Drennan v Community Health Investment Corporation

Key words: Negligence per se, pharmacy, standard of care.

The Court of Appeals of Texas recently decided Drennan v Community Health Investment Corporation (905 S.W.2D 811, Court of Appeals of Texas, Aug. 31, 1995. Rehearing Overruled Sept. 29, 1995: Brief Amicus Curiae filed by the American Association of Nurse Anesthetists) which upheld CRNA practice. Of great importance to those of us concerned with legal issues affecting CRNAs is that the case raised and dismissed a negligence per se argument. While the case is being appealed to the Texas Supreme Court, hopefully it will signal the demise of negligence per se cases involving CRNAs.

"Amy" was being treated by an orthopedic surgeon for scoliosis who recommended the placement of rods in her back. For the preceding 10 years, the surgeon had worked with a Certified Registered Nurse Anesthetist (CRNA). The surgeon believed the CRNA was qualified to administer Amy's anesthetic for the surgery. Prior to her admission to the hospital's facilities, an internist also examined Amy and gave clearance for her surgery.

A registered pharmacist was in charge of the branch of a pharmacy operating on the hospital's premises. The pharmacy was not open to the public, and the pharmacist was an employee of an independent agency which operated the pharmacy, not of the hospital.

On March 20, 1990, Amy was admitted for her scheduled surgery. Based upon the surgeon's order for "general anesthesia," and in accordance with his customary practice, the CRNA procured sodium pentothal and atracurium from the floor stock of the pharmacy. Amy's aunt recalled the CRNA coming to Amy's room and explaining that he would be administering Amy's anesthesia and asking if there were any questions he could answer. The CRNA was not asked whether, nor did he volunteer that, he was a CRNA.

In the operating room, the CRNA administered the sodium pentothal and atracurium and placed Amy under general anesthesia. As the surgery progressed, the CRNA monitored Amy's vital signs and, upon noticing a cardiac arrhythmia, asked the surgeon to stop the surgery. The CRNA first administered Adrenalin® and lidocaine, then administered cardiopulmonary resuscitation until her heart rhythms converted to normal patterns. The surgery was aborted.

Amy had had an adverse reaction to the atracurium, which the surgeon believed to be unforeseeable because she was a "healthy adolescent in whom there should have been no problem." Nevertheless, the operating room events resulted in neurological damage to Amy.

Alleging negligence in the administration of anesthesia, Amy's mother filed suit on Amy's behalf (Amy was a minor) against the surgeon, the CRNA, the hospital, and the pharmacy. The
CRNA and the surgeon entered into settlement agreements and the case proceeded against the hospital and the independent contractor which ran the pharmacy. The hospital and the pharmacy each moved for summary judgment.

No proof of negligence
The difficulty with the plaintiff's case was that there was no proof that the CRNA had been negligent. Although the CRNA had entered into a settlement, the fact of the settlement is not evidence that can be introduced at trial. Defendants can choose to settle cases for lots of reasons besides negligence. If the fact of a settlement was evidence of negligence, it might discourage settlements, causing even more cases to be forced through an already busy court system. To proceed against the hospital, the plaintiff had to have some basis for recovery. Without clear evidence of negligence how was the plaintiff going to prove her case? Readers of this column are familiar with the "magic bullets" which plaintiff's lawyers use when there is no clear evidence of negligence. One is the doctrine of Res Ipse Loquitur. The other is negligence per se.

Terrible outcomes do not necessarily mean there is negligence. Patients react in different and unexpected ways to anesthetics. When a patient is hurt in the course of an anesthetic, the patient may recover damages from the anesthetist if the anesthetist was negligent. If the anesthetist is an employee of the hospital, the plaintiff can also recover against the hospital. The anesthetist and the anesthetist's employer will be liable if the anesthetist failed to exercise that degree of care which most anesthetists would have exercised in similar circumstances. It is up to the plaintiff to prove that the care provided by the anesthetist failed to meet the standard of care. Expert testimony must be offered as to what the level of care is. This makes the trial of malpractice cases difficult and demanding. Plaintiff's lawyer must obtain testimony as to the standard of care, must obtain and present evidence that the standard of care was breached by the anesthetist, and present this to a jury in a manner which will be understandable and comprehensible. In many cases the issues are complex and difficult.

Res Ipse Loquitur and Negligence per se
Plaintiff's lawyers have, consequently, looked for ways to win malpractice cases against anesthetists without having to go through the difficulty of presenting a malpractice case. One way to avoid this difficulty is to present a case using the doctrine of Res Ipse Loquitur. Under Res Ipse Loquitur, which means "the thing speaks for itself," it is not necessary to show specific evidence of negligence if the plaintiff's attorney can show three things: (1) that 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; and (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.

But Res Ipse Loquitur was not the solution for Amy's lawyer. It looked like Amy had had an adverse reaction to the atracurium, which the surgeon believed to be unforeseeable. This injury could have occurred without anyone being negligent. So Res Ipse Loquitur would not apply.

Another way to avoid having to prove negligence is to take advantage of the negligence per se doctrine, first applied to anesthesia in 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 who was assisted by an intern employed by the hospital. A registered nurse, enrolled as a student nurse anesthetist in a school operated at the hospital by a professional corporation consisting of anesthesiologists, administered the anesthesia. 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 procedure, Mrs. Worthy suffered a cardiac arrest resulting in brain damage. 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.

When a state has adopted a statute to protect a class of people that includes the plaintiff, 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, 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 there was anything wrong
with the anesthesia care, the plaintiff can argue
that if the student nurse anesthetist had been prop-
erly supervised, perhaps, the outcome would have
been different because a duly licensed physician
would have been able to take steps that the physi-
cian's assistant did not take.

We have, unfortunately, learned of other cases
in which the plaintiff's lawyer has also attempted
to take advantage of the doctrine of negligence per
se, as illustrated by the Worthy case, to avoid the
expense and difficulty of proving that the plaintiff's
injuries were caused by negligence. In Drennan v Community Health Investment Corporation,
the latest of these, the court denied recovery in the
absence of negligence. The problem with the cases
is that in order to argue that there has been negli-
gence per se, plaintiff's lawyers have to convince the
courts that ordinary accepted practices of CRNAs
violate some aspect of state law.

In one of these cases, Mitchell v Amarillo Hospi-
tal 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 U.S. Constitution. As
noted in this column in February 1994, the Mitchell
case presented a ridiculous argument and was
properly denied by the Texas Court of Appeals. Drennan was another case, like Mitchell, where the
plaintiff's lawyer challenged nurse anesthesia prac-
tice in an attempt to use the negligence per se the-
ory. This time, the plaintiff's attorney focused on
the process by which a CRNA obtains anesthetics
from the hospital pharmacy. But the attempt in
Drennan has not been any more successful than it
had been in Mitchell.

In the lawsuit, Amy's mother alleged negli-
gence and negligence per se because the pharmacy
dispensed atracurium to a CRNA. If the pharmacy
was wrong to give the drugs to the CRNA, Amy's
mother could claim that the hospital and phar-
macy were liable under the negligence per se
doctrine.

**Burden of proof**

In a summary judgment proceeding, the bur-
den of proof is on the person who seeks summary
judgment to show that there is no issue of fact and
that he or she is entitled to judgment as a mat-
ter of law. Therefore, the court is obligated to re-
view each of the plaintiff's claims. If any claim is
recognized by the courts and is based on a set of
facts that could be proven at trial, the court is obli-
gated to permit the case to go to trial.

Amy's case was dismissed by the trial court.
Her lawyer was trying to find some theory by
which Amy might be entitled to recover damages
from the hospital. Amy offered several arguments
as to why summary judgment in favor of the hospi-
tal should not have been granted. She claimed:

1. The CRNA was negligent or negligent per se
in administering the anesthesia.

2. The surgeon was negligent in his supervi-
sion of the CRNA.

3. Patients should have been allowed to choose
who would administer anesthesia.

4. The pharmacy was negligent per se in dis-
ensing drugs to a CRNA.

The hospital claimed both in the trial court
and on appeal that it was entitled to judgment as a
matter of law because:

1. It acted, as did the CRNA and the phar-
macy, in compliance with all controlling statutes.

2. There was no employment or agency rela-
tionship so negligence and negligence per se could
not be imputed to it.

3. It had breached no duty to Amy.

A hospital is not liable for the negligent acts
or omissions of independent physicians. Thus, it
was not enough for Amy to claim that she can prove
she was injured by the negligence or negligence per
se of the surgeon, the CRNA, or the pharmacy. She
must present evidence to (1) make the hospital lia-
ible under a theory of respondeat superior, or os-
tensible agency, or (2) establish liability for a duty
which the hospital owed directly. The evidence
showed that none of the defendants were employ-
ees of the hospital, there were no contracts of em-
ployment, the hospital did not bill for their ser-
dices, and the hospital had no authority to direct
or control their practices.

Amy claimed that there was a factual issue as
to whether the CRNA was an agent of the hospital
because the CRNA failed to disclose that he was
not a medical doctor. Amy's aunt stated that
"... [the CRNA]... came in to the room while we
were there. I remember that he stood at the foot of
Amy's bed, introduced himself and told us that he was
going to be putting Amy to sleep and he asked if anyone
had any questions. I do not recall that Amy or any
family member asked any questions. I had no idea
that... [the hospital]... was using CRNAs in the anes-
thesia department.... No one, including...[the
CRNA], ...told me or Amy or any member of the
family, in my presence, that...[the CRNA]... was a
CRNA and not an M.D. anesthesiologist. It was my
assumption that he was a physician. Had anyone told us that he was a CRNA before Amy’s surgery, I would have told... [Amy’s mother]... that she should not let a CRNA be involved in Amy’s care, and that she should request an M.D. anesthesiologist to provide the anesthesia care at all times.”

Amy’s mother did not remember the CRNA coming to Amy’s room the morning of her surgery but supposed that her sister was “probably correct in her statement that he did.” Amy’s mother stated that, “If he did indeed come in to visit Amy’s room the morning of surgery to indicate that he would be providing anesthesia to Amy, I would have assumed that he was a physician.” She further stated that had she known the difference between a CRNA and a medical doctor, she would have requested a medical doctor provide the service, and that: “The very fact that... [the hospital]... allowed the CRNA to provide a service to patients implied that he was, in fact, a physician or the equivalent of a physician in training and experience and I relied upon this in allowing Amy to have her surgery at... [the hospital]... ”

The court characterized this testimony as “no more than possibilities based upon mere speculation and conjecture.” It concluded that testimony of what Amy’s mother might have done if she had known the anesthetist was a CRNA was insufficient to make the CRNA the hospital’s agent.

Amy also offered the deposition testimony of a board certified anesthesiologist, who expressed the opinion that the hospital “by-laws allowing surgeons to be responsible for the administration of anesthesia is below the standard of care,” and that “a surgeon is not qualified to manage anesthesia complications.” He further opined that the negligence was a proximate cause of Amy’s cardiorespiratory arrest.

The Appellate Court also dismissed this testimony. While CRNAs might hope it was dismissed for being a political opinion (and the court noted that the anesthesiologist, “who practiced only in California, conceded that his opinion was a personal one and was not reflective of the practice in Texas. He also agreed that other people, such as anesthesiologists or groups that might represent CRNAs, might differ with his opinion.”), the court felt it was irrelevant because the surgeon, the CRNA, and the pharmacist were independent contractors and “there is no duty to control the conduct of third persons...”

Argument against the pharmacy

But Amy’s main argument, and our interest in this case, was based on the argument that the pharmacy was negligent per se in delivering drugs to a CRNA without a written prescription or standing order from a licensed physician.

To support her contention of negligence per se, Drennan presented an affidavit of a pharmacist who interpreted Texas’ pharmacy rules to express an opinion of the standard of care for running a pharmacy. He claimed that the pharmacist was required to ascertain whether or not the CRNA was a “person licensed or registered to prescribe, distribute, administer or dispense a prescription drug or device in the course of professional practice in this state.” The pharmacist’s opinion was that the licensing provisions did not permit CRNAs to choose drugs or drug dosages and that a pharmacist breaches the standard of care in allowing a nonphysician to remove drugs from floor stock for administration to a patient, unless a physician or hospital has approved specific drugs and drug dosages through standing medical orders for the patient.

The pharmacist’s testimony, if accepted by the court, would have restricted generally accepted practice in Texas and would have served as the basis of negligence per se. The Appellate Court was very clear about its reasons for rejecting it. In interpreting healthcare statutes, the courts often permit much greater deference to the opinions of healthcare practitioners than many other areas. Amy may have expected that the courts would accept her expert’s testimony on the requirements of the Texas Pharmacy Act. However, interpreting statutes is a function for the court and the Texas Court of Appeals ruled, in a decision that supports CRNA practice, that the Pharmacy Act had not been violated.

The Appellate Court held that the pharmacy could provide and the CRNA could obtain the drugs without violating the Pharmacy Act. The pharmacy was not open to the public, it did not sell drugs, but merely supplied the floor stock with pharmaceutical supplies. Qualified practitioners or their authorized agents, including nurses, removed the drugs and recorded their name and the removal date. With specific reference to Amy’s case, the pharmacist had verified the required information within the permitted time period. The pharmacist was required only to verify, which he did, on the day after Amy’s surgery, that the CRNA, upon the surgeon’s order for general anesthesia, removed the atracurium and sodium pentothal.

The order for “general anesthesia” was sufficient to allow the CRNA to remove the necessary drugs from the floor stock and administer the anesthesia. The court also referred to a letter from the Texas State Board of Pharmacy stating that the pharmacy’s recognition of an order for “general anesthesia” as being sufficient was the customary practice in Texas.

Not only did the court uphold CRNA practice, but it also showed how far removed from real-
ity these negligence per se claims are becoming. *Negli-
gence per se* is a tort concept. The courts adopt a legislatively imposed standard of conduct as defining the conduct of the “reasonably prudent person.” The unexcused violation of the statute constitutes negligence *as a matter of law* if the statute was designed to prevent injury to a class of persons in which the injured party belongs. The purpose behind the statutes governing the distribution of dangerous drugs is to protect the public from the flow of illegal drugs. It was not designed to protect surgical patients from malpractice. Consequently, Amy had not shown that there had been negligence per se.

While it is speculation on my part, I believe that the cluster of “negligence per se” cases involving nurse anesthetists arises from a lack of familiarity of plaintiffs’ attorneys with nurse anesthesia practice. The discovery that anesthesia was provided by a professional known as a CRNA and not an anesthesiologist, coupled with the difficult task of proving negligence (perhaps under circumstances where negligence did not occur or cannot be proved) encourages the plaintiff’s attorney to seek “short cuts.” In a check of the legal literature, the *Worthy* case appears. It is not too difficult to see the plaintiff’s lawyer trying to find some statutory provision that he or she thinks might not have been followed to come within the doctrine of the *Worthy* case. Thanks to *Mitchell v Amarillo Hospital District* and, hopefully to *Drennan v Community Health Investment Corporation*, we will have court determinations that negligence per se is a limited doctrine. The practice of nurse anesthetists has been recognized by the courts since 1917 (*Frank v South*, 175 Ky, 416, 194 S.W. 375), and it is hoped that plaintiff’s attorneys will learn that attacking it will not advance their cause.