

What Is Vicarious Liability?

And why should I care?

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The most common example of vicarious liability is when an employee injures someone within the scope of their job. Independent contractors are not generally considered employees, regarding vicarious liability. You have a podiatric assistant that is a W-2 employee. Her job description involves greeting people at the front desk and obtaining the patient's insurance information. The assistant became aware of some "juicy" information about a patient that her friends knew. The assistant messaged this private medical information to her friends. The patient found out about it when one of the friends asked the patient about it. The "it" involved a history of gonorrhea, coupled with heel pain. As you can imagine, this caused quite a bit of embarrassment and anger with this patient.

Was the podiatrist liable because of the employee's gossiping? Besides being a HIPAA violation, in most

states, the podiatrist and the podiatrist's professional corporation or association (PC or PA, depending on the state) would be liable for this breach of privacy.

This is an example of vicarious liability. Now let's define what it is. Simply put, vicarious liability is

Two podiatrists have been practicing together for 20 years. They split the costs, divide the profits and the patient load. Their names are on the door together, the stationery too. They have nothing in writing as to a legal partnership or professional corporation. A patient has a bunio-

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when you are liable for the actions or inactions of another party, solely based on the relationship between the two parties. That relationship is based on what is called "agency". An agent is a person or legal entity that is able or authorized to act in his or her place. Before your head starts to spin, let's give some examples. All these examples were quite real.

nectomy performed by podiatrist A. She is never seen or treated by podiatrist B. It turns out that her podiatric surgeon's malpractice insurance accidentally lapsed. Can she sue podiatrist B? In most, if not all states, she certainly can. If her attorneys can prove that the two podiatrists acted like partners, Then they legally

Continued on page 44

Liability (from page 43)

are considered partners. Partners are agents for each other. That means when podiatrist A performed a bunion surgery negligently, podiatrist B can be liable for it, even though he or she never saw the patient!

Now, let's change it up a bit. Same set of facts concerning the two podiatrists and the bunion surgery, but one change: the two podiatrists are each employees of the same professional corporation. If podiatrist B never saw the patient, podiatrist B is not personally liable for the actions of podiatrist A. The professional corporation is liable for the actions of its employees, meaning it will be sued in this scenario.

Prior, it was stated that the employee must act within the scope of her/his duties for the employer to be liable. The meaning of this statement is not always so clear.

If your medical assistant is taking bets on the side, that is probably not within the scope of the job. However, if the medical assistant, even though they are not supposed to, gave some advice as to how to change the bandage post-operatively, that could be considered within the scope of the job. Different states may have different interpretations. As will be covered below, it is best to properly train all your employees as to what is expected of them.

Independent Contractors

Independent contractors (IC), just because they are called independent contractors, are not necessarily independent contractors. To go into detail as to exactly what is required in your individual state to qualify as an IC is beyond the scope of this article. Suffice to say that an IC generally gets a "1099" tax form, and the person or entity that hired them, you, does not control how they practice their job. The required result, as opposed to the method, is an important factor in defining who is an independent contractor. Obviously, that last sentence is open to interpretation. As previously stated, automatic vicarious liability does not generally pertain to actions by an independent contractor.

An example of this might be if an outside pathology lab has an incorrect read on a biopsy. If you, the podiatrist, had no reason to suspect the quality of their work, you, the podiatrist, would probably not be liable for a negligently generated pathology report.

What if you have a podiatrist, who is not your employee or partner, who comes into your office to perform office-based surgery? If the podiatric surgeon was appropriately vetted, you would not have any vicarious liability. You would still have

want to protect any personal liability from the acts of other healthcare providers in your practice. You ideally only want to be personally liable for patients you are treating. The protection of a professional corporate structure should provide that.

As an example of how this works, let's look at the following example. The medical assistant is employed by your professional corporation. Post-operatively, she leads the patient to a recovery area. On her way, the patient falls and fractures her ankle. If your medical assistant, at the time,

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your own possible liability for any of your own actions, say negligent post-operative care performed on this same patient. If it turns out that the podiatric surgeon had a history of poor surgery, and you should have been aware of it, you can still get sued for a negligent referral.

Solutions

Now that you know the ways you can get sued even though you did not do anything, let alone anything wrong, let's discuss how you can truly minimize this exposure. First, check your malpractice insurance. While it should cover most of these scenarios, there may be some limitations. Make sure all your PCs or PAs are covered by your malpractice insurance. Require any healthcare provider to prove to you they have sufficient malpractice coverage prior to doing any work in your office. It is surprisingly common to find that various PCs are not covered by the podiatrist's professional liability insurance. Sometimes, this involves a small rider, and other times, the corporate entity is added at no additional cost, but the corporation's name must be named within the policy.

Reviewing your business structure is crucial. Sit down with your health law attorney and review it. Go over the advantages and disadvantages of your various choices. They may differ a bit from state to state. You

was employed by your professional corporation, the PC will be vicariously liable, not you personally.

While we are on the topic of corporate structure, there is a nasty "sidebar" here. You must act like a corporation to be considered one. What does that mean? You must file a corporate tax return and like any other corporation, you must hold corporate board meetings with written minutes. Many, if not most professional corporations and associations, do not hold such meetings. Many of them consist of only you, or fewer than five podiatrists.

When you set up your corporation, you are often provided with a "meeting minutes" book for your corporate meetings. You can use a school notebook just as easily. Hold a corporate meeting, at least quarterly. You can be the only participant if the PC is wholly owned by you. Write down what was old business, new business, and any votes taken for various corporate actions. Those actions might be considering a new office lease, buying machinery, changing a supplier, office insurance, etc.

What if you elect not to do this? You would not be alone, but you would be very foolish. If you do not act like a corporation, you risk having an attorney "piercing the corporate veil" Huh? That means your professional corporation or association, might not

Continued on page 46

Liability (from page 44)

be treated like one. Why? Because you do not treat it like one. That means that any personal protection that your corporation afforded you against personal liability could be gone!

The best defense against personal liability for acts of others, other

call logs, patient follow-up, I can go on and on. Have a record of all the office education and have each employee sign in a log the date and location and name of each educational talk or video. Please remember that staff come and go. That means that new staff must be educated in a timely manner. Veteran staff mem-

Conclusion

Vicarious liability is an entity unto itself. It can be confusing and illogical to the healthcare provider. Suffice it to say that you must take various defensive actions to minimize the chance that you could be personally liable for the actions of others. Consult with your healthcare attorney. **PM**

The best defense against personal liability, for acts of others, other than incorporating, is employee education.

than incorporating, is employee education. You can use videos or live talks. Subjects such as the importance of protecting personal health information (PHI) are important. Go over the consequences of an employee revealing PHI to non-allowed parties. Other areas of education include proper disposal of medical waste, fire prevention, patient phone

bers need refresher sessions. Additionally, some requirements change with time. Periodic updates are a good thing.

Who is supposed to supervise all these talks, videos, record-keeping and the like? Your appointed compliance officer. That person can also have other office duties, especially in a smaller office setting.



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OPD investigations, as well as Medicare Fraud, Fraud & Abuse, Hospital Actions, RAC Audits, Medicare Audits, OIG Fraud, Healthcare Fraud, Medical Audits, and Health Plan Billing Audits. As a licensed podiatrist prior to becoming an attorney, he served as the international president of the Academy of Ambulatory Foot and Ankle Surgery.
