Legal Briefs

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The irrelevant issue of surgeon's liability

Anti-CRNA activity this year seems to be concentrating on the so-called vicarious liability of surgeons working with CRNAs.

The attack can be summarized this way: "Because nurse anesthetists are medically directed by a physician, when surgeons work with nurse anesthetists the surgeons become liable for their mistakes—but when surgeons work with anesthesiologists the surgeons do not have to worry about what happens at the head of the table." This position, however, is *without* foundation.

There are at least three things wrong with this premise. First, surgeons are not always liable for the negligence of nurse anesthetists. Second, surgeons may also be liable for the negligence of anesthesiologists. Third, because a surgeon's liability, whether working with nurse anesthetists or anesthesiologists, depends on the particular facts of the situation, *as a practical matter,* the surgeon is likely to be included in the suit whether the surgeon is working with a nurse anesthetist *or* an anesthesiologist.

The surgeon and the nurse anesthetist

Will a surgon be held liable for the negligence of a nurse anesthetist? Previous articles have discussed this issue (see this column on the "Liability of a Surgeon When Working with a Nurse Anesthetist," *AANA Journal,* June, 1984). It would be foolish to claim that a surgeon never has liability when working with a nurse anesthetist. Clearly, there are cases which have held surgeons liable for the negligence of nurse anesthetists. However, these cases have found liability either because of the surgeon's own acts (the failure to do something that the surgeon was supposed to do or doing something the surgeon should not have done) or because the surgeon was, in fact, in control of a procedure which caused damage. *We have never found an appellate court case in which a surgeon was found liable for the negligence of a nurse anesthetist based solely on a statutory obligation of supervision.* See, *Baird v. Sickler,* 433 N.E.2d 593, a 1982 Ohio case coming to the same conclusion.

Moreover, there are numerous cases in which surgeons and other physicians working with nurse anesthetists have *not* been held liable for their negligence. See *Hughes v. St. Paul Fire and Marine Insurance Company,* (401 So.2D 448, Louisiana 1981), *Kemalyan v. Henderson,* (277 P.2D 372, Washington, 1954), *Sesselman v. Mulenberg Hospital,* (306 A2D 474, New Jersey, 1954) and *Cavero v. Franklin Benevolence Society,* (223 P2D 471, California 1950).

The surgeon and the anesthesiologist

Can a surgeon be held liable for the negligence of an anesthesiologist? The answer is the same: sometimes. Physicians have been held liable

for the negligence of other physicians under the following factual circumstances:

1. Where the physician observed the negligent acts, *Rodgers v. Canfield,* (272 Mich. 562).

2. Where the physician participated in the negligent diagnosis and treatment. *Morrill v. Komasinski,* (256 Wisc. 417).

3. Where the physician was present and participated in the negligent action. *Rytkonen v. Lojacono,* (269 Mich. 270) and *O'Grady v. Wickman,* (213 So.2d 321, Florida).

In addition, courts have indicated that they *would* find the physician liable for the negligence of another physician under the following circumstances:

1. If the physician was in control of the negligent act or observed the negligent act and did nothing about it. *Thompson v. Lillehei,* (164 F. Supp. 716, 1958);

2. If the surgeon was negligent in determining the competence of his team, *Salgo v. Leland Stanford,* (317 P2d 170).

3. If the surgeon was negligent in giving instructions. There are cases holding surgeons liable for the negligence of anesthesiologists where courts have come to the conclusion that the surgeon was in control of the anesthesiologist. See, for example, *Schneider v. Einstein Medical,* (390 A.2d 1271 Penn. 1978), *Rockwell v. Stone,* (173 A.2d 54, Penn. 1961) and *Kitto v. Gilbert,* (570 P.2d 544, Colo. 1977).

Conclusions

Thus, these cases show that sometimes surgeons are held liable for the negligence of nurse anesthetists and sometimes they are not; sometimes surgeons are held liable for the negligence of an anesthesiologist and sometimes they are not. What all of these cases have in common is that whether or not a surgeon will be held liable depends on the particular *facts.*

The suggestion that the difference in licensing laws affects a surgeon's liability is not only untrue, but it does not *mean* anything. Today, virtually every health care provider is covered by insurance and most malpractice cases are settled prior to trial. Saying that a surgeon is liable for the negligence of another health care provider does not mean that the surgeon is going to have to pay a judgment—it means only that the surgeon is going to be involved in a lawsuit.

Being involved in a lawsuit is a very aggravating process and what most defendants try to do is to file a "motion for summary judgment." This says, in essence, *"Assume that all the facts the plaintiff alleges are true, based on the law, I have done nothing wrong and I am not liable for any damage."*

The problem is that a surgeon's liability depends not on *law,* but on the *facts.* Did the surgeon do something wrong? Was the surgeon, in fact, in control? Courts will grant motions for summary judgment only if it is clear that there are no factual circumstances claimed under which the surgeon *could* be held liable. As we have seen, if the plaintiff alleges that the surgeon was in control of the anesthesia, or participated either in a misdiagnosis or the negligent action, the plaintiff may be able (if the facts can be proven) to hold the surgeon liable. Because the surgeon's liability for the negligence of a nurse anesthetist or an anesthesiologist depends on the specific facts of the case, it will be difficult in most cases for a court to grant summary judgment in favor of the surgeon.

Finally, when there is an anesthesia incident —no matter who administered the anesthetic—the plaintiff will not really know what happened before completion of "discovery" or trial. Everyone conceivably connected with the incident is going to be sued, and, because these cases are so dependent on facts, there may be no way out of the case for innocent parties until the plaintiff realizes the facts are not sufficient to hold the surgeon liable.

Which brings us to the conclusion that there is simply no rational basis for a surgeon to choose between a nurse anesthetist or an anesthesiologist based on the difference in state licensing laws.