Legal Briefs

GENE A. BLUMENREICH, JD
AANA General Counsel
Fine & Ambrogne
Boston, Massachusetts

Surgeon's liability for negligence of CRNAs: A recent case

In a recent case, the Tennessee Court of Appeals issued a well-reasoned opinion holding that under the facts of the case, surgeons did not have liability for the negligence of nurse anesthetists *(Richard O. Parker et al. v Vanderbilt University et al.,* 1988 Tenn. App. Lexis 734, November 23, 1988, filed).

Richard Parker was taken to Nashville General Hospital, a hospital operated by the Metropolitan Government of Nashville and Davidson County. The surgical staff was furnished by Vanderbilt University under a contract with the Metropolitan Government. A suit, alleging that Mr. Parker was negligently intubated, was brought against the hospital, the Metropolitan Government, Vanderbilt University, four Vanderbilt doctors, the nurse anesthetist and student nurse anesthetist who intubated Mr. Parker, the school in which the student nurse anesthetist was enrolled and the head of the anesthesia department at the hospital.

Theory of vicarious liability

Two acts of negligence were claimed: misplacement of the tube and failure to recognize and take prompt action to correct it. For purposes of the appeal, the court assumed that the misplacement of the endotracheal tube was negligence. Since the tube was placed by the nurse anesthetists, any recovery against defendants other than the nurse anesthetists would be based on some theory of "vicarious liability." That is, liability for the actions of another when you, yourself, were not negligent. The court determined that none of the physicians was vicariously liable for the alleged negligence of the nurse anesthetists. The case is of great personal interest because it considered many cases previously discussed in this column.

The court considered theories on which vicarious liability could be imposed. The first of these is the so-called "Captain of the Ship Doctrine." It is obvious that the court reacted to the misuse of this doctrine, because there is an interesting discussion of the rise and fall of "Captain of the Ship" in a case cited in the opinion, *Thomas v Raleigh General Hospital* (358 SE 2d 222, West Virginia, 1987): *"In looking to the history of this Doctrine, Pennsylvania originally adopted the "Captain of the Ship Doctrine" to get around charitable immunity for hospitals:... If operating surgeons were not to be held liable for the negligent performance of the duties of those working under them, the law would fail in large measure to afford a means of redress for preventable injury sustained during the course of such operations."*

The West Virginia Court noted that the appropriateness of "Captain of the Ship" was declining, since most states had abolished the hospital charitable immunity doctrine. More importantly, most practitioners now carry insurance, although the courts are reluctant to acknowledge that the presence of insurance has an effect on their decisions. The court also felt that "Captain of the Ship" had gone much further than was ever intended. It was a phrase which was intended only to illustrate that under the facts of a particular case, the surgeon could be held liable for those assisting the surgeon in the operation, just as the Captain of the Ship in the Navy was held responsible for the actions of

those who assisted him in operating the ship. Over time, some courts resorted to the phrase, finding liability whenever the surgeon was directing the operation rather than examining the relationships between surgeons and others for the "control" which the phrase illustrated.

Concept of master and servant

In *Parker v Vanderbilt*, the Tennessee Court was tired of nautical examples and said, *"we are of the opinion that the use of the term "Captain of the Ship" with respect to the liability of a surgeon for the negligent acts of others in or around the operating room is unnecessarily confusing and should be avoided. We think the surgeon's liability for the acts of others should rest on the more familiar concept of master and servant. 'Operating surgeons and hospitals are subject to the principles of agency law which apply to others.'"*

The Tennessee Court of Appeals then looked at traditional legal tests of the master/servant relationship. Under Tennessee law, the right to control the "result" does not necessarily create vicarious liability. It is the actual control "of means and method" that determines liability. Moreover, employment by a general employer does not mean a person cannot be under the control of a special employer for some purposes ("loaned servant"). Applying these concepts, the court then determined that none of the physicians should be vicariously liable for the negligence of the nurse anesthetists.

The nurse anesthetists were not working on behalf of the chief of the anesthesia department but rather were working on behalf of the hospital at the time they engaged in the alleged negligent act. Therefore, they were not the "loaned servants" of the head of the anesthesia department who was not even present at the hospital the night the incident occurred.

The plaintiff claimed that the four operating surgical residents were also vicariously liable for the negligence of the nurse anesthetists. The court said *"a nurse anesthetist is a highly trained specialist acquiring skills in the course of his/her training that a surgeon does not possess. In this case, the nurse anesthetists were assigned by General Hospital according to a call schedule developed and implemented by the hospital. The surgeons did not select the drugs used to put the patient to sleep nor did they oversee or direct the procedures used by the nurse anesthetists.... We find nothing in the record upon which to base vicarious liability."*

Having discussed the facts, the court mentions some of the other cases which have also held that surgeons were not liable for the negligence of nurse anesthetists. *Fortson v McNamara* 508 So. 2d 35 (Florida, 1987), *Kemalyan v Henderson* 45 Wash. 2d 693, 277 P. 2d 372 (1954), *Thomas v Raleigh General Hospital* 358 S.E. 2d 222 (West Virginia, 1987), *Hughes v St. Paul Fire and Marine Ins. Co.* 401 So. 2d 448 (La. Ct. App. 1981) and *Sesselman v Muhlenberg Hospital* 124 N.J. Super. 285, 306 A 2d 474 (1973).

Surgeon's responsibility for nurse anesthetist

Finally, the court discussed the charge that the doctors had personal negligence (as opposed to vicarious liability). The court said that there was evidence that in the absence of an anesthesiologist, the surgeon in charge was responsible for the nurse anesthetist. However, *"the term 'responsibility' is used in the general sense. There is no testimony that the applicable standard of care requires a doctor present in the operating room to supervise the placement of an endotracheal tube."*

Some of the cases mentioned by the court are also of interest. The court felt that *Jackson v Joyner* 236 N.C. 259, 72 S.E. 2d 589 (1952) on which the plaintiff had relied was of limited value because in *Starnes v Charlotte-Mecklenburg Hospital* 28 N.C. App. 418, 221 S.E. 2d 733 (1976), in which the plaintiff argued that the hospital was negligent in supplying a nurse anesthetist instead of an anesthesiologist, the North Carolina Court of Appeals disagreed and came to the opposite conclusion as in the *Jackson v Joyner* decision.

Fortson v McNamara was another case of a negligent intubation.The plaintiff claimed that the surgeon in charge of the operating room should be held vicariously liable for the negligence of the nurse anesthetist. The Florida Court of Appeals distinguished cases involving surgical nurses cited by the plaintiff, because the nurses involved were not like nurse anesthetists who have "specialized training" and who "performed her duties independently." The court summarized: *"While we agree that a surgical nurse, under the direct supervision of the surgeon who acts according to the surgeon's specific direction, is certainly the servant of the surgeon, we are not willing to place a nurse anesthetist in this category, particularly where there is no showing that the surgeon directed the procedures to be utilized by the nurse anesthetist or had a genuine opportunity to alter the course of events."*

What I find so encouraging about the results of *Parker v Vanderbilt* and *Fortson v McNamara* is not just that the courts lined up on the same side as the AANA in holding that the surgeon was not vicariously liable for the alleged negligence of a nurse anesthetist, but that the courts made these rulings after having obviously made the effort to understand the law and the principles involved in the administration of anesthesia.