expenses. The actual negligence is committed by the employee but, as a matter of policy, the risk of liability is expanded to the employer as a naturally flowing cost of doing business. The hospital assumes liability as an innocent third party because of its employment of the negligent actor.

The nurse/employee has a duty to provide patient care that comport with the legal standard of the profession and to practice in compliance with the policies and procedures of the employing hospital. If the nurse fails to do so, he/she will be held personally liable and the hospital will be found liable under the doctrine of respondeat superior.

The nurse’s personal liability for negligent actions makes him/her subject to the principle of indemnification. The hospital’s im-

35. See Lundberg v. State, 255 N.E.2d 177 (N.Y. 1969). Under this doctrine, an employer is held liable for the negligence committed while the employee is acting within the scope of employment. “An employee is acting within the scope of his employment when he is doing something in furtherance of the duties he owes to his employer and where the employer is, or could be, exercising some control, directly or indirectly, over the employee’s activities.”

The basis of respondeat superior has been correctly stated as “the desire to include in the costs of operation inevitable losses to third persons incident to carrying on an enterprise, and thus distribute the burden among those benefited by the enterprise. Insurance is readily available for the employer so that the risk may be distributed among like insureds paying premiums and the extra cost of doing business may be reflected in the price of the product.”

Id. at 141.

38. Id.
39. Id.
40. Id.
41. Id.
42. See McFall v. Compagnie Maritime Belge, 107 N.E.2d 463 (N.Y. 1952). Indemnification is an order requiring another to reimburse fully one who has discharged a common liability. There may be indemnity in favor of one who is held responsible solely by imputation of law because of a relation to the actual wrongdoer as where an employer is vicariously liable for the tort of a servant. See also Canadian Indemnity Co. v. United States Fidelity & Guaranty Co., 213 F.2d 658 (9th Cir. 1954).
puted negligence, via respondeat superior, calls upon the hospital to pay damages to the injured plaintiff for harm received due to the negligent actions of the nurse/employee.\textsuperscript{43}

The leading case under this doctrine in West Virginia is \textit{Duling v. Bluefield Sanitarium, Inc.}\textsuperscript{44} Action was brought against a private hospital for failure of its nurses to provide proper care that ultimately resulted in the death of a patient. Nancy Duling was a thirteen year old who was admitted to the hospital with a diagnosis of acute violent rheumatic fever with heart disease beginning. At 7:00 PM, on the evening of her admission, she was seen by the attending physician who made the diagnosis and informed the mother that her child could go into heart failure. He told her the signs to watch for and to notify nursing immediately if any of these were observed.

Nancy began to show signs of a worsening condition shortly after the doctor left the hospital and Mrs. Duling began immediate attempts to have a nurse check Nancy. The nurse on duty did not check Nancy at that time and, in spite of Nancy's apparent deterioration and constant pleas by her mother for attention, Nancy was not checked at all by the nursing staff until almost six hours later. At that time her condition was so serious that subsequent treatment was not sufficient to save her life.\textsuperscript{45}

The issue in the case was whether the hospital was liable for the negligence of nurses employed by it to provide patient care. The trial court gave a directed verdict for the defendant hospital and the Supreme Court of Appeals of West Virginia reversed the decision and remanded for a new trial stating that the jury would have been justified in finding that the hospital was guilty of actionable negligence and that such negligence resulted in the death of Nancy Duling. The court, citing \textit{Danville Community Hosp., Inc. v. Thompson},\textsuperscript{46} gave the hospital's required standard of care as follows: "A private hospital, conducted for profit, owes to its patients such reasonable care and attention for their safety as their mental

\textsuperscript{44} 142 S.E.2d 754 (W. Va. 1965).
\textsuperscript{45} \textit{Id}.
\textsuperscript{46} 43 S.E.2d 882, 886 (Va. 1947).
and physical condition, if known, may require. The care exercised should be commensurate with the known inability of the patient to take care of himself. 47 Thus, the hospital was found liable for the provision, or lack thereof, of adequate nursing care based on the needs of the individual patient.

Likewise, in Moore v. Guthrie Hosp., Inc., 48 the Fourth Circuit reversed the lower court's directed verdict in favor of defendant hospital when a nurse employee administered medication intravenously to a patient after it was ordered by the physician to be given intramuscularly. As a result of the intravenous administration of the medication the patient suffered a seizure and resultant injury. 49 The court refused to impute the nurse's negligence to the physician, but ordered retrial regarding the vicarious liability of the hospital since the nurse, employed by the hospital, was in fact, an agent of the hospital not the physician. 50

This reliance on the doctrine stems from the nurse's duty to act according to the standard of the profession and from the employment relationship with the hospital wherein the nurse provides care that meets not only the legal standard but hospital mandates.

The hospital owes certain legal duties to patients and employees. 51 What is the status of hospital liability when nursing negligence, that leads to injury of the patient or patients, is based on the hospital's failure to meet its own legal duties? When the hospital's duty is a condition precedent to the nurse being able to fulfill his/her own duties to patients, it would seem that, in certain circumstances, the liability for nursing negligence should be based on a cause of action for corporate negligence as opposed to that of respondeat superior.

47. Id.
48. 403 F.2d 366 (4th Cir. 1968).
49. Id.
50. Id. at 367.

In addition to the general duties owed by every corporation, there are duties specific to hospitals which include, considering community needs when determining policies, general responsibility for adequate patient care throughout the hospital, maintaining proper professional standards in the hospital and assuming businesslike control of expenditures. The hospital also owes to the employee an environment that is safe for purposes of conducting the work for which he/she was hire.
IV. CORPORATE NEGLIGENCE

When a hospital fails to perform the duties owed the patient and harm results because of that failure, the hospital itself is held corporately negligent. This doctrine, as it applies to hospitals, was first announced in Darling v. Charleston Community Memorial Hosp. and was adopted by the West Virginia court in 1987. The decision placed certain non-delegable duties regarding patient care directly on the hospital.

Prior to this ruling, hospitals bore no liability for the provision of health care since, as previously stated, the hospital was considered to be a facility where others provided patient care. Darling, evaluated the modern role of the hospital and determined that the hospital had evolved into a facility that actually provided health care. Thus, hospitals became legally accountable for the care provided.

All of the hospital's corporate duties have a direct impact on the provision of patient care. The emphasis on the hospital's responsibility for adequate patient care is apparent. Most of the case law has dealt with hospital's responsibility to select and delineate clinical privileges of physicians. However, the hospital has duties to the patient outside those having to do with physicians, which include adequate staffing, maintaining the premises in a reasonably safe condition, provision of properly functioning and reasonably

52. 211 N.E.2d 253 (Ill. 1965).
54. Darling v. Charleston Community Memorial Hosp., 211 N.E.2d 253 (Ill. 1965). The court stated,
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 interns, as well as administrative and manual workers and they charge patients for medical care and treatment, collecting for such services, 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.

Id. at 257.

56. Id.
57. 211 N.E.2d 253 (Ill. 1965).
updated equipment, reasonable care in the selection and retention of employees of staff members and, since Darling, the hospital is held to a national standard.60

Several cases dealing with hospital failure to adequately staff resulting in harm to the patient have been decided.61 In these cases, nursing was involved in negligent care (more specifically, failure to give care) that resulted in harm to the patient.62

In Leavitt v. St. Tammany Hosp. and Ins. Co.,63 the court held that the hospital owed a duty to respond promptly to a patient’s call for assistance. The patient suffered from severe congestive heart failure and had been instructed not to get out of bed without proper assistance. The patient needed assistance to the bathroom and after waiting approximately fifteen minutes could wait no longer. She went to the bathroom unassisted and, because of her weakened condition, fell and injured her back.64

The patient brought suit against the hospital and nurses for failure to provide adequate care which proximately caused her to fall and be injured. The lower court found in favor of the plaintiff and held that the hospital owed a duty to respond promptly to patient’s calls for help and that the hospital breached its duty to the patient by having less than adequate staff on hand and in failing to at least verbally answer the assistance light to inquire what the patient needed. The Court of Appeals in the First circuit affirmed the lower court’s finding based on the hospital’s duty to have a sufficient number of staff on hand to provide the care required by the patient.65

In a similar set of facts with much more tragic consequences, the California Court of Appeals for the Fourth District found both hospital and staff guilty of breaching the duty of care owed to a

62. Id.
64. Id.
65. Id. at 407.
patient.\textsuperscript{66} In \textit{Czubinsky v. Doctors Hosp.},\textsuperscript{67} the patient was coming out of anesthesia following surgical removal of an ovarian cyst. She went into cardiac arrest and as a result suffered permanent brain damage and total paralysis. The circulating nurse, whose duty, among other things, was to remain with the patient at all times until recovery from the anesthesia was sufficient, left the room in response to the call from a surgeon in the next operating room. The nurse was the only circulating nurse on duty in the entire operating room and when the patient suffered arrest, she was attended only by the anesthesiologist and an operating room technician.

It was found that the patient suffered permanent injury as a direct result of the nurse leaving the patient at a crucial time during the recovery. This left an insufficient number of trained personnel with the patient to recognize and react to a crisis. The court held that hospital personnel's actions were the proximate cause of the injury.\textsuperscript{68} The majority of the court's holding addressed the failure of nursing personnel to render sufficient care to Ms. Czubinsky, however, the court also addressed the hospital's failure to provide adequate staff to assist the doctor in the immediate post-operative period. The court found the hospital's failure to be an act of dereliction of a legal duty which brought about the injury to the patient and that that injury was a readily foreseeable result of the hospital's failure to provide a sufficient number of nursing personnel to meet the needs of patients.\textsuperscript{69}

Under the doctrine of corporate negligence, once the hospital is aware of a danger to patient safety, it appears the responsibility for providing the nurse with an environment conducive to legally standard practice is a corporate, nondelegable duty of the hospital employer. This shift seems apparent because the nurse/employee is not in a position to take the necessary measures to remedy the problem since adequate staffing to meet the patient's needs is an affirmative, nondelegable duty placed on the employer.\textsuperscript{70}

\textsuperscript{67} Id.
\textsuperscript{68} Id. at 686.
\textsuperscript{69} Id. at 688.
\textsuperscript{70} W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, 203-05 (5th ed.)
The situation where there is insufficient nursing staff employed by the hospital to provide adequate care to patients and where no remedial measures have been taken places the patient in a perilous position. If the patient has a complication and needs immediate attention, an insufficient number of nursing personnel might result in that need going unnoticed by available staff. If the patient’s need are not known by the staff, the patient is much more likely to suffer untoward effects that could lead to serious injury or even death. In short, the patient may be deprived of the very thing for which he was admitted to the hospital, i.e. adequate care. If neither nursing staff nor administration has taken measures to remedy a threat to patient safety resulting from insufficient staffing, the hospital could be held liable under both respondeat superior and corporate negligence. Two accepted tort theories which could place liability upon the hospital corporation for failure to staff nursing services adequately are illustrated in Thornton v. CAMC71 and Reager v. Anderson.72

Thornton was a medical malpractice case which considered the so-called “value of a chance” theory.73 In a discussion of proximate cause, the court cited and followed the Pennsylvania case of Jones v. Montefiore Hosp.74 The Jones court held that

Proximate cause is a term of art, and may be established by evidence that a defendant’s negligent act or failure to act was a substantial factor in bringing

1984. Shifting responsibility for a negligent tort is based on the theory of intervening cause. That is, when the actor had reason to assume that someone else will take the necessary precautions to prevent harm of injury to the plaintiff. The nurse, in an employment relationship, has every reason to believe that the employer hospital, being in control of hiring, will employ a sufficient number of nursing personnel to assure that patients can be cared for according to the legal standard imposed. Factors to be considered in determining whether this shift of liability occurs are the competence and reliability of the person upon whom the reliance is placed, the person’s understanding of the situation, the seriousness of the danger and the number of people to be affected, the length of time elapsed and the likelihood that proper care will not be used and the ease with which the actor himself may take the precautions. Id.

71. 305 S.E.2d 316 (W. Va. 1983).
73. Thornton, 305 S.E.2d at 325 (“When a physician’s or surgeon’s negligent action or inaction has effectively terminated a person’s chance of survival, he will not be permitted to raise conjectures as to possible chances for survival that he has put beyond realization. If there was any substantial possibility of survival and the defendant has destroyed it, he is answerable . . . .”).
about the harm inflicted upon the plaintiff. . . . A plaintiff need not exclude every possible explanation, and "the fact that some other cause concurs with the negligence of the defendant in producing an injury does not relieve defendant from liability unless he can show that such cause would have produced the injury independently of his negligence." 75

Along the same vein, the court in Reager v. Anderson 76 stated that where the plaintiff in a malpractice case has demonstrated that defendant's acts or omissions have "increased the risk of Harm" to the plaintiff and that the increased risk was a substantial factor in bringing about the ultimate injury, then the defendant is liable for the ultimate injury. 77

Hospitals typically utilize some form of patient classification system to determine the number of patients on each unit and the acuity level of each patient to determine the number and qualification of staff needed to provide adequate patient care. If insufficient staff is available, the hospital should be aware of the situation without any form of notification from the staff themselves. However, it remains the nurses duty to assess the clinical area and notify administration, verbally and in writing, that there is, in fact, an insufficient number of staff to provide safe care. 78

If the hospital knows that the number of personnel available is insufficient to provide care that meets the legal standard and fails to take action to remedy the situation, injury to the patient is a readily foreseeable occurrence that could only have been prevented by the hospital taking that action. The failure to meet its corporate duties then decreases the value of a chance that the patient would receive safe, quality care within its walls and increases the risk that the patient will suffer some harm.

If nursing has notified administration that a safety danger exists and has received no positive response, nursing then must practice according to its best professional judgement under all the circumstances. If an injury results to the patient and that injury is a result

75. Id. at 923.
76. 371 S.E.2d at 624.
77. Id.
of inadequate staffing, the hospital will most likely be held liable under the doctrine of corporate negligence.\textsuperscript{79}

If the nurse acts and does so in a negligent manner that causes harm, the primary liability will and should remain with the nurse and the action should then be taken under the doctrine of respondeat superior.\textsuperscript{80} The nurse has a legal and professional duty to act in a manner that is consistent with the legal standard of care.\textsuperscript{81} However, if the nurse fails to act, even though there is a duty to do so, the doctrine of corporate negligence could result in shifting the primary liability from the nurse's failure to act to the hospital for failure to provide enough staff so that the nurse could act in a manner that assures each patient can be adequately cared for.

If the staffing level is below the number or type required to allow the legal standard to be met a determination must be made regarding whether the shortage of staff is temporary, for example when there are call-ins for illness, or whether the shortage requires hiring of additional staff. If the danger to patient safety exists because of a temporary staffing deficit, the hospital can take measures such as closing beds and transferring patients to areas where the nursing staff can be concentrated. This allows nursing to pool its resources and can serve to either eliminate or diminish the danger to patient safety as much as possible.

Whatever steps the hospital chooses to take must be directed to provision of adequate patient care.\textsuperscript{82} Measures that do not accomplish this goal will result in the hospital’s failure to meet its legal duty to the patient and any harm that results is a direct result of corporate negligence.

When a hospital knows of a specific danger that exists and there are measures that can prevent harm, if the measures are not taken, the problem becomes much more significant. Instead of an unforeseen, general danger that one of its employees might act neg-

\textsuperscript{79} Id.
\textsuperscript{81} HOGUE, supra note 6.
\textsuperscript{82} Darling v. Charleston Community Memorial Hosp., 211 N.E.2d 253, 257 (Ill. 1965).
ligently, there is something more specific identified as a source of danger to the patients. The hospital that knows of such a danger yet takes no action, or takes insufficient action to protect the patient from being harmed, presents a far more significant danger to the public.

V. SIGNIFICANCE OF CORPORATE NEGLIGENCE

Corporate negligence by failure to take action that prevents harm to the public is a very serious charge. Unlike imputed negligence, corporate negligence indicates a systemic rather than an isolated patient safety problem. This breach of corporate responsibility indicates a disregard by the hospital of a duty imposed by law to protect the public. The consequences to the hospital for corporate negligence go far beyond payment of damages to the plaintiff.

The legal duties imposed on the hospital exist as guidelines for use in achieving the legal standard of care. The standard of care is derived from a variety of sources. These standards are used to determine whether or not a hospital is qualified to provide health care to the public. Failure by the hospital to meet the standard can result in loss of licensure. Without licensure a hospital cannot operate as a provider of health care services. Short of loss of licensure, the hospital may be restricted in the types of patient to whom it may be allowed to provide reimbursable services. This may involve a particular type of patient such as Medicare recipients.

Increased consumer awareness could lead to patients choosing another hospital for needed services. Physicians, aware of inadequate staffing for patient care, may choose to admit their patients to other facilities where they feel their patient’s interests can best be served. One other possible ramification may be further difficulty in recruiting nursing personnel for employment. Nurses already express a sense of alarm because of their difficulty and sometimes inability to provide safe, quality care to their patients. Recruitment difficulties can make it very problematic to bring the standard of

83. Id.
84. Id.
85. See ANNAS, supra note 3.
care up to the required level. This will serve to further perpetuate the problems of the hospital. Any one of these consequences can be crippling to a provider in today’s volatile health care arena and could make a significant difference in the hospital’s ability to remain viable.

Shifting the liability for certain nursing omissions to act because of the failure of the hospital corporation to meet its legal duties to provide adequate patient care will serve to increase the incidents of actions brought against hospitals for corporate negligence.

VI. CONCLUSION

In today’s hospital the factors discussed in section II have all interacted to increase the potential for patient care related injuries. Hospitals are concerned and the nursing profession is not unconcerned. Actions are being taken by nurses to protect themselves from liability when a valid safety danger exists that is beyond their control to remedy.

Notification and documentation is being done increasingly by members of the nursing profession. When a patient is injured as the result of negligent acts of omission, this will inevitably lead to problems for the hospital corporation. If the omission is found to have been made because there was insufficient staff available to provide the legal standard of care and the nurse has notified the hospital through the appropriate channels, this can serve to shift the cause of action away from the doctrine of respondeat superior to that of corporate negligence.

The finding of corporate negligence, being a systemic rather than an isolated problem of negligence, leads to far more serious consequences to the already struggling health care provider and can threaten viability altogether.

The plaintiff’s attorney, during discovery, will question the nurse about his/her failure to act according to standard. The nurse will reveal that notification of the danger to patients was given to administration. The nurse’s testimony and the documentation of notification can be crucial evidence on which the plaintiff’s case against the hospital under the doctrine of corporate negligence will be de-
cided. Hospitals, aware of the serious consequences of corporate negligence rulings, may well be pressed to settle these cases to avoid such rulings. Additionally, since the plaintiff’s attorney is also aware of this, the situation may result in hospitals paying more to settle corporate negligence cases than it would be prepared to pay for a case brought under the doctrine of respondeat superior.

Although nursing must protect itself against liability, the use of such evidence can have an extremely chilling effect on the relationship between nursing and hospitals. Documentation of notification is a very powerful tool in the hands of nurses who have no desire to be held negligent in cases of injury to patients where the prevention of such injury was, in fact, beyond their control. The tool is even more powerful in the hands of the plaintiff’s attorney.

*Carmen D. Rasmussen*