



LEGAL BRIEFS

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Navigating the “Captain of the Ship” Argument

The goal of the “Captain of the Ship” argument is to create anxiety for surgeons by claiming that they will face increased liability for working with Certified Registered Nurse Anesthetists (CRNAs). This argument is not true. The purpose of this article is to debunk the myths surrounding the Captain of the Ship argument by providing CRNAs with a better understanding of the facts and the law.

The Captain of the Ship argument was originally designed to *penalize* doctors by suggesting they were responsible for anything that happened in the operating room. It has since been corrupted into a weapon being used to instill fear in surgeons from working with CRNAs. Ironically, it is being misrepresented by one group of physicians (anesthesiologists) to their own benefit and to the disadvantage of the surgeons with whom they want to work. The tactic relies on taking advantage of what surgeons do not know about the law and exploiting surgeons’ legitimate concerns over being sued.

Like anything else, asking the right questions and obtaining the necessary information can provide the understanding necessary to combat fear, and *fear* is the anchor to the captain of the ship argument. Fear is allowing those intent on opposing CRNAs to reintroduce this archaic and distorted theory in a last-ditch effort to win a “turf war” over the administration of anesthesia. It is time that we focus on the

degree of healthcare being provided and not the degree of the healthcare provider.

Once armed with the necessary information, CRNAs can cast off this anchor of fear and finally move on from this argument for good. Understanding the facts and the law will allow the focus of all of the healthcare professionals involved to remain where it should be: on the welfare of the patient and on the quality of care being provided.

To achieve this, first we must understand the argument.

What “Captain of the Ship” Really Was

It all started with a single question, “Who is in charge of this surgery?”

The Captain of the Ship argument originates from the concept of *vicarious liability*, or being held liable for the negligent act of someone else. The concept took advantage of the confidence with which surgeons were instilled as part of their medical school training. The result was that when questioned, a surgeon was content acknowledging being in control of everything that took place in his or her operating room during a surgery. Just like the captain of a ship commands the boat, the surgeon claimed to be “in charge” of anything and everything that took place during the surgery. Unfortunately, no one taught these surgeons the law of vicarious liability.

Liability, especially the concept of vicarious liability, turns on con-

trol. Whether or not you control the performance of someone else will have an impact on whether you can be held liable for that person’s conduct. By claiming control over everything that occurs in the operating room, a surgeon actually risks exposing himself or herself to potential liability for *any negligence* that takes place.

More importantly, the surgeon could be taking on potential liability that he or she should not face. The history of the case law is clear, and the courts impose liability on a surgeon only when that surgeon participated in the negligence or the surgeon *controlled* the performance of the procedure that was performed negligently.

What the “Captain of the Ship” Became

Anesthesiologists’ adoption and modification of the outdated Captain of the Ship concept was a marketing strategy designed to scare surgeons away from working with CRNAs. The false premise was presented that working with a nurse anesthetist rather than a physician anesthesiologist would cause the surgeon to be liable for any anesthesia mishap. To quote Gene Blumenreich, JD, former general counsel of the AANA, “this was untrue 30 years ago, it was untrue 20 years ago, it is untrue today, and tomorrow it will still be untrue.” The foundation of this claim is rooted in fear and finds no

support in either fact or law.

We must train ourselves to ask the right questions and get others to do the same.

For too long, the question surgeons have been told to ask is, “How can I avoid being sued?” That is no longer the right question to ask. Our society has experienced a proliferation of opportunistic lawyers who, based on the dollars flowing through healthcare and the perception of available “deep pockets” have and remain focused on the healthcare community. The government’s enforcement and recoupment efforts are equally focused on healthcare. The unfortunate answer to “How can I be certain to avoid being sued?” is that you can’t.

The right question to ask is, “How can I minimize the likelihood of being sued successfully?” The answer to that, of course, is contained in the law.

A surgeon will always be potentially liable for his or her own acts of negligence. A surgeon’s risk of being held liable *due to the negligence of an anesthesia provider* will turn on what *control* he or she exerted over the anesthesia provider in the performance of his or her duties. This is true whether the surgeon is working with a CRNA or an anesthesiologist. The safest course of action for the surgeon is to simply afford the anesthesia provider the discretion and judgment in the performance of his or her professional duties. If the surgeon claims no control over the administration of anesthesia, he or she should face no increased risk of liability.

What “Captain of the Ship” Is Not

Supervision does not equal control. Let me be clear on that. Supervision does not equal control.

A surgeon merely supervising a nurse anesthetist to fulfill Centers for Medicare & Medicaid Services (CMS) reimbursement regulations (in nonopt-out states) does not yield

liability, and the decision to work with a nurse anesthetist does not increase the risk of liability. There is not a single published case in which a surgeon was held liable for the conduct of a CRNA solely based on the surgeon having “supervised” the CRNA to comply with reimbursement regulations.

What “Captain of the Ship” Is and Should Be

The Captain of the Ship is a reminder that we are all in this together. Everyone in the operating room has a role to play, and everyone should have a singular focus: the welfare of the patient. The message should be that there is value in working with qualified anesthesia providers. The focus should be on working with qualified professionals and not on the professional’s curriculum vitae.

Let us be honest about what is behind the revival of the Captain of the Ship argument. Everyone is after the money of healthcare professionals. If it is not the medical malpractice lawyer, it is the insurance auditor, the False Claims Act *qui tam* relator, or the government’s enforcement agencies. Surgeons have legitimate fears of getting sued and needing to defend themselves. Some anesthesiologists are coupling **their** premise that somehow, as physicians, they are better qualified to administer anesthesia with surgeons’ concerns about being sued to goad them into not working with CRNAs.

Also, let us clear the air about the quality of care being provided. There are no differences in patient outcomes when anesthesia services are provided by CRNAs, physician anesthesiologists, or CRNAs supervised by physicians,¹ according to the results of a national study conducted by RTI International and published in the journal *Health Affairs* in 2010. The study, titled “No Harm Found When Nurse Anesthetists Work Without Supervision by Physicians,” examined nearly 500,000 individual cases

and also confirmed that the quality of care administered by CRNAs is equal regardless of supervision.

There are very few aspects of healthcare that are more results oriented than the administration of anesthesia. Patients want to go to sleep, feel no pain, and return safely to their loved ones and their life. Any circumstance requiring administration of anesthesia is already likely to provoke anxiety, and there is no reason for anesthesia providers to add to that anxiety. Patients are not interested in, and should not be subjected to, internal or political struggles regarding the academic degrees of their anesthesia provider but should be allowed to focus on the degree of care they are receiving.

Righting the Ship for Smooth Sailing

It is time to be open and honest and work together to spread the truth about the administration of anesthesia. It is safer than it has ever been, and it is getting safer every day with every advancement. Both anesthesiologists and nurse anesthetists are professionals who are judged by their infrequent failures rather than the customary successes experienced every day.

For physicians who want to minimize their liability, the course of action is clear. Allow your anesthesia providers (whether CRNAs or anesthesiologists) to be the independent and well-trained professionals they are.

For CRNAs who are faced with the question about the legitimacy of the Captain of the Ship argument, remind them that allowing CRNAs to be the independent providers of anesthesia they are trained to be is all surgeons must do to reduce their potential liability related to anesthesia administration.

For too long the Captain of the Ship has been an issue of urban legend—like evil forces we have never really seen or even understood—but just the mention of it was enough

to strike fear into the heart of a surgeon. Like most things that scare us in the dark, turning on the lights can expose the reality and reveal all the fears as unwarranted.

REFERENCE

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DISCLOSURES

The author has declared he is the outside general counsel of the American Association of Nurse Anesthetists. The author did not discuss off-label use within the article.