



## CLINICAL JURISPRUDENCE COLUMN

# Vicarious liability. First of 2 parts: The gynecologist who wore an unusual pen

When a colleague is out of line

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What obligations do physicians and medical facilities have when it comes to dealing with troubled or troublesome clinicians? In this 2-part column, we look at a recently reported case of a gynecologist who engaged in serious misconduct without being noticed. In part 2, we will discuss the obligation of the medical profession to notice and deal with colleagues who are creating a risk to patients or the institution.

### CASE Medical center blamed for negligence when rogue physician records pelvic exams

Dr. A, a gynecologist, had been a physician at a leading academic medical center for many years. His employment was terminated in February 2013 when he admitted taking more than 1,000 videos and images using a tiny camera embedded in a pen or key fob that he wore around his neck. He stored the images on his home computer. It seems that he had been secretly recording pelvic examinations since 2005.

A class-action lawsuit initiated against the academic medical center and the physician suggested invasion of privacy, emotional distress, and negligence in oversight on the part of the academic institution. (This case was settled before trial and most of the records are not publicly available. The facts used here are based on press releases and published articles and, therefore, are incomplete and may be subject to interpretation.)

### Breach of trust

Talk about a violation of the doctor-patient relationship! The suit claims, among other things, "harmful and offensive sexual contact with patients." The hospital identified 12,700 patients that the gynecologist might have seen during his 25-year-span as an employee.

Some victims report posttraumatic stress disorder (PTSD). In addition to feeling betrayed by their physician, the victims feel the action was a breach of faith, of trust. They report being fearful of being examined by another physician, and some have refused to seek medical care. The sense of mistrust of

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the medical profession has resulted in some victims' reluctance to allow their children to be seen by pediatricians.<sup>1</sup>

#### **CASE Settled**

This lawsuit, possibly the largest medical malpractice case of its kind, resulted in a \$190 million settlement. The academic medical center will disperse the funds to more than 7,000 possible victims.<sup>1</sup> A special hotline Web site and a toll-free number have been established to facilitate victim reporting. A board-certified psychologist will work with victims.

#### **Similar suits have settled**

Other lawsuits involving physicians who have secretly recorded patients also have been settled:

- A Connecticut endocrinologist who took photos of patients nude settled for \$50 million in 2012.<sup>1</sup>
- A pediatrician pedophile in Delaware was associated with a \$123-million settlement with long-term follow-up of victims.<sup>2</sup>

### **What are the ethical obligations?**

Ethics in medicine can be discussed at great length (see "Issues of ethics in medicine" on page 38). An important question related to this case concerns the investigators' obligations to make their findings public with the scenario that the patient/victims are not aware that a crime occurred.<sup>3</sup> This is among the issues that will be considered in part 2 of this article that will be published next month. One concern is that publicly identifying the victims may lead to the development of PTSD and its intrinsic consequences. How can one prosecute the perpetrator and yet prevent psychological consequences of the victims?

### **Unusual elements of this case**

The case of "The gynecologist who wore an unusual pen" is extraordinary in terms of the financial consequences for the medical center. Indeed, the \$190 million class-action settlement is probably a record in cases of

this kind. The facts (insofar as we know them, and we certainly do not know them all) are sufficiently unusual to seem more like fiction than reality.

An unusual element of the case is that the images were apparently not shared with others, but retained by the gynecologist. Thus, the \$190 million settlement was not for disclosing confidential information, but for the unauthorized and inappropriate act of taking the videos and storing them at home. This case was a violation of professional obligations and clearly unethical and likely illegal. It was not associated with the distribution of images that is so often the hallmark of breach of privacy cases.

Another very unusual condition of this case was that there was no way to identify the victims. The faces of the women were not in the videos, so the subjects of the 1,200 videos and 140 images found on the physician's home computer could have been any of more than 7,000 patients.<sup>1</sup> The distribution of funds, therefore, may encompass all of these former patients, and the size of an individual's recovery may depend largely on the degree of emotional upset she experienced. The victims will be asked how much time they spent with the physician, whether a nurse was present, whether there was any verbal or sexual abuse, and details about emotional harm they experienced.

### **Vicarious liability**

#### **Why was the medical center responsible?**

At first blush it may seem puzzling that the medical center, rather than the gynecologist, was responsible for the damages. In fact, the gynecologist might well have been both criminally and civilly responsible, but sadly, he committed suicide after his wrongdoing was discovered.<sup>3</sup>

The hospital was civilly responsible. In this instance it appears (again, from our limited facts) that the gynecologist was an employee of the medical center. Employees are generally considered agents of their employers ("principals"). By definition, a



**Because employers select and appoint their employees, they are generally liable for employee actions within the course of employment**



## Issues of ethics in medicine

### What do ACOG and the AMA say about sexual misconduct in medicine?

**ACOG.** The American College of Obstetricians and Gynecologists (ACOG) is explicit about sexual misconduct. Specifically, the physician-patient relationship can be damaged when there is “confusion regarding professional roles and behavior or clear lack of integrity”<sup>1</sup> that results in sexual exploitation and harm. ACOG further states that<sup>1</sup>:

- Mere mutual consent is rejected as a justification for sexual relations with patients because the disparity in power, status, vulnerability, and need make it difficult for a patient to give meaningful consent to sexual contact or sexual relations.
- Sexual contact or a romantic relationship concurrent with the physician-patient relationship is unethical.
- Sexual contact or a romantic relationship with a former patient may be unethical under certain circumstances. The relevant standard is the potential for misuse of physician power and exploitation of patient emotions derived from the former relationship.
- Education on ethical issues involved in sexual misconduct should be included throughout all levels of medical training.
- Physicians have a responsibility to report offending colleagues to disciplinary boards.

The request by either a patient or a physician to have a chaperone present

during a physical examination should be accommodated regardless of the physician's sex. If a chaperone is present during the physical examination, the physician should provide a separate opportunity for private conversation.

**The AMA.** The American Medical Association's Council on Ethical and Judicial Affairs developed a report titled “Sexual Misconduct in the Practice of Medicine.” The Council concluded that<sup>2</sup>:

- Sexual contact or a romantic relationship concurrent with the physician-patient relationship is unethical.
- Sexual contact or a romantic relationship with a former patient may be unethical under certain circumstances.
- Education on the ethical issues involved in sexual misconduct should be included throughout all levels of medical training.
- In the case of sexual misconduct, reporting offending colleagues is especially important.

#### References

1. Committee on Ethics. ACOG Committee Opinion No. 373. Sexual misconduct. <http://www.acog.org/Resources-And-Publications/Committee-Opinions/Committee-on-Ethics/Sexual-Misconduct>. Published August 2007. Accessed November 11, 2014.
2. McMurray RJ, Clarke OW, Barrasso JA, et al; Council on Ethical and Judicial Affairs. Sexual misconduct in the practice of medicine. *JAMA*. 1991;266(19):2741-2745. <http://jamanetwork.com/article.aspx?articleid=393342&resultClick=3>. Accessed November 11, 2014.

principal has the right and obligation to oversee and control the actions of its agents. As such, the principal is generally legally liable for the actions of an employee within the course of employment. Vicarious liability essentially allows someone harmed by an agent to seek compensation from the principal because the principal selected and appointed the agent.

The vicarious responsibility of an agency relationship applies even when the employee is not following the direct instructions of the employer. For example, even if a trucking company tells its employee, “Do not drink at

all and do not drive over the speed limit for any reason,” the company can still be liable when an employee becomes drunk or speeds and causes an accident. At some point, however, the employee may so deviate from tasks related to employment that the employee is off on a “lark of his own.” For example, if the driver is supposed to travel from New York City to Buffalo, but instead takes a personal side trip to Baltimore, where the truck hits a pedestrian, that side trip is probably not the responsibility of the employer.

Applying these principles to this case (assuming the physician was an employee

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of the medical center), the center would generally be legally responsible for the torts (wrongful acts) of the gynecologist. Now you ask, “what about the ‘lark of his own’? Wasn’t taking all those pictures and videos for his own purposes not really part of the job?” (Now you are thinking like a lawyer—that was meant as a compliment.) It is a good question. First, this involved serious misconduct, which was a violation of basic professional ethics. Second, this videotaping was not part of the job the physician was supposed to be doing. Although it may have been for his own benefit, this deviation of good practice was closely related to and entangled with the purpose of his employment. It is perhaps analogous to the truck driver who drank at lunch and then caused the accident. It made sense, therefore, for the medical center to conclude that it would likely be responsible for the actions of this employee, and settle the case.

As a side note, this vicarious liability does not just apply to medical centers. Physi-

cians have agents in their offices (employees: nurses, interns, and even volunteers). Your medical practice is likely responsible for the actions of your staff members via the concept of vicarious liability.

In hospitals, it is common for physicians to have staff privileges without being employees. Would this case have a different result if the physician had staff privileges but was not an employee? Another good question. We are going to look at that in the next installment—and the answer has significant implications for physicians and nurses as well as for medical facilities. 📌

#### References

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