ASA Newsletter
December 2000
Volume 64

Number 12

Surgeon Liability for Nurse Anesthetists: Fact or Fiction?

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Whenever a physician works with a nonphysician allied health practitioner, a legitimate concern exists as to the circumstances under which the physician may be held responsible for the actions of the nonphysician. In some cases, the nonphysician may be an assistant who directly assists the physician in providing services to the patient, accepting instruction as to each specific action to be taken. In other cases, the nonphysician provider may be trained in an area entirely different from the physician's specialty and may perform services needed for patient care, but they may be separate and distinct from the specific services the physician is providing.

Overview

Employers are responsible for the actions of their employees performed in the reasonable scope of their employment under the doctrine of respondeat superior, under which the master is responsible for the acts of the servant. Often in hospitals, ambulatory surgical centers and physician offices, however, personnel employed by different entities combine to provide services to patients, and several different parties can be sued in the event of injury. Generally, in cases involving adverse anesthesia incidents, at least three parties may be named defendants: the hospital or other facility at which the surgical procedure took place, the surgeon or other operating physician and the anesthesiologist and/or the nurse anesthetist involved.

Physicians (and hospitals) may be held accountable for the actions of persons who are not their employees based upon a variety of theories of vicarious liability, under which the law of agency is used to impose liability on a physician who possesses a right to control the actions of the nonemployee health care provider. The law of agency sets forth principles regarding the circumstances under which one person can be held accountable for the actions of another. Often, the nonemployee is said to become the borrowed servant of the physician. Courts differ on the precise rationale under which vicarious liability should be imposed. Some courts look to whether the physician had the right to control the nonemployee, while others courts will impose liability only if the physician actually took steps to control the person.

A more outdated theory of liability known as captain of the ship once was a basis for finding the surgeon responsible for every person working in the operating room, without regard to whether the surgeon did or did not try to exert control or even knew what the other personnel were doing. That theory has fallen into disfavor as courts recognize that today's operating rooms are more complicated facilities with more specialized personnel, some of whom are skilled in areas in which the surgeon has little training.

Physicians typically ask for a snapshot of the legal principles and want to know in a few words under what circumstances they can be held responsible. The truth is that the cases in this area do not lend themselves to easy characterization. This article will provide an overview of some of the theories and facts relied upon by the courts in evaluating liability of a physician (or hospital) for a nonemployee. Many times the cases involve a nonemployee nonphysician, including nurses and nurse anesthetists. In some instances, the facts concern a nonemployee physician, including anesthesiologists. Readers should recognize that courts in different states may follow different principles and that the procedural history of the case, including the different parties who may have settled before a case is decided, also may bear on the outcome.

Vicarious Liability

Determining vicarious liability is a fact-intensive process that depends upon the facts of the incident giving rise to the lawsuit. The theories that the parties present to the court also affect the outcome. The cases fall along a spectrum: A surgeon may be held legally responsible for the actions of a nurse anesthetist if the surgeon takes steps to intervene in the provision of anesthesia or if the surgeon accepts responsibility for the actions of the nurse anesthetist. A hospital may be held accountable for the actions of nonemployee nurse anesthetists if the hospital's own policies are not followed. Some courts reason that a surgeon can be held accountable if the surgeon had the right to control the actions of the nonemployee without regard to what steps the surgeon actually did or did not take to control the actions of the nonemployee. In determining whether the surgeon had the right to control the nonemployee, courts look at a variety of factors, including the facts of the case, expert testimony regarding the standard of practice and any hospital policies regarding the conditions under which a nonphysician may practice. Finally, at the far end of the spectrum, the more extreme view is represented by the “captain of the ship doctrine that many courts now decline to follow.

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Significantly, courts generally do not consider the scope of practice of the nurse anesthetist or other nonphysician practitioners in reaching their decisions. Instead, the courts look at doctrines of the law of agency discussed above as well as the hospital or department of anesthesiology policies or protocols regarding practice by nurse anesthetists.

That is not to say that the licensing provisions governing the nonphysician's practice are not relevant. For example, the Supreme Court of Georgia* reviewed the licensing statute governing nurse anesthetist practice in order to assess the liability of an anesthesiology practice and a hospital where anesthesia was administered by a student nurse anesthetist under the supervision of a physician's assistant. The court found that the anesthesiology practice which employed the physician's assistant had breached its duty in allowing an uncertified student nurse anesthetist to administer anesthesia while not under the direction and responsibility of an anesthesiologist as required by Georgia law. Similarly, the hospital was found liable for violating its legal duty by using a surgical consent form stating that anesthesia would be administered under the direct supervision of an anesthesiologist and by knowingly permitting the anesthesiology practice to violate its statutory duty.

So what guidance can be drawn from the cases?

Right to Control

In a 1994 decision of the North Carolina Supreme Court, the court found the surgeon responsible for the actions of the nurse anesthetist with whom he had worked because the surgeon was capable of exercising control over the nurse anesthetist, knew the principles of anesthesia administration and had exercised control on at least one occasion during the procedure. In reaching this decision, the court relied in part on the hospital's anesthesia manual, which provided that anesthesia care would be provided by nurse anesthetists working under the responsibility and supervision of the surgeon doing the case. The conclusion that the surgeon had the right to control the nurse anesthetist was supported by the fact that the hospital did not employ or contract with an anesthesiologist.

Interestingly, the court departed from the decisions of other courts and decided that the surgeon could be held liable for the negligence of a skilled assistant if the surgeon in fact possessed the right to control that assistant at the time of the assistant’s negligent act.

Actual Control

A Maryland appellate court decision illustrates how courts have moved away from the captain of the ship doctrine and instead have looked at whether the surgeon exercised actual control over the negligent nonemployee assistant before imposing liability. In this case, an anesthesiologist had evaluated the patient as a high-risk patient for anesthesia and had prescribed the anesthesia plan but had not specified the anesthetic agents to be used and was not present when the hospital-employed nurse anesthetist induced the patient. The plaintiff's expert testified at trial to several violations of the standard of care by the anesthesiologist and by the nurse anesthetist. The court declined to impose liability on the surgeon, finding that there was no evidence that the surgeon had in any way supervised or controlled, had attempted to control or had the right to control the conduct of the anesthesiologist and nurse anesthetist.

> The controlling factor in determining whether a surgeon is to be held accountable for a nurse anesthetist's actions is whether, based on the facts of the case, the surgeon actually exercised control or had the right to exercise control over the nurse anesthetist during the surgical procedure.

In another case where a patient was injured in the course of the administration of anesthesia by a nurse anesthetist who was supervised by his employer-anesthesiologist, the court determined that the operating surgeon could not be held accountable for the administration of anesthesia. The court stated that the surgeon would not be held responsible in the absence of actual control.

The lack of control over the way in which a nurse anesthetist provides services has served as a rationale for finding that a hospital was not vicariously liable for the actions of a nurse anesthetist. In a 1995 decision, a Texas appellate court relied on uncontroverted testimony that the nurse anesthetist was an independent contractor who determined with the surgeon, outside the parameters and control of the hospital, the details of providing anesthesia to the injured patient. (The liability of the surgeon and the nurse anesthetist, both of whom had settled with the plaintiff, was not at issue.)

Violation of Hospital Policies

Where hospital policies relating to the administration of anesthesia are not followed, the hospital is subject to liability for the anesthesia-related injury. In an appellate court decision in Texas, the hospital was held vicariously liable for the injury caused to a patient when a nurse anesthetist administered anesthesia for an emergency cesarean delivery. The hospital's anesthesia department policies required that an anesthesiologist perform the preanesthesia evaluation, discuss the anesthesia plan with the patient and supervise a nurse anesthetist by being physically present or immediately available in the operating suite. The obstetrician testified that he did not supervise the nurse anesthetist and that he understood that the anesthesiologists were immediately available if help was needed.

The Supreme Court of Alabama reached a similar result in a case in which a patient died following the administration of anesthesia by a nurse anesthetist who had not notified his anesthesiologist-employer before administering anesthesia. The question before the court was the potential liability of the hospital for the actions of the nurse anesthetist. The court reasoned that the hospital maintained detailed guidelines and manuals concerning the duties of nurse anesthetists and that the disputed facts concerning the degree of control retained by the hospital over the nurse anesthetist was an issue of fact for the jury to decide.

Specialized Training

Several courts that have considered the potential vicarious liability of surgeons for the actions of nurse anesthetists have noted the specialized training of nurse anesthetists in ruling that the surgeons were not responsible for the nurse anesthetists' actions. An appellate court in Florida stated that the nurse anesthetist was not under the immediate personal supervision of the surgeon and that she performed her duties independently. The court noted that the nurse anesthetist was certified by the state as a nurse anesthetist and was authorized to practice under a protocol approved by the medical staff. The court concluded that the nurse anesthetist could not be characterized as a mere nurse, and therefore, the surgeon was not responsible for her actions.

A Tennessee court also declined to impose liability on the surgeons when the hospital-employed nurse anesthetist and a student nurse anesthetist administered anesthesia. The court stated that the question was whether the surgeons exercised control over the manner in which the nurse anesthetist acted. The court took note of the hospital protocols that authorized the nurse anesthetist to administer anesthesia to patients in the absence of the anesthesiologist. The court noted that a nurse anesthetist is a highly trained specialist acquiring skills in the course of his or her training that a surgeon does not possess. The surgeons did not select the drugs used to anesthetize the patient or direct the procedures used by the nurse anesthetists. The court concluded that the nurse anesthetist was not the borrowed servant of the surgeons and the surgeons were not liable for the actions of the nurse anesthetist and student nurse anesthetist.

State Law Issues and Points Raised by the Plaintiff

A 1999 decision of the Supreme Court of Kansas illustrates how state law and the specific allegations asserted by the plaintiff can affect the outcome of the case. The case involved a patient who died following the administration of anesthesia by a nurse anesthetist. Under Kansas law, the defendant obstetrician could not be held vicariously liable for the nurse anesthetist's actions because both of them were covered by the state compensation fund. The plaintiff contended that the obstetrician had been negligent in failing to direct and monitor the nurse anesthetist in the administration of anesthesia. The court found that it was proper to allow the jury as the trier of fact to decide the nature and extent of the obstetrician's duty of direction. Accordingly, the court affirmed the finding that the obstetrician had a duty to direct the administration of anesthesia by the nurse anesthetist. The lower court had based its finding on the nursing statute that provided that a nurse anesthetist functions in an interdependent role as a member of a physician-directed health care team.

Conclusion

The controlling factor in determining whether a surgeon is to be held accountable for a nurse anesthetist's actions is whether, based on the facts of the case, the surgeon actually exercised control or had the right to exercise control over the nurse anesthetist during the surgical procedure. If not, the surgeon is likely not to be held accountable for the actions of the nurse anesthetist or adverse patient outcomes resulting from the administration of anesthesia. Under this control or right to control test, the scope of practice of the nurse anesthetist under state law is less important. Whatever state law provides, if a hospital requires some level of physician oversight of anesthesia services, or if the surgeon intervenes in the administration of anesthesia, the surgeon may be found liable for a nurse anesthetist's actions.

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