Legal Briefs

GENE A. BLUMENREICH, JD
AANA General Counsel
Powers & Hall
Boston, Massachusetts

The CRNA as employee

Key words: Employee, statutory interpretation, Workmen's Compensation.

There is an old joke told about accountants. A businessman is selecting an accountant. He interviews three accountants. He asks each of them, "How much is two plus two?" Two accountants answer "four," but the accountant who was hired asks, "How much do you want it to be?"

What makes this a joke is that there is an ironic element of truth in the accountant's answer. While "two plus two" must always be "four" by definition, many concepts which we deal with every day are not so easily defined or described. For these concepts, the complexities of the context cause our feelings to vary significantly. The process of definition becomes fluid and dynamic as we weigh the need for fairness in the particular circumstances with a search for consistency. Because of the inherent uncertainty in the process, in a sense, we have our choice of answers. Professional advisers, attempting to provide answers recognize the uncertainty of predicting what a court will do or say and find the context of the question more important than scholarly research. One such difficult area is "employment." Many people perform services for others. Nurses and doctors work for patients, lawyers and accountants work for clients, and salesmen work for customers. Does this make them employees? Is a nurse the employee of a patient the way the nurse may be an employee of a hospital? The answer to the question of who is an employee will frequently depend on who wants to know, why, and "How much do you want it to be?"

Reports of the case of *Salih v Lane* (244 VA. 436, 423 S.E.2D 192) carried the not very surprising news that a CRNA was not the employee of a psychiatrist. But why would anyone have thought so in the first place? To understand that we have to review the law and look at context.

Salih v Lane

In *Salih v Lane,* a nurse anesthetist brought suit against a psychiatrist for injuries allegedly received during administration of electroconvulsive therapy (ECT) by the psychiatrist to a patient. The CRNA was injured because she was unsuspectingly shocked while providing anesthesia to a patient undergoing ECT. The CRNA alleged that the psychiatrist failed to exercise reasonable care "in setting up, handling, and activating the electric shock equipment." Specifically, the CRNA charged the psychiatrist with failing to warn her and others "to stand clear of the stretcher and equipment before electronically activating the equipment" and failing to assure that they were indeed clear of the stretcher and equipment before delivering the electric shock.

ECT is sometimes used for treatment of severe psychiatric illness, notably severe depression. To minimize medical risk to patients receiving ECT, anesthetics, muscle relaxants, and oxygen are administered by anesthetists. The court found that normally, three persons work together closely in a hospital to administer the therapy. They are the

attending psychiatrist, an anesthesiologist or nurse anesthetist, and another nurse. The patient lies face up on a stretcher or table. The anesthetist is at the patient's head, the other nurse at the patient's feet, and the psychiatrist is positioned to the patient's left near the machine. The psychiatrist, who supervises the procedure is regarded as "the chief of the team," readies the machine, attaches electrodes at the proper time to the patient's head, and usually inserts a bite block in the patient's mouth to prevent damage to the patient's teeth and jaw. The nurse anesthetist starts an intravenous (IV) line, administers anesthesia to put the patient to sleep, gives a muscle relaxant to paralyze the patient, and puts a mask on the patient's face to ventilate the patient. This necessitates that the anesthetist place his or her left hand along the left side of the patient's face in order to hold the mask in place. The other nurse connects the patient to monitors measuring brain activity, heart rate, and degree of oxygenation.

When the patient is paralyzed and electrodes are in place, the nurse anesthetist removes the mask and the psychiatrist inserts the bite block. Then, the psychiatrist must assure that everybody is away from the table so that electrical shock to them can be avoided. Usually a verbal warning is given by the psychiatrist before the stimulation takes place. In order to deliver the electric current, the psychiatrist presses a button on the machine. After the seizure occurs, the anesthetist begins to ventilate the patient again until the patient resumes breathing unassisted.

In *Salih v Lane,* the CRNA was employed as a nurse anesthetist by an anesthesia group which was responsible for "fulfilling all of the anesthesiology needs that arose at the hospital." The CRNA had been assigned by her employer to the hospital where ECT was to be administered in a recovery room on that day. The CRNA reported to the room along with another nurse shortly before 8:00 a.m. The patient was brought to the room and the psychiatrist arrived. The monitors had been connected to the patient and the IV was in place.

After greeting the patient, the psychiatrist told the CRNA "it was all right to go ahead." The CRNA then administered the anesthesia and the muscle relaxant and began to ventilate the patient. The psychiatrist placed electrodes on the patient's temples in a strap that was around the patient's head. Next, the electrodes were connected to the machine, and the CRNA continued to ventilate the patient. The patient was not completely relaxed. The CRNA's left hand was along the left side of the patient's face holding the mask in place, and her right hand was on top of the bag squeezing it; apparently, her left hand was touching an electrode.

At that point, a student nurse was in the room and the psychiatrist was explaining the procedure to her. While still conversing with the student, the psychiatrist "reached down and flipped the switch" on the machine. According to the CRNA, "the next thing I knew my hand was up in the air." She felt a tingling "all through" her hand. The CRNA exclaimed, "you got me." The psychiatrist had not inserted the bite block nor had he given any warning before the current was delivered.

After the incident, the CRNA continued to ventilate the patient until spontaneous respirations came along. The CRNA's hand "was totally numb and very weak." Eventually, the CRNA brought suit against the psychiatrist for the injuries she suffered.

The law of what is an employee?

It is said that common law "employment" depended on four elements:

- The employer had the power to select and engage the employee.
- The employer paid wages to the employee.
- The employer had the power to dismiss the employee.
- The employer had the power to control the conduct of the employee.[1]

Of these, the power to control conduct was recognized as the most important. But whether or not someone is an employee depends not only on the exact nature of the relationship but also on the context or reason for the question. Many nurse anesthetists work in varying degrees of collaboration with surgeons and other physicians. They share, as will be seen, many of the characteristics of the CRNA's relationship with the psychiatrist in *Salih v Lane.* Are these nurse anesthetists employees of the surgeon or other physician? As was true in *Salih v Lane,* rarely will the relationship between nurse anesthetist and surgeon embody the four elements listed above.

Under the Internal Revenue Code, a number of taxes become payable if someone is an employee. For example, employers are required to collect withholding taxes on wages but not on amounts paid to independent contractors. The Internal Revenue Service (IRS) has accepted the "common law" definition of employment embodying the four elements listed above. Because the question has such ramifications, the IRS has published a number of comprehensive rulings detailing factors which are helpful in applying this definition. The IRS recognizes control as the most important factor in determining whether the employment relationship ex-

1. 53 Am Jur 2d "Master and Servant" 82.

ists. An employee is one who is subject to the will and control of the employer, not only as to what shall be done, but also as to how it shall be done. "Conversely . . . individuals (such as physicians, lawyers, dentists, contractors, and subcontractors) who follow an independent trade, business, or profession, in which they offer their services to the public, generally are not employees." According to the IRS' most prominent ruling,[2] it has identified 20 factors to indicate whether sufficient control is present to establish an employee-employer relationship.

The following 16 factors are considered an indication of employment:

1. A person is required to comply with another person's instructions about when, where, and how he or she is to work.
2. Training is provided.
3. Integration of the worker's services into the business operations of the person for whom services are performed.
4. A requirement that the services must be rendered personally by the worker.
5. The person for whom the services are performed has the right to hire, supervise, and pay assistants.
6. A continuing relationship.
7. The person for whom the services are performed has the right to set hours.
8. The worker must devote substantially full time to the business of the person for whom the services are performed.
9. Work is performed on the premises of the person for whom the services are performed.
10. The services are performed in an order or sequence set by the person for whom the services are performed.
11. The worker must submit regular reports.
12. Payment is made by the hour, week or month.
13. The person for whom the services are performed pays business or travel expenses.
14. The person for whom the services are performed furnishes equipment or materials.
15. The person for whom the services are performed has the right to discharge.
16. The worker has the right to terminate his or her relationship with the person for whom the service are performed, at any time and without incurring liability.

Four factors are considered an indication of independent contractor. They are:

1. If the worker invests in facilities that are used by the worker in performing services and are not typically maintained by employees (such as the maintenance of an office rented at fair value from an unrelated party).
2. A worker who can realize a profit or suffer a loss as a result of the worker's services (in addition to the profit or loss ordinarily realized by employees) is generally an independent contractor.
3. If a worker performs more than de minimis services for a multiple of unrelated persons or firms at the same time, that factor generally indicates that the worker is an independent contractor.
4. Does the worker make his or her service available to the general public on a regular and consistent basis?

Revenue Ruling 87-41 pointed out that these factors were merely guides and each factor would vary in importance from occupation to occupation and from factual context to factual context.

The Context of *Salih v Lane*

In *Salih v Lane,* the same issue of differentiating between an employee and an independent contractor was addressed again but in a different context. Yet to the court in *Salih v Lane,* the issue became not a question of full-time versus part-time or who furnished equipment but a totally different test of whether the CRNA and the psychiatrist were in the same trade or occupation. The Workmen's Compensation statutes, like the tax laws impose certain obligations on employers. Some employers tried to avoid their obligations to purchase insurance under the Workmen's Compensation statutes by claiming that their workers were independent contractors. Some of these laws did not use the common law test but developed their own test for employment.

According to the court's findings in *Salih v Lane,* at the time of the incident, the CRNA had been directed by her anesthesia group to administer anesthesia pursuant to the privileges she and the anesthesia group had at the hospital to perform anesthesia services. All decisions regarding the administration of anesthesia, including the dosage of anesthesia and muscle relaxants, were made by the CRNA with and under the supervision of the anesthesia group. Should an emergency develop with the patient resulting from any anesthesia services rendered by the CRNA, she was under orders to call for an anesthesiologist, from the group to render emergency care. All bills for the CRNA's services were sent directly by the group to the patient and were designated "anesthesia services." The equipment and medical supplies used by the CRNA in administering anesthesia were not furnished by the psychiatrist but were furnished by the CRNA, the anesthesia group, or the hospital.

The psychiatrist was not in a position to select

2. Rev. Rul. 87-41.

the CRNA nor even the CRNA's anesthesia group for the ECT. The CRNA's anesthesia group had no contract with the psychiatrist to supply anesthesia services to his patient. The psychiatrist, a medical doctor specializing in psychiatry, practiced as a professional corporation. The corporation's only employees were the psychiatrist and a part-time secretary. The psychiatrist had no privileges to administer anesthesia at the hospital According to the CRNA, it was customary in the profession at the time of this incident for providers of anesthesia care to psychiatric patients to act as independent contractors. The court noted that the psychiatrist billed the patient directly for the psychiatrist's services. When the psychiatrist decided that a patient was to have ECT, he or she would call the hospital and the hospital would fix a time for the procedure and assign a specific recovery room as the site of the therapy.

It was not the CRNA who thought she was the psychiatrist's employee. In fact, she knew she was not and did not want to be. When the CRNA brought suit against the psychiatrist, the psychiatrist wanted to take advantage of the Workmen's Compensation statute. While Workmen's Compensation statues require employers to maintain insurance to cover damage to their employees, they, in turn, keep the employer from being sued by employees for negligence.

In the context of *Salih v Lane* if the CRNA were the psychiatrist's employee, the psychiatrist could not have been sued for negligently turning on the electricity without adequately warning the CRNA. The psychiatrist wanted to be the statutory employer of the CRNA so that the CRNA would be unable to bring a common-law negligence action, and her compensation would be limited to the modest benefits afforded under the Workmen's Compensation statute (modest, in comparison with the $1,200,000 in damages actually awarded her by the jury).

The Virginia Workmen's Compensation statute had its own definition of "employee," which also distinguished between employees and independent contractors just like the common law test. But under Section 65.2-302 of the Virginia Code, a "statutory employer" was someone who hired a person to perform services in the same trade, business, or occupation of the employer. In addition, if an employer hired a CRNA to perform services in an area which was *not* part of the trade or business of the CRNA, then the CRNA was a statutory employee. The Virginia statute also provided that an employer could not escape being found to be an employer by finding someone else to contract with who would actually hire the employees. An employer who contracts with another employer is still the "employer." The psychiatrist argued that he contracted with the hospital for anesthesia services and that while the CRNA was assisting with the ECT, the CRNA was involved in the same trade, business, or occupation of the psychiatrist because "her activity was a part of the overall contract with the patient to administer ECT."

The court found that relationships did not fit within any provision of the definition of statutory employees or any of its previous decisions. But the court held that the psychiatrist was not in the "trade, business, or occupation" of providing anesthesia services.

"The psychiatrist is a psychiatrist, not an anesthesiologist. Indeed, he did not have privileges to administer anesthesia at the hospital. The CRNA is a nurse anesthetist, not a psychiatrist. The CRNA and [the anesthesiology group] were not permitted to perform any services other than anesthesia services at the hospital. The psychiatrist billed his patient directly for his psychiatric services only. The CRNA's employer billed the patient directly for anesthesia services only."

Conclusion

Other Workmen's Compensation statutes have similar formulations to the Virginia statute to distinguish between employees and independent contractors. In Massachusetts, for purposes of Workmen's Compensation, an employee does not include someone "whose employment is not in the usual course of the trade, business, profession, or occupation of his employer. . ." (Ch. 152 Mass. Gen. Laws §1(4)(g)).

You would think that the concept of "employee" had been around long enough for lawyers and judges to be able to say what is an employee. However, the courts and legislatures have struggled with the distinction between an independent contractor and an employee. Even with the detailed, 20-criteria test established by the IRS, the issue remains because statutes in other areas of the law trying to answer the same questions have used different language. Courts are bound to interpret the language in the statute even when it is obvious that both the Workmen's Compensation statute and the IRS are trying to describe the same thing.

Theoretically, the court's analysis holding that the CRNA was not an employee of a psychiatrist should also apply to a CRNA's relationship with a surgeon, even where the surgeon is regarded as "the chief of the team." However, just as the court ignored the common law test to interpret the Virginia Workmen's Compensation statute, courts might ignore a Workmen's Compensation interpretation when faced with a common law question.