Legal Briefs

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Supervision

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Originality is a trait that is as rare in many trial lawyers as it is in television programming executives. The trial of any case is difficult, and the trial of anesthesia malpractice cases is especially difficult because nurse anesthetists are professionals. That is, they are one of a group of occupations which requires education and skills not possessed by ordinary citizens.

When a patient is hurt in the course of an anesthetic, the patient may recover damages from the anesthetist if the anesthetist was negligent. Ordinary citizens have no way of knowing whether the anesthetist was negligent. The question is whether the nurse anesthetist exercised that degree of care which an ordinary nurse anesthetist would have exercised in similar circumstances. Expert testimony must be offered as to what the level of care is. This makes the trial of malpractice cases difficult and demanding. The trial lawyer must obtain testimony as to the standard of care, obtain and present evidence that the standard of care was breached by the anesthetist, and present the evidence to a jury in a manner which will be understandable and comprehensible. In many cases the issues are complex and difficult. Patients react in different and unexpected ways to anesthetics.

Lawyers have, consequently, looked for ways to win malpractice cases without having to go through the difficulty of presenting them. One way to avoid this difficulty is to present a case under the doctrine of *res ipsa loquitur.* Under *res ipsa loquitur,* or "the thing speaks for itself," it is not necessary to show specific evidence of negligence if one can show three things:

1. The injury must occur under circumstances such that in the ordinary course of events the injury would not have occurred if someone had not been negligent.
2. The injury must be caused by something within the exclusive control of the defendant.
3. The injury must not have been due to any voluntary action or contribution on the part of the plaintiff.

If these three conditions are met, the plaintiff's trial lawyer need not prove negligence at all.

Central Anesthesia Associates, P.C., et al v Worthy

Another way to avoid having to prove negligence in an individual case was demonstrated by the case of *Central Anesthesia Associates, P.C., et al v Worthy* (333 S.E.2d 829 (1985)). In the *Worthy* case, a woman gave birth without anesthesia and without complication. The next day she underwent a tubal ligation which was performed by her obstetrician/gynecologist assisted by an intern employed by the hospital. A professional corporation consisting of anesthesiologists administered the anesthesia through a registered nurse enrolled as a student nurse anesthetist in a school operated at the hospital by the anesthesiologists' corporation. At the time of induction the student nurse anesthetist was under the supervision of a physician's assistant employed by the corporation. During the tubal ligation pro-

cedure, Mrs. Worthy suffered a cardiac arrest resulting in brain damage.

At the time of the accident, Georgia statutes required that CRNAs administer anesthesia "under the direction and responsibility of a duly licensed physician with training and/or experience in anesthesia." There had been a lot of confusion as to what the statute meant and, in fact, the statute has since been amended. But whatever it meant, it did not provide that a nurse anesthetist could be supervised by a physician's assistant. There is a legal theory known as "negligence *per se*" which provides that when a state has adopted a statute setting forth a standard of conduct, the violation of the statute is, in most circumstances, conclusive evidence that the violator was negligent. It is not necessary to introduce actual or expert evidence of negligence. All that needs to be provided is evidence that the statute was violated. In the *Worthy* case, for example, there was no proof that the student nurse anesthetist's care was below the standard of care nor even that the student nurse anesthetist did anything wrong. All that was shown was that the supervisor of the nurse anesthetist did not meet the requirement of the statute because the supervisor was not "a duly licensed physician with training and/or experience in anesthesia."

It is difficult to argue with the outcome of the *Worthy* case. The statute had not been followed, and while we can be curious as to whether the anesthesia care met the standard of care, the plaintiff can argue that if the student nurse anesthetist had been properly supervised, *perhaps* the outcome would have been different because a duly licensed physician would have been able to take steps that the physician's assistant did not take. Except for the cost of the appeal, the outcome in the *Worthy* case was a real benefit to the trial lawyer and the plaintiff. They were able to save the expense of hiring their own experts and of introducing expert testimony at trial. In fact, they may not have been able to prove that there was any negligence at all.

In the past year, we have, unfortunately, learned of a number of "copycat cases" in which the plaintiff's lawyer has also attempted to take advantage of the doctrine of the *Worthy* case to avoid the expense and difficulty of proving that the plaintiff's injuries were caused by negligence. While no appellate court has upheld any of these efforts, there is a common thread in all of these cases: the reluctance of trial attorneys to make the effort to prove that negligence was involved and, instead, to seek some easier solution.

Mitchell v Amarillo Hospital District

In one of these cases, *Mitchell v Amarillo Hospital District* (855 S.W.2d 857, Texas 1993, discussed in this column in February 1994), the plaintiff claimed that he was deprived of his civil rights because nurse anesthesia practice constituted a denial of civil rights guaranteed by the Constitution. As noted in the above-mentioned column, the *Mitchell* case presented a ridiculous argument, and it was properly denied by the Texas Court of Appeals. Unfortunately, there have been two more cases in Texas in which other plaintiffs have also attempted to use the *Worthy* case. Unlike *Mitchell* which argued that CRNA practice constituted a depravation of civil rights, these cases have tried to follow the formula of the *Worthy* case more closely and have claimed that the plaintiff was entitled to recovery because the CRNA was not being properly supervised.

It is important to see these cases in the context of the *Worthy* case. There is no reason to examine the precise nature of supervision of nurse anesthetists. These cases are merely attempts by trial attorneys to test a new technique in hopes of avoiding having their cases dismissed for lack of proof. These cases invite the courts to look at the manner in which the CRNAs are supervised to determine whether negligence *per se* applies.

I do not believe that the courts will permit this technique. While anesthesia is extremely safe and has been growing safer every year, it is nonetheless true that anesthetics are administered by humans who sometimes make human mistakes, sometimes with very tragic results. Since CRNAs are involved in 65% of the anesthesia care in this country, CRNAs will have administered the anesthesia in many of cases in which patients are harmed. Surely, it is not the intent of the courts to give plaintiffs the opportunity to claim, in 65% of all anesthesia cases, that there is some technical issue that allows them to sue for damages without proof of negligence. Secondly, and more importantly, the courts have held that the nature and degree of supervision is not a legal issue to be decided by the courts but a factual issue to be determined by the profession. Consequently, it is very rare to find a case in which a court has even discussed the requirement of statutes that CRNAs be supervised or directed.

Doctors Hospital of Augusta Inc. v Bonner

In *Doctors Hospital of Augusta Inc. v Bonner* (329 S.E.2d 897 (Georgia, 1990)), the Georgia Court of Appeals did not seek expert evidence on whether defendants met the standard of care but permitted the testimony of two anesthesiologists to support a ruling that a supervising physician should have been called earlier and entered into a determination that the Georgia statute on supervision was not

complied with. Interestingly, although others have tried to follow the *Worthy* case, *Bonner* stands alone. The decision in *Bonner* was not a judicial interpretation. The court upheld a jury decision after hearing evidence based on expert testimony.

Leiker v Gafford

Another case was *Leiker v Gafford,* 245 Kan. 325 (1989), in which a surgeon was held liable for the CRNA's alleged negligence. The Supreme Court of Kansas refused to overturn a jury verdict in a case where the surgeon admitted that his professional corporation had vicarious liability for the negligence of a CRNA. The Supreme Court of Kansas noted that there was conflicting testimony from expert witnesses as to whether the surgeon was appropriately supervising the CRNA, but the court did not itself interpret the statute by saying what level of supervision was required.

Harris v Miller

The courts have recognized that the question of what is appropriate in terms of supervision is not a legal matter but a factual one calling for expert testimony. In fact, in *Harris v Miller* (438 S.E.2d 731, N.C. 1994, discussed in my June 1994 column), the Supreme Court of North Carolina referred to testimony of a nurse anesthetist that the surgeon's supervision of the nurse anesthetist was negligent. The Supreme Court did not interpret its statute to determine that the supervision provided was inappropriate but listened to expert testimony.

In states which have statutes that require that anesthesia care be under the supervision of a physician, most of the decided litigation is not on whether the supervision met the requirement of the statute but on whether the supervisors exercised control over the nurse anesthetist thereby rendering them liable. The courts have recognized that the question of appropriate supervision is one which is beyond the ability of law courts to understand or to decide. The question of supervision is primarily a factual matter to be determined within the healthcare profession, and the AANA Position Statement on "Relationships Between Health Care Professionals"[1] could be very important. This statement, adopted by the AANA Board of Directors on March 1, 1987, states clearly that: "Supervision *or* direction *refers to a variety of different practice settings within a continuum. While all satisfy the legal requirement, practice settings take into account the education, experience and capabilities of the nurse anesthetist, the rules and guidelines of the institution in which anesthesia is to be provided, and the needs and desires of the patient, nurse anesthetist, physician, dentist, podiatrist or other healthcare professional."*

These statutes are not the type that should invite negligence *per se.* Given that the determination of what is appropriate supervision is not specified in the statutes or even by the courts but is left up to the profession to determine, trial attorneys will soon find out that this new fad will bring them only the opportunity to introduce expert testimony as to the proper standard of supervision. If plaintiffs feel that the nurse anesthetist was improperly supervised, they will have to present actual evidence of this failure (primarily from members of the profession) with adequate proof that the lack of supervision, if there was any, gave rise to the damage. Since most anesthesia mishaps are avoidable, resulting from the failure to pay attention, it would be extremely rare to find malpractice cases in which the damage was caused by "negligent supervision," and this effort to stretch the *Worthy* case as an excuse to offer actual evidence of negligence will turn out to be a mere fad, no more lasting than "chlorophyll" and Davy Crocket pajamas.

REFERENCE

(1) Relationships Between Healthcare Professionals. AANA Position Statement. In: *Professional Practice Manual for the Certified Registered Nurse Anesthetist.* Park Ridge, Illinois: American Association of Nurse Anesthetists. Revised 1988;1.2.