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Operating Surgeon Is Not Automatically Liable for Assistant's Negligence.

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present by express or implied invitation.[47] The language of *Piggly Wiggly* leaves uncertain whether liability is predicated upon the common law duty or whether a new exception of a nondelegable duty is created.[48]

It should be noted that the *Piggly Wiggly* case failed to resolve whether *negligent* acts of a similarly situated security service would result in liability to the employer. Repeated statements that the case concerns the intentional tort of false imprisonment may be found in the opinion.[49] The court approaches the question of liability, however, from the direction of the traditional nondelegable duty exception, which speaks of negligence.[50] It would be hard to conceive of any rational justification for distinguishing the decisions assessing liability for an intentional tort from those involving negligence by the contractor. If it is unconscionable to immunize the contractee "from the responsibilities imposed by law," there can be no reason why the employer of a negligent independent contractor should be allowed to insulate himself from liability.[51]

The court in *Piggly Wiggly* has followed the trend established by other jurisdictions in finding the retail employer of an independent contractor liable. As might be expected, however, the complexities of the independent contractor rule have prevented a clear and certain ruling. The Texas Supreme Court's disposition of the *Piggly Wiggly* case ensures that the law regarding liability of an employer for an independent contractor's tort will require further refinement.

Chris A. Hale

MEDICAL MALPRACTICE—"Captain of the Ship" Doctrine —Operating Surgeon Is Not Automatically Liable for Assistant's Negligence

Sparger v. Worley Hosptial, Inc.,
547 S.W.2d 582 (Tex. 1977).

Plaintiff Sylvia Caldwell brought suit against Dr. C. F. Sparger and Worley Hospital, Inc. to recover for personal injuries caused by the negligence of hospital nurses that resulted in the operating physician's failure to remove a sponge from within the plaintiff following surgery. Based upon

47. Comment, *Responsibility for the Torts of an Independent Contractor*, 39 YALE L.J. 861, 869 (1930).

48. *See* Dupree v. Piggly Wiggly Shop Rite Foods, Inc., 542 S.W.2d 882, 890 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.).

49. *Id.* at 888-90 (passim).

50. *Id.* at 890.

51. *Id.* at 889.

jury findings that Dr. Sparger was not personally negligent and that the nurses were not his borrowed servants, the trial court entered judgment against Worley Hospital. The hospital appealed and the Amarillo Court of Civil Appeals reversed, finding that, as "captain of the ship," Dr. Sparger was vicariously liable for the negligence of the nurses.[1] The court, therefore, held that Dr. Sparger and the hospital were jointly liable. The hospital again appealed, asking that Dr. Sparger be held solely liable. HELD—*Reversed.* A surgeon is not automatically liable for the acts of hospital personnel who assist him in an operation; rather, his liability depends upon the application of general agency principles.[2]

Tort liability ordinarily rests on the actor's own misconduct.[3] Agency law, however, imposes vicarious liability upon a master for certain torts committed by his servant.[4] This policy stems from the practicality of reaching the master's "deep pocket"[5] and of encouraging him to effectively supervise his servants. It is imposed regardless of the master's personal innocence.[6]

Occasionally an admittedly negligent servant will have more than one master,[7] in which case liability flows to the master who had the right to control the particular negligent action causing the injury.[8] Thus, a servant who is within the short term employ of a second master as to a given task is a "borrowed servant" for whom the second master is responsible.[9]

During an operation the nurse is within the general employ of a hospital even though she is obeying the specific instructions of the surgeon. Early decisions did not find the borrowed servant theory applicable in this situation,[10] but instead based liability on the issue of the surgeon's personal negligence.[11] The leading case for the proposition that a jury may find that

1. Worley Hosp., Inc. v. Caldwell, 529 S.W.2d 639, 643 (Tex. Civ. App.—Amarillo 1975), *rev'd sub nom.* Sparger v. Worley Hosp., Inc., 547 S.W.2d 582 (Tex. 1977).

2. Sparger v. Worley Hosp., Inc., 547 S.W.2d 582, 585 (Tex. 1977).

3. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 1, at 6 (4th ed. 1971).

4. P. MECHEM, OUTLINES OF THE LAW OF AGENCY § 349, at 237 (4th ed. 1952).

5. T. BATY, VICARIOUS LIABILTY 29 (1916), *quoted in* P. MECHEM, OUTLINES OF THE LAW OF AGENCY § 351, at 238 (4th ed. 1952).

6. Laski, *The Basis of Vicarious Liability*, 26 YALE L.J. 105, 109 (1916); Mechem, *Employer's Liability*, 4 ILL. L. REV. 243, 246 (1909). *See generally* P. MECHEM, OUTLINES OF THE LAW OF AGENCY §§ 349-63 (4th ed. 1952).

7. P. MECHEM, OUTLINES OF THE LAW OF AGENCY §§ 453-68 (4th ed. 1952).

8. Skogland, *Borrowed Servants*, 76 COM. L.J. 307, 309-11 (1971); Smith, *Scope of the Business: The Borrowed Servant Problem*, 38 MICH. L. REV. 1222, 1225 (1940); Comment, *The Loaned Servant Doctrine*, 29 TENN. L. REV. 448, 448-50 (1962).

9. J. A. Robinson Sons, Inc. v. Wigart, 431 S.W.2d 327, 334 (Tex. 1968); Producers Chem. Co. v. McKay, 366 S.W.2d 220, 225 (Tex. 1963); RESTATEMENT (SECOND) OF AGENCY § 227 (1958).

10. Harris v. Fall, 177 F. 79, 84-85 (7th Cir. 1910); Guell v. Tenney, 159 N.E. 451 (Mass. 1928); Perionowsky v. Freeman, 176 Eng. Rep. 873, 875 (Q.B. 1866). *See generally* Annot., 60 A.L.R. 147 (1929); Annot., 27 L.R.A. (N.S.) 1174-75 (1910).

11. Spears v. McKinnon, 270 S.W. 524, 526 (Ark. 1925); Akridge v. Noble, 41 S.E. 78

a surgeon had the necessary type of control within the operating room to make assisting hospital personnel his borrowed servants is *Aderhold v. Bishop,*[12] a decision which today is almost universally accepted.[13] Its initial popularity was partly attributable to the fact that most hospitals were enjoying either charitable[14] or governmental[15] immunity and many courts found it more equitable to assess damages against the blameless surgeon than to let the innocent plaintiff go without compensation for his injury.[16]

In 1949 the Pennsylvania Supreme Court adopted the borrowed servant approach in *McConnell v. Williams,*[17] analogizing that an operating surgeon is "in the same complete charge of those who are present and assisting him as is the captain of a ship over all on board."[18] From this phrase the "captain of the ship" doctrine arose. The doctrine extends the borrowed servant theory by stating that a surgeon has absolute control over all personnel within the operating room as a matter of law and, therefore, is vicariously liable for their negligence.[19] This reasoning is consistent with the argument that the surgeon performs the operation for financial gain

(Ga. 1902); Palmer v. Humiston, 101 N.E. 283, 285 (Ohio 1913); Annot., 65 A.L.R. 1023, 1026 (1930). Failure to remove a sponge or other foreign object was often found to be negligence per se on the part of the surgeon. Saucier v. Ross, 73 So. 49, 50 (Miss. 1916); Moore v. Ivey, 264 S.W. 283 (Tex. Civ. App.—Galveston 1924), *rev'd on other grounds,* 277 S.W. 106 (Tex. Comm'n App. 1925, jdgmt adopted); McCormick v. Jones, 278 P. 181 (Wash. 1929). Other cases held the surgeon liable for failure to remove a foreign object upon a jury finding of personal negligence. Houston Clinic v. Busch, 64 S.W.2d 1103, 1104-05 (Tex. Civ. App.—Galveston 1933, writ dism'd); Hackler v. Ingram, 196 S.W. 279, 281 (Tex. Civ. App.—Amarillo 1917, writ ref'd); *see* Denton v. Carrell, 138 S.W.2d 878 (Tex. Civ. App.—Dallas), *rev'd on other grounds,* 138 Tex. 145, 157 S.W.2d 878 (Tex. 1942).

12. 221 P. 752 (Okla. 1923).

13. *E.g.,* Alves v. Ryan, 64 P.2d 409, 420 (Cal. 1936); Davis v. Potter, 2 P.2d 318, 320 (Idaho 1938); McConnell v. Williams, 65 A.2d 243, 247 (Pa. 1949); D. LOUISELL & H. WILLIAMS, 1 MEDICAL MALPRACTICE § 16.05 (1973); Annot., 12 A.L.R.3d 1017, 1028 (1967).

14. Schloendorff v. Society of New York Hosp., 211 N.Y. 125, 128; 105 N.E. 92, 93 (1914), *overruled,* Bing v. Thunig, 163 N.Y.S.2d 3, 12 (1957); Watkins v. Southcrest Baptist Church, 399 S.W.2d 530, 534 (Tex. 1966), *overruled,* Howle v. Camp Amon Carter, 470 S.W.2d 629, 630 (Tex. 1971). *See generally* Zollman, *Damage Liability of Charitable Institutions,* 19 MICH. L. REV. 395 (1921).

15. Gibbons v. United States, 75 U.S. (8 Wall.) 269, 274 (1868); City of Dallas v. Smith, 130 Tex. 225, 234, 107 S.W.2d 872, 877 (1937). *See generally* Borchard, *Government Liability in Tort,* 34 YALE L.J. 1 (1924).

16. Thomas v. Hutchinson, 275 A.2d 23, 27 (Pa. 1971); L. REGAN, DOCTOR AND PATIENT AND THE LAW 367 (2d ed. 1971); Note, *Pennsylvania's Captain-of-the-Ship Doctrine: A Mid-Twentieth Century Anachronism,* 71 DICK. L. REV. 432, 442 (1967).

17. 65 A.2d 243, 247-48 (Pa. 1949).

18. *Id.* at 246.

19. Mazer v. Lipschutz, 327 F.2d 42, 46-49 (3d Cir. 1963); Rockwell v. Stone, 173 A.2d 48, 51 (Pa. 1961); Note, *Separation of Responsibility in the Operating Room: The Borrowed Servant, the Captain of the Ship, and the Scope of Surgeons' Vicarious Liability,* 49 NOTRE DAME LAW. 933 (1974).

and should be financially liable when the patient is injured due to a nurse's negligence.[20]

A basic policy issue in the area of medical malpractice is the determination of how the patient's safety can best be served.[21] The "captain of the ship" doctrine places liability on the person found to be in immediate control—the surgeon.[22] Even if a hospital has improperly trained its nurses this theory makes it the surgeon's responsibility to see that they correctly perform their duties or operate in another hospital.[23]

Early Texas cases held the surgeon liable on the grounds of negligent supervision rather than upon the theory of vicarious liability.[24] *McKinney v. Tromly*[25] was the first Texas case to extend the borrowed servant doctrine to the operating room. It has also been construed as implying acceptance of the "captain of the ship" concept,[26] leading subsequent Texas cases to apply the doctrine in fact, if not in name.[27]

In 1975, however, two cases, *Worley Hospital Inc. v. Caldwell*[28] and

20. Note, *Separation of Responsibility in the Operating Room: The Borrowed Servant, the Captain of the Ship, and the Scope of the Surgeons' Vicarious Liability*, 49 NOTRE DAME LAW. 933, 947 (1974); Note, *The Borrowed Servant Doctrine as it Applies to Operating Surgeons*, 19 SW. L.J. 179, 186-87 (1965).

21. Aderhold v. Bishop, 221 P. 752, 755 (Okla. 1923).

22. Schuler v. Berger, 275 F. Supp. 120, 125 (E.D. Pa. 1967), *aff'd*, 395 F.2d 212 (3d Cir. 1968); Nicholson v. Sisters of Charity of Providence, 463 P.2d 861, 862 (Ore. 1970); Thomas v. Hutchinson, 275 A.2d 23, 27 (Pa. 1971); McConnell v. Williams, 65 A.2d 243, 246-48 (Pa. 1949).

23. Mazer v. Lipschutz, 327 F.2d 42, 50-51 (3d Cir. 1963); Yorston v. Pennell, 153 A.2d 255, 260 (Pa. 1959).

24. Thompson v. Barnard, 142 S.W.2d 238, 240 (Tex. Civ. App.—Waco 1940), *aff'd*, 138 Tex. 277, 158 S.W.2d 486 (1942); Moore v. Ivey, 264 S.W. 283, 288 (Tex. Civ. App.—Galveston 1924), *rev'd on other grounds*, 277 S.W. 106 (Tex. Comm'n App. 1925, jdgmt adopted). The *Moore* court imposed a nondelegable duty upon the surgeon to use all possible care during the operation and held that he could not evade liability for leaving sponges within the patient by depending upon nurses to account for them. 264 S.W. at 288; *cf.* Edwards v. West Tex. Hosp., 89 S.W.2d 801, 811-13 (Tex. Civ. App.—Amarillo 1935, writ dism'd) (partnership found between surgeon and hospital where patient was in the care of both).

25. 386 S.W.2d 564 (Tex. Civ. App.—Tyler 1964, writ ref'd n.r.e.).

26. The implication was a tenuous one, resting primarily upon the quotations and cases relied upon in support of the decision. Sesselman v. Muhlenberg Hosp., 306 A.2d 474, 476 (N.J. Super. Ct. App. Div. 1973); Martin v. Perth Amboy Gen. Hosp., 250 A.2d 40, 47 (N.J. Super. Ct. App. Div. 1969); Perdue, *The Law of Texas Medical Malpractice*, 11 HOUS. L. REV. 302, 347 (1974); *cf.* Note, *The Borrowed Servant Doctrine as It Applies to Operating Surgeons*, 19 Sw. L.J. 179, 184 (1965).

27. Webb v. Jorns, 488 S.W.2d 407, 411 (Tex. 1972) (surgeon conceded vicarious liability); Harle v. Krchnak, 422 S.W.2d 810, 814 (Tex. Civ. App.—Houston [1st Dist.] 1967, writ ref'd n.r.e.) (without discussion). One commentator upon review of the cases stated that "the 'captain of the ship' doctrine appears to be firmly established in Texas." Perdue, *The Law of Texas Medical Malpractice*, 11 HOUS. L. REV. 302, 347 (1974); *cf.* Miller v. Hood, 536 S.W.2d 278, 283 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.) (differentiating between operating room and nonoperating room situations).

28. 529 S.W.2d 639 (Tex. Civ. App.—Amarillo 1975), *rev'd sub nom.* Sparger v. Worley

Ramone v. Mani,[29] reached contrary results regarding the doctrine. The Amarillo Court of Civil Appeals in *Caldwell* applied the "captain of the ship" doctrine by name and held the defendant surgeon vicariously liable as a matter of law, notwithstanding a jury finding that the nurses were not his borrowed servants.[30] The *Ramone* case, in contrast, rejected the doctrine by holding that a surgeon would not be vicariously liable absent a jury finding that the hospital personnel were his borrowed servants.[31] The Texas Supreme Court granted writs of error in both and decided them as companion cases, with *Sparger v. Worley Hospital, Inc.*[32] being the lead decision.

In *Sparger* the respondent surgeon suggested that a distinction be made between the different types of duties performed by nurses within the operating room, with the hospital being held liable for some and the surgeon for others.[33] The petitioner, however, asserted that a surgeon is vicariously liable for the actions of the nurses in the operating room performed under his supervision and during his presence.[34] The hospital argued further that, regardless of the applicability of the "captain of the ship" doctrine, the surgeon had an absolute right to control the nurses during the operation and, therefore, was liable for their acts as a matter of law under the "borrowed servant" principle of agency.[35]

Hosp., Inc., 547 S.W.2d 582 (Tex. 1977).

29. 535 S.W.2d 654 (Tex. Civ. App.—Eastland 1975), *aff'd,* 20 Tex. Sup. Ct. J. 149 (Jan. 12, 1977).

30. Worley Hosp., Inc. v. Caldwell, 529 S.W.2d 639, 641 (Tex. Civ. App.—Amarillo 1975), *rev'd sub nom.* Sparger v. Worley Hosp., Inc., 547 S.W.2d 582 (Tex. 1977).

31. Ramone v. Mani, 535 S.W.2d 654, 657 (Tex. Civ. App.—Eastland 1975), *aff'd,* 20 Tex. Sup. Ct. J. 149 (Jan. 12, 1977).

32. 547 S.W.2d 582 (Tex. 1977).

33. Brief for Appellee at 39, Worley Hosp., Inc. v. Caldwell, 529 S.W.2d 639, (Tex. Civ. App.—Amarillo 1975), *rev'd sub nom.* Sparger v. Worley Hosp., Inc., 547 S.W.2d 582 (Tex. 1977). Respondent urged that he was responsible only for the medical tasks of the nurses which require training and skill and are under the direct supervision of the surgeon. *Id.* at 39. As to administrative tasks requiring no skill and done in accordance with prescribed hospital regulations, the hospital should be responsible. Respondent contended that the counting of sponges by the nurses was an administrative duty. *Id.* at 43; *see* Buzan v. Mercy Hosp., Inc., 203 So. 2d 11, 13 (Fla. Dist. Ct. App. 1967); Tyler v. Touro Infirmary, 207 So. 2d 235, 242 (La. Ct. App. 1968); Robertson v. Maher, 177 So. 2d 412, 417 (La. Ct. App. 1965); Comment, *The Hospital-Physician Relationship: Hospital Responsibility for Malpractice of Physicians,* 50 WASH. L. REV. 385, 403-08 (1975).

34. Application for Writ of Error at 13-16, Sparger v. Worley Hosp., Inc., 547 S.W.2d 582 (Tex. 1977), *citing* Harle v. Krchnak, 422 S.W.2d 810 (Tex. Civ. App.—Houston [1st Dist.] 1967, writ ref'd n.r.e.); McKinney v. Tromly, 386 S.W.2d 564 (Tex. Civ. App.—Tyler 1964, writ ref'd n.r.e.); Thompson v. Barnard, 142 S.W.2d 238, 240 (Tex. Civ. App.—Waco 1940), *aff'd,* 138 Tex. 277, 158 S.W.2d 486 (Tex. 1942); Moore v. Ivey, 264 S.W. 283, 288 (Tex. Civ. App.—Galveston 1924), *rev'd on other grounds,* 277 S.W. 106 (Tex. Comm'n App. 1925, jdgmt adopted).

35. Application for Writ of Error at 22-23, Sparger v. Worley Hosp., Inc., 547 S.W.2d 582 (Tex. 1977), *citing* J. A. Robinson Sons, Inc. v. Wigart, 431 S.W.2d 327 (Tex. 1968); *cf.*

The Texas Supreme Court reversed the Amarillo Court of Civil Appeals and expressly rejected the "captain of the ship" doctrine, holding that an operating surgeon's vicarious liability must be measured by standards common to other employers.[36] The decision of the majority was founded on a desire to apply the burden of vicarious liability uniformly by making the requisite right to control as much a question of fact for sugeons as for other short term employers.[37] The rationale was that if a jury found a surgeon did not have the right to control the particular action of the nurse, then the principles of agency should not make him liable for it.[38]

In abolishing the "captain of the ship" doctrine, the court noted that the doctrine did not conform to present realities and was an inequitable anomaly of agency principles.[39] It suggested that by applying the borrowed servant concept instead, both of these disadvantages could be remedied. Accordingly, a surgeon will still be liable for the negligence of operating room personnel over whom he has control, but the issue of control is now a question of fact for the jury.[40]

Having determined that it was confronted with a borrowed servant problem, the majority upheld the jury's finding that the nurses were not Dr. Sparger's borrowed servants.[41] The court relied on testimony that the surgeon neither selected the nurses nor interfered with the hospital's prescribed method of counting sponges.[42] This testimony was held sufficient to prevent a judgment notwithstanding the verdict from being rendered against the surgeon.[43] On motion for rehearing the court conceded that it

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Burke v. Washington Hosp. Center, 475 F.2d 364, 365-66 (D.C. Cir. 1973) (nurse's erroneous sponge count did not relieve surgeon of his nondelegable duty of removing sponges from patient).

36. Sparger v. Worley Hosp., Inc., 547 S.W.2d 582 (Tex. 1977).

37. *Id.* at 585.

38. *Id.* at 585. Justice Johnson, in a dissenting opinion, argued that the doctrine was necessary to make the law conform to the expectations of the patient and of society. The patient chooses a surgeon whom he expects to take every precaution possible to ensure his safety. To hold, then, that the surgeon was not in charge is inconsistent with that expectation. Justice Johnson further felt that the doctrine was based upon a judicial recognition of the surgeon's inherent right to control whether or not he exercised it, and if in fact he did not have it, then "on the theory that the surgeon was negligent for failing to insist upon the right to control." *Id.* at 587 (dissenting opinion); *cf.* W. BALLINGER, J. TREYBAL, & A. VOSE, ALEXANDER'S CARE OF THE PATIENT IN SURGERY 24 (5th ed. 1972), which states in a sample nursing procedure manual that "[t]he surgeon shall be responsible for the total medical care of his patient and retains all the obligations and authority . . . in the operating room . . . ." *Id.* at 25.

39. Sparger v. Worley Hosp., Inc., 547 S.W.2d 582 (Tex. 1977).

40. *Id.* at 585.

41. *Id.* at 586.

42. *Id.* at 585-86.

43. *Id.* at 586. The decision to limit the surgeon's liability may also have roots in the policy of spreading the cost of medical malpractice. The present furor over the cost of physician's malpractice insurance has coincided with a reduction in the legal immunities of hospi-

was without jurisdiction to enter any finding upon the evidence without first allowing the Amarillo Court of Civil Appeals to apply the appropriate rules of law to the facts.[44]

The importance of the majority's initial evidentiary ruling lies in its indication as to the principles to be applied in determining whether a borrowed servant relationship exists between a surgeon and a nurse. None of the testimony referred to as supporting the jury finding asserted that the surgeon did not have the right to control the manner of performing the procedures.[45] Rather, the testimony most favorable to the surgeon merely indicated it would have been inconvenient or difficult for him to have *exercised* his right to command.[46] Therefore, by refusing to find that the nurses were borrowed servants as a matter of law, the majority applied an *actual control* standard rather than the *right to control* standard of general agency law.[47]

The actual control standard may describe more realistically the relationships which exist in the operating room.[48] Unlike a right to control standard, it may take into account that the surgeon is concerned with more pressing matters than counting sponges and is often unable to directly supervise the nurse.[49] An undesirable result, however, is the loss of certainty which the law should provide. If the potential liability of the surgeon and hospital is conditioned upon their exercise of control, the patient's

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tals. Bing v. Thunig, 163 N.Y.S.2d 3, 12 (1957); Howle v. Camp Amon Carter, 470 S.W.2d 629, 630 (Tex. 1971) (ending charitable immunity doctrine in Texas); TEX. REV. CIV. STAT. ANN. art. 6252-19 (1970 & Supp. 1976-1977) (restricting governmental immunities).

44. Sparger v. Worley Hosp., Inc., 547 S.W.2d 582, 589 (Tex. 1977) (on rehearing).

45. *Id.* at 587 (dissenting opinion). Dr. Sparger and two nurses all testified that nurses are supposed to follow the surgeon's orders during an operation. *Id.* at 587-89 (dissenting opinion).

46. *Id.* at 587. The nurses were within the general employ of the hospital, assigned to the operation and to the specific duties by the hospital, and performed the specific duties (counting sponges) in a hospital prescribed method. *Id.* at 585-86.

47. The right to control standard was explained in J.A. Robinson Sons, Inc. v. Wigart, 431 S.W.2d 327 (Tex. 1968):

> A borrowing employer may have the "right of control of the manner in which the employees perform the services necessary to accomplishment of their ultimate obligation" and still not control *all* the details of their work. For example, a truck driver might remain under the direction and control of his general employer in regard to the details of caring for his equipment and operating in a safe manner, and still be a special or loaned employee of one who was directing or controlling the particular activity which resulted in an injury.

Id. at 334. In *Sparger* the doctor testified that in ordering a second sponge count he had departed from hospital procedures. Sparger v. Worley Hosp., Inc., 547 S.W.2d 582, 589 (Tex. 1977) (dissenting opinion). *But see* Martin v. Perth Amboy Gen. Hosp., 250 A.2d 40, 47-48 (N.J. Super. Ct. App. Div. 1969) (nurses not borrowed employees of surgeon until ordered to depart from hospital prescribed procedures).

48. Bria v. St. Joseph's Hosp., 220 A.2d 29, 31 (Conn. 1966); Collins v. Hand, 246 A.2d 398, 405 (Pa. 1968).

49. Bradford & Carlson, *Captain of the Ship*, 27 INS. COUNSEL J. 156, 156-58 (1960).

welfare may become subordinate to their desire to protect themselves from liability.[50] For example, an actual control standard subjects to liability the surgeon who exercises careful control and supervision while exempting the surgeon who merely lets the hospital personnel work in their accustomed manner.[51] Additionally, if the hospital seeks to protect itself by instructing the nurses to follow only prescribed procedures, the surgeon may find that those present will not in fact obey his instructions. By fixing liability with certainty, the "captain of the ship" doctrine at least kept considerations of liability out of the operating room and allowed those present to practice medicine rather than law.

Nevertheless, the *Sparger* decision represents an improvement in Texas medical malpractice law in that it replaces the rigid "captain of the ship" concept with the more flexible borrowed servant doctrine. If trial courts do not show a greater willingness to issue directed verdicts on the issue of vicarious liability when the facts are not in dispute, however, juries may return verdicts based upon personal negligence or actual control rather than the correct standard of right to control.[52] The actual control approach utilized in *Sparger* may result in equitable decisions in isolated cases, but it completely ignores the fact that respondeat superior is an instrument of public policy rather than of individual justice. Under the standard applied by the court, the best interests of the various professionals in the operating room may no longer coincide with those of the patient. The policy of promoting the patient's welfare is ill served if the actual control standard is employed because it discourages the surgeon from actively supervising assisting personnel by conditioning his liability upon the exercise of his right to control. Therefore, the right to control standard seems to be the preferable method of dealing with the borrowed servant problem since it conforms to the realities of modern medical practice and provides a needed measure of legal certainty in the operating room.

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50. HEW, REPORT OF THE SECRETARY'S COMMISSION ON MEDICAL MALPRACTICE 2 (1973). The report found that "[t]he fear of being sued permeates the entire health-care community" and that as a consequence the costs, methods, and patterns of medical care are greatly affected by the problem. *Id.*

51. Note, *The Borrowed Servant Doctrine as it Applies to Operating Surgeons*, 19 Sw. L.J. 179, 185-86 (1965).

52. The right to control standard does not automatically fix sole liability upon the surgeon. If the hospital also has the right to control the assisting nurse then it should be jointly liable with the surgeon. Dickerson v. American Sugar Ref. Co., 211 F.2d 200, 203 (3d Cir. 1954); Tonsic v. Wagner, 329 A.2d 497, 501 (Pa. 1974); Worley Hosp., Inc. v. Caldwell, 529 S.W.2d 639, 643 (Tex. Civ. App.—Amarillo 1975), *rev'd sub nom.* Sparger v. Worley Hosp., Inc., 547 S.W.2d 582 (Tex. 1977); RESTATEMENT (SECOND) OF AGENCY § 226 (1957). Further, the trend toward specialization in medicine has created situations where the surgeon does not have the right to control all personnel within the operating room. Thompson v. Lillehei, 164 F. Supp. 716, 720-22 (D. Minn. 1958), *aff'd*, 273 F.2d 376 (8th Cir. 1959); Marvulli v. Elshire, 103 Cal. Rptr. 461, 463-65 (Ct. App. 1972).