

# **Scampone: Redefining The Corporate Liability Doctrine**

by

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The Pennsylvania Supreme Court recently issued its opinion in *Scampone v Highland Park*, 57 A.2d 582 (Pa. 2012). The long anticipated decision will fundamentally change how the corporate liability doctrine is applied in Pennsylvania and perhaps beyond. While the focus of *Scampone* was a Skilled Nursing Facility and its management company, the decision potentially has a broader reach.

## **Background:**

Prior to *Scampone*, the concept of corporate liability in a health care setting took root in the seminal case of *Thompson v. Nason Hospital* 591 A.2d 703 (Pa. 1991). In that matter, the Pennsylvania Supreme Court held that under a “corporate liability” theory, a hospital owes the following non-delegable duties directly to the patient: 1) maintenance of safe and adequate facilities and equipment; 2) duty to select and retain only competent physicians; 3) duty to oversee all persons who practice medicine within its walls as to patient care; and 4) duty to formulate, adopt and enforce adequate rules and policies to ensure quality care for patients. The holding was premised upon the concept that a hospital plays a central role in the healthcare of its patients.

Since *Thompson*, the Pennsylvania courts struggled with its application to non-hospital entities, such as HMO’s, physician practices and long term care providers. In each case, the lower courts seized upon the *Thompson* language and applied (or limited) the application of corporate liability based upon an analysis of whether the entity played a “central role” in the healthcare of the patient. With the advent of *Scampone*, this has all changed.

## **Scampone:**

Madeline Scampone was a resident at Highland Park Care Center, LLC, (Highland) a skilled nursing facility. It was alleged that as a result of neglect, primarily due to understaffing, the resident developed multiple urinary tract infections, dehydration, malnutrition and bed sores. It was further alleged that these conditions were substantial factors in causing cardiac arrest and death. Multiple parties were named in the lawsuit. By the time of trial, two remained – Highland and the management company, Grane Healthcare Company (Grane).

At the conclusion of Plaintiff’s case, a compulsory nonsuit was granted as to Grane. The trial court also found insufficient evidence to support a punitive damage claim. Thereafter, the case was submitted to the jury as to Highland on both vicarious negligence and corporate liability theories. The jury returned a verdict in favor of the plaintiff for a total award of \$193,000.00.

On appeal, the Superior Court reversed and remanded the case for a new trial, finding *inter alia*, that both Highland and Grane played a “central role” in the healthcare of the resident and, as such, were subject to corporate liability.

The issue before the Pennsylvania Supreme Court was whether a SNF and/or the managing company could be directly liable under a theory of corporate negligence (as opposed to vicarious liability only for the negligence of its staff members). In other words, do these entities have a direct duty to the resident/patient.

Initially, the Court stated that immunity or exemption from liability is generally created through the legislature. SNFs and their related entities do not enjoy such carve-outs under the current law, nor would the Court create one by judicial fiat. The Court went on to state:

*“We do not doubt that the industry operates on a thin margin; nevertheless, the question of tort insulation requires an assessment and balancing of policies best left to the General Assembly.”*

The Court then analyzed the concept of tort duty and the standard applied since *Thompson*. The Court held that the “central role” inquiry did not capture the appropriate standard in deciding whether a direct duty exists. Rather, the key is the relationship between the parties “as in every case where the question of duty arises.” To determine whether that relationship forms a duty, the court must apply either Section 323 of the Restatement(Second) of Torts, or the following discrete factors articulated in an earlier Supreme Court case, Althaus v Cohen, 756 A.2d 1166 (Pa. 2000):

- 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.

Notably, the Court stated that there must be an individualized duty inquiry as to each entity “which ensures that multiple entities are not exposed to liability for breach of the same non-delegable duties.”

### **Application of Scampono:**

#### **a) Section 323 of the Restatement(Second) of Torts:**

Section 323 states as follows:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other’s person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

- (a) His failure to exercise such care increases the risk of such harm, or

(b) The harm is suffered because of the other's reliance upon the undertaking.

The Restatement is rather straight forward. Arguably, application would always impose a duty upon the licensed operator of the SNF. However, it is less likely a duty would be imposed upon a management company, parent or other ancillary corporate entity under this section. While a "follow the money" argument may be advanced, ultimately, it is the licensee that provides the services for which compensation is paid, irrespective of how the money is collected or distributed.

**a) Althaus v Cohen**

The factors outlined in *Althaus* are, by their nature, somewhat nebulous. In order to better understand how they might be interpreted, it is worth considering how they were applied in that case.

In *Althaus*, a therapist was advised by a child-patient that she had been sexually abused by her parents. The therapist reported those allegations, which she considered to be well-founded. As a result, the parents were prosecuted. Eventually, it was determined that no abuse occurred and all charges were dropped. The parents then sued the therapist for negligence.

The court was faced with the issue of whether the therapist owed a duty to the non-patient parents. In addressing this fundamental tort issue, the court came to the following conclusions:

- 1) The relationship between the parties** - this factor weighed against imposing a duty, as the professional relationship was between the therapist and the child only;
- 2) The social utility of the actor's conduct** - this factor weighed against imposing a duty to a non-patient parent, because therapists that treat sexually abused children perform a valuable service for society;
- 3) The nature of the risk imposed and foreseeability of the harm incurred** - the court noted that being falsely accused of child abuse undoubtedly causes harm. However, based on the specific facts of the case, by the time the therapist became involved in the care, the harm had already occurred. Thus, this factor weighed against imposition of a duty.
- 4) The consequences of imposing a duty upon the actor** - this factor also weighed against creating a duty, as adding this obligation would invade the trust and confidentiality inherent in a patient-therapist relationship and possibly create a conflict;
- 5) The overall public interest in the proposed solution** – While there were compelling arguments that a person falsely accused should have a remedy at law, the existence of other potential causes of action as well as the societal interest in encouraging treatment of abused children weighed against imposing a duty.

Thus, the court concluded that a duty did not exist between the therapist and the parents.

Significantly, two of the Justices dissented, finding that under their analysis of the same factors, a duty should be imposed. This suggests the ambiguous, subjective manner in which these factors may be applied to create or negate a duty.

### **Conclusion**

Going forward, trial courts will be called upon to analyze the proffered evidence in each case to determine whether a direct “corporate” duty is established as to each named entity.

That said, it will not be difficult to establish a corporate duty between the resident and the licensed facility under Section 323 of the Restatement (Second) of Torts. The more significant issue will be whether a direct duty exists between the resident and other entities, such as management companies, parents and other ancillary corporate entities. The *Althaus* factors will be the likely vehicle used in this quest. Given the vague nature of those factors and arbitrary manner in which they may be applied, any uniform application is unlikely – at least initially.

Although corporate liability is ostensibly a case by case, entity by entity analysis, successive courts evaluating the same providers are likely to follow a trail that has already been blazed by their peers. Accordingly, for long term care providers, early success in limiting the corporate duty to the licensed entity will be crucial.