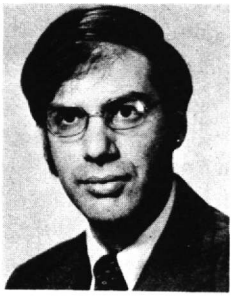
Legal Briefs



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Liability of a surgeon when working with a nurse anesthetist

The other day, we came across a very interesting case which discussed various legal doctrines under which a surgeon could be held liable for the actions of a nurse anesthetist. Holding one party (the surgeon) liable for the actions of another (the nurse anesthetist) is known as the doctrine of *vicarious liability* and there are several ways it could apply.

A surgeon will usually be held vicariously liable for the actions of personnel employed by him or her. This form of vicarious liability is known as the doctrine of *respondeat superior*. It would be unusual for a surgeon to directly employ a nurse anesthetist.

Many courts have applied a *captain of the ship* doctrine under which the surgeon is deemed to be in control of the operating room and thus is responsible for the actions of all personnel assisting in the operation. Some jurisdictions have abandoned or modified the "captain of the ship" doctrine because it led to unfair and inconsistent results.

Another rationale for imposing vicarious liability on a surgeon is known as the doctrine of the *borrowed servant*. Under this approach, certain employees of a hospital are deemed to be "borrowed" by the surgeon who then becomes liable for their negligent actions as if they were his employees.

Another way of justifying vicarious liability occurs when the surgeon supervises or controls or has the right to control the negligent individual.

To the extent that the surgeon selects a particular nurse anesthetist or anesthesiologist, the surgeon can also be liable for negligence in such selection.

Statutes which regulate the practice of nurse anesthetists often provide that a nurse anesthetist must work under the "supervision" or "direction" of a physician. Some people have claimed that this language in a statute can create *statutory vicarious liability* under which a surgeon can be held liable for the actions of a CRNA. In fact, in the case we found, the court faced precisely this issue.

The case

In *Baird v. Sickler* (1982, Ohio), there were three separate opinions. In the majority opinion, the court found that the surgeon was liable for the negligence of a nurse anesthetist because the surgeon exercised and possessed the right to *control* the actions of the nurse anesthetist.

Two of the judges, however, did not agree with the rationale applied by the majority of the judges. One of these judges, felt that the majority did not interpret the facts correctly and expressed the opinion that the surgeon did not direct, control or supervise the CRNA. He also felt that the statute did not provide a basis of vicarious liability, but was merely a mechanism to exempt a CRNA from the general prohibition against the unlicensed practice of medicine.

The other judge felt that the Ohio statute

that permits a CRNA to administer an anesthetic under the direction of and in the immediate presence of a licensed physician required "statutory vicarious liability" for the surgeon.

It should be emphasized that the two minority positions expressed by the judges in *Baird* do not have any legal impact. We found the case interesting because the majority of the judges rejected a determination that the statute requiring supervision of a CRNA imposed liability on the surgeon. Instead, the majority examined the factual situation and determined that the surgeon was liable for the actions of the CRNA because the surgeon controlled or had the right to control the CRNA.

Other cases

Liability for the negligence of persons subject to the defendant's control has long been recognized by the courts. In *McKinney v. Tromly* (1964, Texas), the court found that the surgeon was liable for the negligence of a nurse anesthetist because again, the doctor had the "right to control" the nurse anesthetist.

It is interesting to note that there have been at least two cases where surgeons have been found liable for the negligence of anesthesiologists based on a "right to control" rationale. (See *Kitto v. Gilbert* [1977, Colorado] and *Schneider v. Albert Einstein Medical Center* [1978, Pennsylvania]).

In other cases, surgeons have not been found liable for negligence of nurse anesthetists because they did not "control" the actions of the nurse anesthetist.

In *Hughes v. St. Paul Fire and Marine Insurance Company* (1981, Louisiana), a physician (who was not a surgeon) instructed a CRNA to attempt nasal intubation on a patient suffering a respiratory crisis. The court found that the doctor was not vicariously liable for the acts of the CRNA since (1) the CRNA was not employed by the doctor, and (2) the doctor did not actually supervise or control the acts of the CRNA.

In *Kemalyan v. Henderson* (1954, Washington), the court found that the surgeon was not responsible for the negligence of a nurse anesthetist in administering an anesthetic since the surgeon "did not exercise any supervision or control" over the nurse anesthetist.

In *Sesselman v. Muhlenberg Hospital* (1954, New Jersey), the court found that an obstetrician who gave instructions to a nurse anesthetist, did not become liable for the negligence of the nurse anesthetist.

In cases of this type, courts sometimes impose "primary liability" rather than "vicarious liability" upon the surgeon. The courts find that the surgeon fails to take appropriate action to remedy or minimize harm when there is an anesthesia accident without regard to his responsibility for the actions of a nurse anesthetist or anesthesiologist.

Thus, in *Schneider vs. Albert Einstein Medical Center,* noted above, (which involved an anesthesiologist) the court also found that the surgeon was negligent in fulfilling his obligation to monitor the patient "regardless of what the anesthesiologist is doing." The court noted that the doctor "could have and should have given orders to cancel the anesthesia attempts when it was apparent that the progress of these procedures was not satisfactory."

An interesting variation on this theme occurred when a surgeon was held liable for injury caused during the anesthesia process, even though the nurse anesthestist was not herself negligent. In *Weinstein v. Prostkoff* (1959, New York), the court noted that "the negligence charged against the doctor was his failure to take steps which he should have taken, but did not." Although the lower court found that the jury's verdict against the surgeon but in favor of the nurse anesthetist was inconsistent, the appellate court disagreed, and found that "the jury could have found that the doctor was derelict in matters of judgment which were exclusively his concern."

Although we do not claim to have read all of the cases, we have not yet come across a case in which a statutory requirement of supervision was the basis of imposing liability on a surgeon for the actions of a nurse anesthetist. In general, it seems that the courts take a "common sense" approach to the issue by finding liability where the surgeon caused or could have prevented the damage either because of his control or because he failed to take remedial measures.

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