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## Examining Nursing Malpractice: A Defense Attorney's Perspective

**T**he expanded role for critical care nurses and the increasing demands placed on them in the care and treatment of patients have led to a concomitant expansion of legal liability for malpractice. Historically, liability for treatment issues fell solely upon treating physicians as nurses were perceived largely as ministerial. However, with the responsibility of patient care assessment and planning and management being undertaken by critical care nurses, legal claims against nurses are increasing.

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### What Constitutes Nursing Malpractice?

Not all unfortunate events in medicine are caused by malpractice. Despite what may be a common societal belief, not all unexpected, unintended, or even undesired medical results can be attributed to the fault of the healthcare provider. The law recognizes that much of nursing care requires clinical judgment. Consequently, a patient must prove 4 requisite elements to establish a malpractice case.

First, the patient must establish that there was a nurse-patient relationship. It is out of the nurse-patient relationship that a nurse's duty to the patient arises. Rarely can it be said that a particular nurse had a duty to the patient if such a relationship cannot be shown. Most often, this element will be satisfied by reliance on the hospital record documenting the nurse's involvement with some aspect of patient care. Once this is established, a duty is created.

Second, the patient must establish the scope of the duty that was owed by the nurse; this is usually done through an expert witness testifying about the care that was required.

Third, the patient must establish that there was a departure from "good and accepted practice." Good and accepted practice is most often defined as care that would have been provided by the ordinarily prudent nurse practicing in the particular circumstances. The care need not have been the best care or even optimum

care. Furthermore, when there is more than 1 recognized method of care, a nurse will not be deemed negligent if an approved method was chosen, even if that method later turns out to be the wrong choice. As long as the defendant nurse provided care that was consistent with accepted practice, the nurse will not be found negligent, regardless of outcome.

Lastly, there must be a causal relationship between the act or acts that departed from accepted nursing care and the patient's injury. This link must be established not by possibility, but by probability; that is, it must be proved that if the nurse had not been negligent, then more likely than not, the patient would not have suffered harm. This element must also be proved by expert testimony.

### What Events Commonly Result in Malpractice Cases?

In November 1999, the Institute of Medicine reported that each year medical errors are responsible for the deaths of between 44 000 and 98 000 patients. The Institute of Medicine further reported that adverse drug events are the most common cause of medical error and cost hospitals more than \$20 billion per year.<sup>1</sup> In a study conducted by the Physicians Insurer's Association of America, it was determined that 30% of all medical malpractice cases involve medication-related injuries.<sup>2</sup> According to this 7-year study, there were 6646 claims filed for drug-

related injuries. Of these claims, 2195 claims were paid with an average payment per case to the patient of \$99 721. The primary causes of litigation arising from medication errors are wrong dose given, wrong drug administered, incorrect method of administration, and failure to assess for side effects and toxicity.

Other common causes of malpractice cases against nurses include failure to properly monitor and assess the patient's condition and failure to properly supervise a patient resulting in harm. Typically, negligent monitoring cases arise from a nurse's failure to perform an assessment and notify the treating physician of changes. Thus, a nurse's failure to obtain vital signs and report a patient's deteriorating condition was held to constitute negligence.<sup>3</sup> Similarly, when a nurse observed that a patient's arm was swollen, black, and foul-smelling but failed to advise the treating physician of other clinical findings, including delirium and arm drainage, the nurse was held liable.<sup>4</sup> Negligent supervision cases usually involve a patient who falls while getting out of bed, while ambulating, or while using the bathroom.

The need to advocate on behalf of a patient when the suitability of care is at issue is also a common allegation. In many instances, merely carrying out a physician's order may insulate a nurse from liability. However, it is well established that blindly carrying out such orders will not insulate the nurse when such orders are questionable. The Supreme Court of Ohio<sup>5</sup> stated the rationale for this duty in the following manner:

A nurse who concludes that

an attending physician has misdiagnosed a condition or has not prescribed the appropriate course of treatment may not modify the course set by the physician simply because the nurse holds a different view. To permit that conduct would allow the nurse to perform tasks of diagnosis and treatment denied to the nurse by law. However, the nurse is not prohibited from calling on or consulting with nurse supervisors or with other physicians on the hospital staff concerning those tasks when they are within the ordinary care and skill required by the relevant standard of conduct.

Therefore, a nurse has an obligation to advocate on behalf of the patient when issues arise about the course of care or treatment being provided. Merely documenting in the chart that the order was discussed and confirmed with the ordering care provider is not enough. The issue in these cases is not about allocating the responsibility of healthcare, but instead arises from the hospital's and nurse's duty to keep the patient safe.

### Is the Hospital Responsible for the Actions of Its Nurses?

Generally speaking, a principal is responsible for the acts of its agents. In law, this is known as respondeat superior. Therefore, a hospital has vicarious liability for the negligence of its nurses, which allows a patient to bring a lawsuit against either the nurse individually, or the hospital as the employer, or both.

In addition to liability arising

out of respondeat superior, a hospital may also have separate institutional or corporate liability. Among its responsibilities, a hospital has a duty to the patient to ensure the competency of its nursing staff and the physicians who maintain privileges at its institution. Furthermore, the hospital is responsible for ensuring that proper drugs and equipment are available for use, and that they are not defective. The hospital also has a general duty to patients and visitors to maintain the hospital premises in a reasonably safe condition.

Within its responsibility to ensure the competency of its staff is hospital's the duty to provide sufficiently trained staff to meet the obligations of its patient population. Failure to do so may create institutional liability on the part of the hospital. For instance, in a Louisiana case, a 92-year-old woman was admitted to the hospital's cardiac intensive care unit (ICU) for observation. After admission, the patient was noted to be intermittently disoriented. Shortly after the patient was admitted, she began getting out of bed unassisted. During rounds, the attending physician was made aware of the incidents; however, he determined that restraints were not appropriate. Within a few hours of making this assessment, the patient crawled to the foot of the bed. As she attempted to get out, she fell and fractured her right hip.

In this case, according to hospital policy, each nurse in the cardiac ICU was assigned only 1 patient because of the need for close monitoring and in order to give nurses the ability to respond immediately to any problems. However, at the same time, the nurse was also

required to respond to any code that occurred in the ICU. At the time the patient was crawling out of bed and fell, the nurse had been called to respond to a code.

At trial, the hospital was deemed liable on the grounds of inadequate staffing. Because of the hospital directive, the nurse was required to be in 2 places at the same time.<sup>6</sup>

The difficulty that exists in bringing suit against a hospital, however, is that in some jurisdictions, limitations exist if the hospital is a charitable institution. These limitations include restrictions on monetary awards. For instance, in Massachusetts, a charitable corporation can be held liable for only \$20 000.<sup>7</sup> Therefore, to circumvent a cap on liability damages that can be awarded, plaintiffs attempt to identify individuals against whom suit can be brought who do not have a similar type of protection.

## How Can Malpractice Actions Be Avoided?

The simple answer is that they cannot be avoided. However, by utilizing the nursing process and employing critical thinking, bad outcomes that commonly lead to malpractice claims can be reduced.

The steps of the nursing process are described as follows:

1. Assessment
2. Problem/need identification
3. Planning
4. Implementation
5. Evaluation

By ensuring that each step is taken and that reflection is given by using critical thinking, the likelihood of an avoidable adverse medical event occurring is less likely. In medication administration, the 5 Rs

are often cited: right patient, right drug, right route, right dose, and right time. All too often 1 or more of these “rights” are violated, and a patient is injured. As with any order, guideline, directive, or principle within the nursing process, following these steps is only the beginning. To ensure that the clinical circumstances warrant implementation of the order, critical thinking is essential when administering any drug.

## What Is the Role of Documentation?

The jury’s role in a lawsuit is to determine the facts. Often, the plaintiff and the defendant have different perspectives on the facts that occurred at the time of the events. At trial, each party presents evidence, including testimony of witnesses, in an effort to prove their position. The jury then deliberates and determines the facts based on what they believe most likely happened. With assistance from the Court, the jury then applies the law and decides whether the facts, as they have determined them to be, create liability.

In medical negligence cases, discrepancies include disputes over symptoms complained of, signs that did or did not exist, and care or treatment that was recommended. In an effort to determine the facts, the jury will avail itself of the medical record. Each record is unique in that it is contemporaneous to the events and is usually created at a time when there is no interest in a legal outcome. Although the adage “if it isn’t documented, it wasn’t done” is good to consider at the time of documenting, in court there is no rule of evidence to coincide with that premise. The difficulty will lie, how-

ever, in proving that something was done when a patient’s attorney is suggesting that it wasn’t and there is no supporting documentation.

Such a difficulty arose in a case in which a 26-year-old man presented to the emergency department with potential depression of the respiratory system caused by alcohol ingestion. He was severely intoxicated at the time of his admission at 10:45 PM. During the initial examination, it was documented that the patient was responsive to pain and able to speak, and he could move his extremities. There was “no apparent trauma.” He was then placed on his side in a “bypass area.”

The next documented interaction was at 11:30 PM, when the patient was brought to the examining room. At that time he was not breathing, and he was cyanotic, with pupils fixed and dilated. According to the autopsy report, respiratory arrest was the sole cause of death. The minimum standard of care called upon the nurse to monitor the respiratory rate every 15 minutes. According to 1 of the plaintiff’s expert witnesses, this “would more likely have permitted the nursing staff to observe changes in this patient’s breathing patterns and/or the onset of respiratory arrest.” Thus, had the standards been maintained, respiratory arrest might have been averted or overcome. The court determined that the failure to provide adequate care, as suggested by the plaintiff, could be rationally be attributed by a jury to the staff nurse assigned to the area responsible for the patient.<sup>8</sup>

Although the emergency department can be an extremely busy and demanding area in which to provide nursing care, documentation under

such circumstances is essential. Had the nurse documented her standard practice of taking vital signs every 15 minutes, a malpractice suit may have been averted, even though the patient died. Conversely, without such documentation, it then becomes the task of the jury to determine the nurse's credibility, and draw inference from the existing documentation.

## Conclusion

For nurses, the chance of being named in a malpractice lawsuit remains relatively small. However, with the increased demands that have been placed on critical care nurses and the number of adverse

medical events that occur in the hospital setting, the risk clearly is increasing. Utilizing good nursing care and employing critical thinking will significantly decrease the likelihood of being named in a malpractice lawsuit. These skills combined with a good documentation technique is the best approach to use to avoid an adverse legal outcome in the event that a nurse is sued.

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