PRELIMINARY OBJECTIONS TO CORPORATE NEGLIGENCE CLAIMS: RE-READING *SCAMPONE*

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It seems that the implications of the Supreme Court's unanimous 2012 opinion in *Scampone v. Highland Park Care Center, LLC*[1] still have not sunk in, judging from recent preliminary objections to corporate negligence claims in medical malpractice actions. Some still read the decision as merely adding nursing homes to the list of categories of entities that can be held liable for corporate negligence. But the decision went much further: it overthrew the analysis that had come to predominate under Superior Court applications of *Thompson v. Nasson Hospital.*[2] Under *Scampone,* the viability of corporate negligence claims must be analyzed under traditional tort principles; it is not a function of whether the healthcare entity at issue is either a hospital or like a hospital. Plaintiffs now have much greater flexibility in making out claims against institutional defendants.

Thompson, decided in 1991, established the viability of a corporate negligence claim against a hospital for failing to fulfill certain institutional duties to its patients. Until *Scampone, Thompson* was commonly understood to have held that *only hospitals* can be held liable for corporate negligence, because of hospitals' comprehensive responsibility for coordinating their patients' total healthcare. Several Superior Court opinions addressing corporate negligence in the ensuing years validated this understanding. In *Shannon v. McNulty,*[3] Health Maintenance Organizations acting as the primary decision-makers with respect to their subscribers' care were found subject to corporate liability, on the basis that an HMO taking such comprehensive responsibility for coordinating its patients' total healthcare must be held liable for shortcomings in the discharge of its institutional duties. In *Hyrcza v. West Penn Allegheny Health,*[4] medical professional corporations were added to the list, again on

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the basis that such entities, when they take responsibility for their patients' total healthcare like hospitals, must be held liable for failing to fulfill institutional duties. And in *Scampone v. Grane Healthcare Co.,*[5] nursing homes were also found to be subject to corporate liability because of their responsibility for coordinating their patients' total healthcare, like hospitals.

When *Scampone* reached the Supreme Court, the Court set the record straight on how to analyze the viability of a corporate negligence claim. *Thompson*, it said, did not hold that only hospitals are subject to corporate negligence claims. Further, the viability of a corporate negligence claim is not a function of whether the institution at issue fits into a designated category of institutions that provide hospital-like care. Rather, it is a function of whether the institution breached traditional tort duties to its patient. "This inquiry [into whether an entity "assumed the role of a comprehensive health center responsible for arranging and coordinating the total healthcare of its patients"] makes too much of the facts in *Thompson* and is of limited use in developing a principled analysis of relevant considerations and lacks the potential to serve as the governing principle upon which to recognize a legal duty or obligation with respect to other entities in the healthcare field."[6] "A proper application of *Thompson* is not simply an inquiry into whether [a given entity] is a hospital or like a hospital... The relevant question is whether the legal principles explicated in *Thompson,* or elsewhere in our decisional law, apply to describe [the entity's] legal duty or obligation to [the plaintiff], given the considerations which pertain."[7] The Supreme Court held that the legal principles to be applied when determining corporate liability are the same that apply when determining any duty in tort. To determine whether an institutional-care-provider-defendant owed a patient-plaintiff a duty of care, the court must consider "(1) the relationship between the parties; (2) the social utility of the actor's conduct; (3) the nature of the risk imposed and foreseeability of the harm incurred; (4) the consequences of imposing a duty upon the actor; and (5) the overall public interest in the proposed solution."[8]

Scampone is a welcome development for plaintiffs' advocates. Flexible, multi-factorial, fact-based inquiries give us more opportunities to show why the imposition of liability is appropriate in any given case. The opinion reaffirms the vitality of the age-old method of establishing liability for negligence, which is utterly dependent upon the specific circumstances of the case at hand. *Scampone* gives clear guidance that preliminary objections to a corporate negligence claim merely on the basis that the defendant is not either a hospital or hospital-like are unfounded, and should be overruled.

Notes:

1. 57 A.3d 582 (Pa. 2012).
2. 527 Pa. 330, 591 A.2d 703 (1991).
3. 718 A.2d 828 (Pa. Super. 1998).
4. 978 A.2d 961 (Pa. Super. 2009).
5. 11 A.3d 967 (Pa.Super. 2010).
6. Scampone, 57 A.3d at 605 (citations omitted).
7. Id.
8. Scampone, 57 A.3d at 600 (quoting Althaus v. Cohen, 562 Pa. 547, 756 A.2d 1166, 1169 (2000)).

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It was in law school that Joseph Traub was first inspired to work on behalf of catastrophically injured laborers, helping represent them in claims against the manufacturers of the defective industrial machines that caused their injuries. Since graduating, cum laude, from Temple University Beasley School of Law, his professional work has expanded to representing people catastrophically injured by defective industrial and consumer products, unsafe construction practices, dangerous driving and serious medical errors. For example, he has represented a man thrown from a scissor lift with poor lateral stability, a woman whose arm was pulled into a commercial ironing roller, a family struck by a drunk driver, and a man whose throat cancer was missed by a pathologist. His work has helped provide financial relief, as well as a sense of justice and resolution, to victims and their families while also encouraging safer products and medical practices.

Mr. Traub has lectured and published articles on various topics relevant to the practice of personal injury litigation, including principles of legal ethics, strategies in construction litigation and federal preemption. As a member of the Amicus Curiae Committee of the Pennsylvania Association for Justice, Mr. Traub advocates for the rights of injured persons in the appellate courts of Pennsylvania. His appellate advocacy on behalf of his own clients has resulted in several positive developments in the law, including ensuring funds are available to compensate malpractice victims where a doctor's insurance carrier goes bankrupt (Heim v. Medical Care Availability and Reduction of Error Fund, 23 A.3d 506 (Pa. 2011)), and allowing medical experts to testify where they are familiar with the care at issue even if they do not practice in the same specialty as the defendant (Vicari v. Spiegel, 989 A.2d 1277 (Pa. 2010)). He is also on the Board of Directors of the National Lawyers Guild Philadelphia Chapter, an association of lawyers and legal workers doing primarily civil rights and public interest advocacy. In his free time he enjoys distance running and playing drums in a band.

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