

# **The Case of the Assailing Psychiatrist: Testing the Bounds of Apparent Agency in Illinois**

By: Adnan Arain  
Alholm, Monahan, Klauke, Hay & Oldenburg, L.L.C.  
Chicago

Since the advent of *Gilbert v. Sycamore*, 156 Ill.2d 511, 525, 622 N.E.2d 788, 795 (1993), defense attorneys, and specifically medical malpractice defense attorneys, have found themselves contending with the ever expanding doctrine of apparent agency. Based upon the holdings in *Gilbert* and its progeny, there are many considerations which come into play.<sup>1</sup>

A number of Illinois cases can be read to erroneously imply that any act committed by a physician imputes liability upon the hospital and that the plaintiff need merely allege that the physician invoked the hospital's name while committing the act. Common sense dictates that there must be a limit as to what acts a physician can commit in the name of the hospital which impute liability to the institution. For example, attempted murder by a physician with privileges must not be placed on the same level, in terms of apparent agency, as an emergency room failure to diagnose. Otherwise an absurd result would ensue.

But while common sense dictates that such a limit be clearly defined, currently, no case law in Illinois sets forth this line of demarcation. Thus one approach to defending a hospital against spurious claims of apparent agency is to first consider the big-picture concepts of objectivity and proximate cause.

Consider the case *Doe v. Smith*<sup>2</sup>, in which a perpetrator (Dr. Smith), a non-agent psychiatrist with privileges at the defendant hospital, physically assaulted a woman he was dating. He met the woman at her home, at the recommendation of the woman's sister, under the auspices of performing an initial psychiatric consultation. The initial meeting occurred in the final week of December 1999. The two met and continued their personal, romantic<sup>3</sup> relationship completely outside of the hospital's knowledge and mutually decided against a physician-patient relationship so that they could date each other. The woman now claims to have been a patient of Smith throughout the time that they were dating. The relationship ended with Smith attacking Doe on February 17, 2000, essentially bludgeoning her about the head over a matter of hours before leaving the scene.

Dr. Smith was criminally prosecuted and convicted for the attack. His license to practice medicine was revoked and he served a jail sentence for aggravated physical

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<sup>1</sup> See, e.g., Roger R. Clayton & Maureen R. De Armond, *What Every Litigator Needs to Know About Apparent Agency*, IDC QUARTERLY, Fall 2004, at 14.

<sup>2</sup> The real names of the parties are not being used herein. Summary judgment was granted in March 2005 and the plaintiff's motion to reconsider was denied in May 2005. Plaintiff has filed a Notice of Appeal.

<sup>3</sup> The complaint in this case affirmatively characterized the relationship as an "intimate sexual relationship", an "ongoing romantic relationship", and an "emotional involvement."

battery. Doe filed a civil suit against Smith for battery and for medical malpractice.<sup>4</sup> Presumably due to the difficulty in recovering against Smith,<sup>5</sup> Doe's counsel also named the hospital as a defendant in two counts: apparent agency and negligent hiring and retention. The trial court granted the hospital's motion for summary judgment premised upon the objective standard for the first and third elements of apparent agency, along with lack of proximate cause.

This article will focus only on the apparent agency portion of the case, and specifically, the way in which the facts of this case clearly delineate the outer limits of the doctrine of apparent agency. Using the concepts of (1) the objective standard for the first and third prongs of apparent agency, and (2) proximate cause, the facts of this case should clearly place the hospital (the psychiatrist's ostensible employer) outside of the realm of any liability on apparent agency grounds. The facts of his case would also ideally serve as an example of how liability must not be mechanically assigned to the hospital under the theory of apparent agency in all circumstances.

### **Applicable Case Law**

#### **Apparent Agency**

In order to establish liability on a theory of apparent agency, the plaintiff must plead and prove the following three elements: (1) the hospital, or its agent, acted in a manner that would lead a reasonable person to conclude that the individual who was alleged to be negligent was an employee or agent of the hospital; (2) where the acts of the agent create the appearance of authority, the plaintiff must also prove that the hospital had knowledge of and acquiesced in them; and (3) the plaintiff acted in reliance upon the conduct of the hospital or its agent, consistent with ordinary care and prudence. *Gilbert v. Sycamore*, 156 Ill.2d 511, 525, 622 N.E.2d 788, 795 (1993), quoting *Pamperin v. Trinity Memorial Hospital*, 144 Wis.2d 188, 423 N.W.2d 848 (1988), and citing to *Kashishian v. Port*, 167 Wis.2d 24, 481 N.W.2d 277 (1992). These elements are commonly known as (1) holding out, (2) knowledge or acquiescence, and (3) justifiable reliance.

#### **Objective Standard Applies**

In Illinois, whether an objective standard has been met may be determined by the court as a matter of law. See *Maras v. Milestone, Inc.*, 348 Ill.App.3d 1004, 809 N.E.2d 825 (2d Dist. 2004) (holding that court objectively determines whether act was reasonably within the scope of employment in vicarious liability context); *Zurich Ins. Co. v. Walsh Const. Co. of Illinois, Inc.*, 352 Ill.App.3d 504, 816 N.E.2d 801 (1st Dist. 2004) (holding that as matter of law, the court objectively determines whether time in which notification of loss was provided to insurer was reasonable); *Burnidge Bros. Almora Heights, Inc. v. Wiese*, 142 Ill.App.3d 486, 491 N.E.2d 841 (2d Dist. 1986) (finding as a matter of law that developer's reliance on commissioner's representations was not reasonable).

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<sup>4</sup> The suit was initially filed while Dr. Smith remained in prison for the attack.

<sup>5</sup> Dr. Smith's license to practice medicine was revoked shortly after his conviction in this incident. His malpractice carrier denied coverage on this claim due to late notice and his failure to renew his policy. After his limited participation in this case, the other parties in this case have been unable to locate him.

The objective standard, especially as it applies to the third element of apparent agency, and to a lesser degree the first element, precludes a finding of liability against the Hospital under the doctrine of apparent agency.<sup>6</sup>

### Holding Out

According to *Gilbert*, the first element of apparent agency, “holding out,” is defined as follows: “the hospital, or its agent, acted in a manner that would lead a *reasonable person* to conclude that the individual who was alleged to be negligent was an employee or agent of the hospital.” *Gilbert*, 622 N.E.2d at 525 (emphasis added).

It would be irrational for the court to hold that merely because the hospital exists in a community as a comprehensive healthcare facility, either in the context of emergency services or other health care, the Plaintiff will under all circumstances defeat summary judgment on apparent agency. Instead, the defendants should argue that this element should be evaluated on a case-by-case basis.

As a starting point, defendants may analogize to the one exception that has been carved out in Illinois case law, namely, situations in which the patient signed a consent form specifying that the treater is an independent contractor. *James v. Ingalls*, 299 Ill.App.3d 627, 701 N.E.2d 207 (1st Dist. 1998). While the *James* court refrained from stating that the existence of a signed consent form laying out the independent contractor status of a treater would be dispositive in all cases, the First District Appellate Court clearly felt in that case that there was no reconciling the plaintiff’s apparent agency claim with his earlier acknowledgment that the treater was an independent contractor.

By contrast, the classic plaintiff’s stance is that the element is fulfilled where the hospital simply fails to specify that the physicians are independent contractors. *Gilbert*, 622 N.E.2d 796. *See also Dahan v. UHS of Bethesda, Inc.*, 295 Ill.App.3d 770, 692 N.E.2d 1303 (1st Dist. 1998); *Kane v. Doctors Hospital*, 302 Ill.App.3d 755, 706 N.E.2d 71 (4th Dist. 1999).

This formulation of the “holding out” element is based upon the principle, set forth in *Pamperin v. Trinity Hospital*, 144 Wis.2d 188, 423 N.W.2d 848 (1988), that “when a hospital holds itself out to the public as providing complete medical care, a hospital can be held liable under the doctrine of apparent authority for the negligent acts of the physicians retained by the hospital to provide emergency room care, irrespective of the fact that the person who committed the negligent act was an independent contractor.”

*Pamperin*, 144 Wis.2d at 193.

The optimal defense approach to the first element would include citation to the reasonable person standard set forth in *Gilbert*, along with analogies to the *James* case. For additional guidance, the defense may look to the dissenting opinion in *Pamperin* regarding the inequities of an extremely permissible policy on holding out. *Pamperin v.*

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<sup>6</sup> “An apparent agency is initiated by a manifestation of the principal, and the necessary manifestation is one made by the principal to a third party who, in turn, is instilled *with a reasonable belief* that another individual is an agent of the principal.” 2A C.J.S. *Agency* §140, footnote 8 (West 2003) (emphasis added). “An apparent agent is a person who, whether authorized or not, *reasonably appears* to third persons because of the acts of another, to be authorized to act as the agent for such other persons.” I.L.P. *Agency* §3 (1988) (emphasis added), *citing Mitchell Buick & Oldsmobile Sales, Inc. v. National Dealer Services, Inc.*, 138 Ill.App.3d 574, 485 N.E.2d 1281 (2d Dist. 1985). *See also* I.L.P. *Agency* §62 (1988), *citing Hofner v. Glenn Ingram & Co.*, 140 Ill.App.3d 874, 489 N.E.2d 311 (1st Dist. 1985).

*Trinity Memorial Hospital*, 144 Wis.2d 188, 423 N.W.2d 848 (1988) (Steinmetz, J., dissenting). However, Illinois case law provides few other opportunities for the defense to emphasize the applicability of the objective standard to the first element. When taken together with the holdings of *Dahan* and *Kane*, along with the rationale set forth in *Pamperin*, the defense would fare better in arguing the objective standard in the context of the third element.

### Justifiable Reliance

The third element of apparent agency, justifiable reliance, lends itself better to the objective standard analysis. In *Gilbert*, the Illinois Supreme Court defined the “justifiable reliance” element as follows: does the plaintiff rely upon the hospital to provide comprehensive emergency room care? The plaintiff must prove that she acted in reliance upon the conduct of the hospital or its agent consistent with ordinary care and procedure. *Gilbert*, 156 Ill.2d 511.<sup>7</sup>

With regard to the boundaries of finding that there was justifiable reliance, Illinois case law provides the following rule: if the patient goes to a hospital in order to be treated by his or her private physician, *and* that private physician committed the malpractice, then as a matter of law, there is no reliance upon the hospital. *McCorry v. Evangelical Hosp. Corp.*, 331 Ill.App.3d 668, N.E.2d 1067 (1st Dist. 2002). However, aside from this specific situation, Illinois case law provides little guidance with regard to this element.

In the context of justifiable reliance, some case law seems to support application of an objective standard. In *James v. Ingalls Memorial Hospital*, 299 Ill.App.3d 627, 701 N.E.2d 1037 (1st Dist. 1998), the patient was brought to the emergency room of the hospital with complaints of vomiting and leaking amniotic fluid during her 22nd week of pregnancy. Her personal physician was contacted to see if he wanted her transferred, and at the time, approved of her staying at the hospital. The patient signed a consent form containing a disclaimer that all physicians treating her are independent contractors. She was then treated by an obstetrician/gynecologist. The treating physician discharged her and one week thereafter, she gave birth to the plaintiff, a premature infant who suffered from blindness and neurological impairment.

The patient testified that she thought she had no choice but to go to that particular hospital, since public aid was to pay for her medical treatment. The appellate court upheld the summary judgment ruling in favor of the hospital, holding that where the patient did not affirmatively exercise the choice of which hospital to attend, this precluded the fulfilling of the justifiable reliance element, and therefore summary judgment must be granted.

In *Butkiewicz v. Loyola*, 311 Ill.App.3d 508, 724 N.E.2d 1037 (1st Dist. 2000), the First District Appellate Court held that the patient must show actual reliance upon the apparent agency relationship in going to a specific hospital in order to survive summary

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<sup>7</sup> “However, a third party with whom the agent deals may rely on an appearance of authority only to the extent that such reliance is *reasonable*. Thus, in order to establish ostensible or apparent authority, the record must reflect that the alleged principal not only represented another as his or her agent, but that the person who relied upon the manifestation was *reasonably justified* in doing so under the facts of the case.” 2A C.J.S. *Agency* §142 (2003) (emphasis added). “The doctrine of apparent authority protects only those who *reasonably* rely. Thus, apparent authority vanishes when the third party gains knowledge of the agent’s lack of authority.” HAROLD GILL & WILLIAM A. GREGORY, *THE LAW OF AGENCY AND PARTNERSHIP* §§23 (2d ed. 1989) (emphasis added).

judgment. The court also criticized *Kane* as misapplying the holding of *Monti v. Silver Cross Hospital*, 262 Ill.App.3d 503, 637 N.E.2d 427 (3d Dist. 1994) (holding that the fact that a patient is unconscious at the time he comes to emergency hospital room for emergency care does not preclude imposition of vicarious liability on the hospital under the doctrine of apparent agency). The *Butkiewicz* court stated that the *Monti* holding only applies to situations where the patient is unconscious or otherwise unable to decide which hospital to go to. Thus, the court explained, the *Kane* decision erroneously held that the reliance element may be fulfilled by a third party, such as a private physician, relying upon the holding out of the hospital. The *Butkiewicz* court upheld summary judgment.

Once again, however, the Illinois Supreme Court in *Gilbert* set forth extremely low thresholds for determining whether the element has been fulfilled. *Gilbert*, 156 Ill.2d at 525-526. Quoting *Pamperin*, the Court stated that the critical distinction is whether the plaintiff seeks care from the hospital itself or views the hospital as merely a place where a personal physician can provide medical care. *Id.*

It should also be noted that a number of Illinois cases severely criticize the *James* and *Butkiewicz* holdings, although not specifically criticizing any objective standard set forth therein. *Scardina v. Alexian Brothers Medical Center*, 308 Ill.App.3d 359, 719 N.E.2d 1150, (1st Dist. 1999); *McCorry v. Evangelical Hospitals Corporation*, 331 Ill.App.3d 668, 771 N.E.2d 1067 (1st Dist. 2002); *York v. El-Ganzouri*, 353 Ill.App.3d 1, 817 N.E.2d 1179 (1st Dist. 2004).

### **Applying the Objective Standard to the First and Third Elements**

In the *Doe v. Smith* case, the plaintiff argued that the hospital allowed Smith to wear his lab coat and ID badge when originally seeing the Plaintiff. Nevertheless, a number of circumstances placed the behavior of the doctor outside of any legitimate, objectively reasonable apparent agency claim from the aspect of holding out. The relationship was marked with the overall outrageousness of the acts by the psychiatrist throughout. The patient admitted that within the first ten seconds of their second meeting, they started kissing. They reached an explicit, mutual agreement to date each other rather than initiate or continue a physician-patient relationship. Sexual activity started by the third meeting, and sexual intercourse took place by the fourth meeting.

The two saw each other exclusively off of hospital premises until the doctor visited the plaintiff at an affiliated hospital during her hospitalization on unrelated, non-psychiatric complaints approximately three weeks into the relationship.<sup>8</sup> The plaintiff and psychiatrist discussed marriage and cohabitation often, at one point staying at the psychiatrist's father's home together as a gift paid to the plaintiff in anticipation of marriage. The relationship was both social and intimate and included all-night fraternization, which consisted also of ordering pizza, going shopping, a restaurant rendezvous, and the plaintiff using the psychiatrist's computer to prepare resumes in her job search. The relationship also consisted of illicit drug consumption, staying awake for a number of consecutive days, and abusive and coercive behavior by the psychiatrist, such as holding the plaintiff against her will.

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<sup>8</sup> The psychiatrist visited the plaintiff at the affiliated hospital. The plaintiff then requested in writing to be transferred to the defendant hospital, at which the psychiatrist had privileges. However, having no documentation to accept her, the hospital appropriately refused to admit her.

By the plaintiff's own testimony, the relationship was characterized by a number of warning signs, or "red flags" whereby the plaintiff was made aware that Smith was someone to be avoided. There was never any treatment sought at the hospital, and in fact, there was little or no actual medical treatment of the plaintiff by Smith. Therefore the case at hand is clearly distinguishable from *Petrovich v. Share Health Plan of Illinois, Inc.*, 188 Ill.2d 17, 719 N.E.2d 756 (1999), and *Malanowski v. Jabamoni*, 293 Ill.App.3d 720, 688N.E.2d 732 (1st Dist. 1997). In those cases, actual medical treatment occurred on hospital or clinic premises, and within the knowledge and control of the defendant entity.

Second, a physician-patient relationship definitively did not exist after the plaintiff and Smith explicitly agreed to have a personal relationship instead. The court may determine as a matter of law whether a physician-patient relationship exists. *See Gathings v. Muscadin*, 318 Ill.App.3d 1091, 743 N.E.2d 659 (1st Dist. 2001) (holding that no physician-patient relationship existed between patient and consulted physician); *Tsoukas v. Lapid*, 315 Ill.App.3d 372, 733 N.E.2d 823 (1st Dist. 2000) (holding that no physician-patient relationship existed where HMO called physician on behalf of patient). A "physician-patient relationship" is a consensual relationship in which the patient knowingly seeks the physician's assistance and in which the physician knowingly accepts the person as a patient. *Reynolds v. Decatur Memorial Hospital*, 277 Ill.App.3d 80, 660 N.E.2d 235 (4th Dist. 1996).

The plaintiff characterized the relationship as romantic and sexual, both in the pleadings and at deposition. The plaintiff consistently testified that Smith was her boyfriend, and not her treating physician, in committing the complained-of acts. The duly executed pleading entered by Smith,<sup>9</sup> confirms that as a matter of law no physician-patient relationship existed.

Third, the hospital was only implicated through the fraudulent misrepresentations of Smith. The misrepresentations were of two types. According to the plaintiff, Smith claimed that he was a Hospital employee at the time that he first met the Plaintiff, and continued to claim so throughout their relationship. Later, after the plaintiff successfully avoided him from mid-January to mid-February of 2000, Smith induced her to call him back by leaving messages under an assumed name. By representing that he was someone else entirely, he in effect lured the plaintiff into calling him back, and once in contact with her, apologized profusely and promised to be on his best behavior if they could go out on a dinner date. The fact pattern as set forth can only lead to the finding that, as a matter of law, it would not be reasonable to assume that Smith acted on behalf of the hospital in his relationship with the plaintiff.

### **No Proximate Cause**

In fact, it was this final misrepresentation by Smith, claiming to be someone else, which also operated to sever any proximate cause on the part of the hospital. Although proximate cause, as an element of negligence, is generally a question of fact, the lack of proximate cause may be determined by the court as a matter of law where the facts alleged do not sufficiently demonstrate both cause in fact and legal cause. *Young v. Bryco Adams*, 213 Ill.2d 433, 821 N.E.2d 1078 (2004), *citing Harrison v. Hardin County Community Unit School District No. 1*, 197 Ill.2d 466, 476, 758 N.E.2d 848 (2001). Even if this defendant hospital could be found to have neglected to investigate a condition, for

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<sup>9</sup> After serving his sentence, Smith filed a responsive pleading in this case.

example if treaters at an affiliated institution made a record of the plaintiff's statements that she was dating her psychiatrist, as occurred in this case, the intervening and proximate cause of the plaintiff's damages was Smith's luring her on a date and subsequently battering her. In such a situation, this defendant hospital cannot be held liable for the plaintiff's damages. *First Springfield Bank & Trust v. Galman*, 188 Ill.2d 252, 720 N.E.2d 1068, (1999).

If the negligence charged does nothing more than furnish a condition by which the injury is made possible, and that condition causes an injury by the subsequent, independent act of a third person, the creation of the condition is not the proximate cause of the injury. *Abrams v. City of Chicago*, 211 Ill.2d 251, 811 N.E.2d 670 (2004). In order for the intervening act to sever the initial wrongdoer's culpability, the intervening event must be unforeseeable as a matter of law. In this context, "foreseeability" means that which is objectively reasonable to expect, and not anything which might conceivably occur. *Carter v. Indiana Harbor Belt R. Co.*, 547 N.E.2d 488 (1st Dist. 1989). This is the correct standard to be applied in any case in which there is an intervening cause, including the context of apparent agency. *See, e.g., Albright v. Parr*, 126 Ill.App.3d 464, 467 N.E.2d 348 (5th Dist. 1984).<sup>10</sup>

Thus, on the defense side of the issue, the case once again comes down to an objective determination. As the hospital argued, it was not reasonably foreseeable that the plaintiff would successfully avoid an alleged apparent agent of the defendant, then succumb to his stalking advances and agree to date him, only to be brutally beaten by him. The fact that the plaintiff affirmatively decided to avoid Smith, and succeeded in doing so, severed any causal link between Smith's apparent master and any tortious act later committed by Smith. The fact that Smith reentered his victim's life by means of fraudulent misrepresentation only further supports the argument that his torts were objectively unforeseeable by the hospital.

Despite the applicability of the doctrines of the objective standard and proximate cause to this case, Illinois case law suffers a serious lack of guidance on the theory of apparent agency. The holdings of certain cases among *Gilbert* and its progeny are counterintuitive in that they restrict or ignore the clear requirements that the plaintiff act reasonably with regard to the holding out and justifiable reliance elements. The loosening of the standards for finding liability on the part of the hospital, by the courts' own admissions, is an innovation with no basis in Illinois law.<sup>11</sup> The effect is to imply a standard similar to that of strict liability of a hospital for even intentional acts of non-agent physicians.

In the case at hand, proximate cause figures prominently in the analysis, but even here, the applicability of the doctrine might be limited. Apparent agency is rooted in

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<sup>10</sup> However, the issue of interplay between the fact that apparent agency is based in equity, and the fact that medical malpractice claims consist of the tort components of duty, breach, causation and damages, is slightly more complex. Admittedly, proximate cause plays a key role in the case at hand due to the intervening fraudulent misrepresentations of Smith in luring the plaintiff to reestablish contact with him. *See, e.g., HAROLD GILL & WILLIAM A. GREGORY, THE LAW OF AGENCY AND PARTNERSHIP* §§23, 25 (2d ed. 1989).

<sup>11</sup> As discussed above, the innovation is based on Wisconsin law, *Pamperin*, 144 Wis.2d 188.

equity and not in law, and therefore the role of proximate cause in a typical apparent agency case may come into question.<sup>12</sup>

## **Conclusion**

There is no question that *Gilbert* and its progeny show a definitive tilt in favor of plaintiffs regarding the doctrine of apparent agency, even to the extent of possibly implying liability on the part of a hospital for a non-medical, intentional tort by a non-agent physician, committed fully outside of the hospital's knowledge. One can only hope that the next generation of appellate cases remedies the troubling trend toward a strict liability standard for hospitals regardless of the nature of the tort committed by the non-agent physician. In the meantime, defendants should emphasize the objective standard set forth in the law of apparent agency, and where applicable, lack of proximate cause, as ways to combat against this doctrine and its accompanying trend of ever-expanding liability.

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<sup>12</sup> HAROLD GILL & WILLIAM A. GREGORY, THE LAW OF AGENCY AND PARTNERSHIP §§23, 25 (2d ed. 1989).