LEGAL EAGLE EYE NEWSLETTER

For the Nursing Profession

April 2012 Volume 20 Number 4

Medications: Court Says Nurse Practitioner Can Be Liable For Homicide By Her Patient.

The adult male patient was under the care of a nurse practitioner in an outpatient clinic who prescribed a combination of Concerta, Valium, doxepin, Paxil, pregnenolone and testosterone for him.

With all of these medications in his system the patient went into a violent rage and shot and killed his wife. He later pled guilty to aggravated murder and is presently incarcerated.

The two young children, now without parents, filed a negligence lawsuit through a court-appointed guardian against the nurse, her consulting physician and the corporation which owns the outpatient clinic.

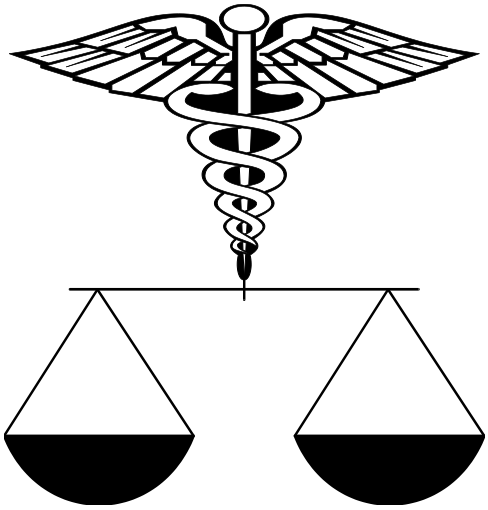
The Supreme Court of Utah ruled that the children's lawsuit stands on solid legal grounds. The children are entitled to their day in court for a jury to determine the ultimate question of the nurse practitioner's liability.

The General Rule

No Duty to Control Violent Persons

As a general rule, mental health practitioners are not liable in civil lawsuits for failing to treat and control persons whose inherent psychiatric issues make them potentially dangerous to society at large.

Mental health practitioners do have a legal duty, following a landmark 1977 California court decision, to break medical confidentiality and notify a specific third party or parties, and law enforcement, when a patient under their care verbalizes a present intent to commit specific harm upon a specific identifiable person.



Healthcare professionals like physicians and nurse practitioners must exercise care in prescribing medications so that their patients do not pose an unreasonable risk of harm to other persons.

They must understand the risks to others and must assess the relative advantages and disadvantages of any course of drug therapy.

SUPREME COURT OF UTAH
February 28, 2012

However, according to the Supreme Court of Utah, the situation is very different when a healthcare professional creates the risk of harm by the affirmative act of prescribing medication or a combination of medications which can cause an otherwise harmless patient to act out violently.

The evidence before the jury will focus on the issue of foreseeability, whether the nurse practitioner should have anticipated that these particular medications taken together by this particular patient could have led to an episode of violence.

Some medications, the Court said, would be ruled harmless in this context while others would have very foreseeable consequences. An idiopathic reaction to ibuprofen leading to a murderous rage would not be foreseeable and the victim's family would have no right to sue. However, a high dose of narcotics prescribed to an active-duty airline pilot could have very foreseeable consequences to the pilot's passengers. **"B.R." v. West, __ P. 3d __, 2012 WL 621341 (Utah, February 28, 2012).**

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CMS Inspections: Nursing Home Not Able To Prove Selective Religious Bias.

A nursing facility associated with the Jewish religion but open to persons of all faiths was cited for patient-care deficiencies and assessed a substantial civil monetary penalty.

In its appeal the facility pointed to the fact that one of the survey inspectors declined an invitation to visit the facility on a Saturday to verify that the facility itself was not discriminating, that is, that all residents regardless of their religions were allowed to participate in the Kiddush meal, stating that she was a Christian and would not feel comfortable at the Kiddush even if it was truly non-denominational.

That incident was offered as proof of an anti-Semitic bias behind the multiple deficiencies for which the facility was written up.

Selective enforcement based on discriminatory criteria can be raised as a defense to a deficiency citation, if the facility was treated differently than others and the differential treatment was based on an unjustifiable standard such as race or religion or some other arbitrary factor.

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT
March 14, 2012

The US Court of Appeals for the Fourth Circuit agreed with the general premise behind the facility's appeal that selective enforcement on the basis of discriminatory bias can be valid a defense to a deficiency citation.

However, in this case the evidence was not strong enough to prove that the survey process was tainted by bias, the Court ruled. **Jewish Home v. CMS, 2012 WL 834129 (3rd Cir., March 14, 2012).**

Religious Bias: Nurse Educator's Discrimination Case Dismissed.

A nurse educator had been employed for a number of years at a hospital-based nursing school before she began to experience incidents which she related to discrimination against her on the basis of her Jewish background.

Someone put a handwritten note in her mailbox imploring her to accept Jesus Christ as her savior to avoid eternal damnation. A co-worker was in the habit of playing Christian music on the radio within earshot of her office. The facility sponsored gatherings for Christmas rather than "the holidays" as she preferred. Christian prayers were said at graduation dinners. Spring break was timed to coincide with Easter rather than Passover.

Her complaints to management about these issues were generally ignored.

The nurse educator was given an unflattering performance review and a personal improvement plan by a Christian supervisor.

To sue for a hostile religious environment the employee must show intentional harassment in the form of intimidation, ridicule and insult so severe and pervasive that it alters the conditions of the victim's employment.

Offhand comments and isolated incidents are usually not sufficient.

UNITED STATES DISTRICT COURT
PENNSYLVANIA
March 14, 2012

The US District Court for the Eastern District of Pennsylvania ruled the Christian atmosphere at the facility did not add up to a hostile religious environment. Other faculty members, Christians, also got unfavorable reviews. **Nott v. Reading Hosp., 2012 WL 848245 (E.D. Pa., March 14, 2012).**

Narcotics: Nurses' Testimony Convicts Patient.

An unresponsive patient was brought in to the hospital's E.R. by a police officer after the department received a call about a person who was lying in the street. The man was still unresponsive when the officer left the hospital.

When he awoke the patient took a baggie from the waistband of his pants and asked the E.R. nurse to hold his dope for him.

She asked him if he had been using it. He said he did not use crack cocaine, he only sold it.

The nurse gave the baggie to her supervisor. The two of them counted the white nuggets, put them in a biohazard bag and called the police back to the hospital.

COURT OF APPEALS OF TEXAS
February 16, 2012

The Court of Appeals of Texas upheld the patient's conviction for possession of a controlled substance based on the E.R. nurses' testimony and the incriminating evidence the patient gave to them.

The E.R. nurses acted appropriately in all respects, the Court said. Given the patient's recent history and current condition, it was highly relevant to his care to determine what substance or substances he had been using and it was a legitimate medical question to ask him whether he had been using what appeared to be crack cocaine.

It was irrelevant, the Court said, that the patient's statement to the E.R. nurse that he sold crack cocaine was a confession to the crime of possession with intent to sell while he was only charged with simple possession.

The nurses had no obligation to hold his contraband for him as the patient requested and it was the right thing to summon the police to return to the hospital. **Mills v. State, 2012 WL 524450 (Tex. App., February 16, 2012).**

Patient's Fall: Before And After Nursing Assessments Ruled Inadequate, Verdict Given To Patient's Family.

The elderly patient was admitted to a nursing facility for physical therapy and rehab after hospitalization for injuries from a fall at home.

The patient was in a state of general physical decline. He suffered from generalized weakness, had problems with his gait and had difficulty standing without assistance. He needed help with most of his activities of daily living including bathing, showering, eating and transferring.

He was found on the floor near his bed shortly before midnight his fifth day in the facility. He had broken his hip in the fall.

Almost two years later, after the patient had passed, his family sued the nursing facility for negligence. The Court of Appeals of Mississippi upheld a jury verdict of $25,000 against the facility in favor of the family.

Family's Nursing Expert Faults Nursing Assessments

A nursing assessment and care plan were generated for the patient the day he was admitted to the facility.

However, in the opinion of the family's nursing expert, the assessment and care plan failed to address adequately his high risk of falling. In fact, there was no express mention of fall risk in the paperwork that was generated for the patient's chart at the time of admission.

Fall risk is an essential element of nursing assessment at the time of admission to a nursing facility.

Confusion, incontinence, gait and balance problems, hypertension and medication side effects are factors pointing to high fall-risk.

Fall risk mitigation can include bed and chair alarms, padding on the floor near the bed and a consistent toileting routine to minimize the patient's need to get up on his own without assistance.

If a patient does fall, a thorough nursing assessment must be done to evaluate fully the extent of injury so that appropriate medical care can be obtained in a timely fashion.

Failure to assess and care for a high-fall-risk individual before and after a fall is grounds for a nursing negligence lawsuit.

COURT OF APPEALS OF MISSISSIPPI
February 21, 2012

The admission nursing assessment should have identified the patient's confusion, incontinence, troubles with gait and balance, hypertension and the side effects of his medications as factors pointing to a high fall-risk.

Failure to assess and plan for fall risk is a deviation from the nursing standard of care and grounds for allegations of negligence in a civil lawsuit after the fact when a patient has fallen and been injured.

Family's Nursing Expert Faults Nursing Care Plan

The care plan should have included bed and chair alarms to alert the nurses when the patient was attempting to rise and padding on the floor near the bed to soften the impact from a fall that might occur. The patient should have been on a toileting schedule involving routine assistance to the bathroom to minimize his need to get up on his own when staff were not in the room to assist him. He should have been checked on frequently.

Family's Nursing Expert Faults Post-Incident Nursing Assessment

After he fell the patient should have been given a head-to-toe exam which should have focused on the hips, rolled from side to side to check the hip alignment and given frequent follow-up neuro checks, the expert said.

The hip fracture was not detected until his physical therapy session the next day. Had it been detected earlier, in the expert's opinion, the damage could have been lessened and the outcome improved. **McComb Nursing Ctr. v. Lee, __ So. 3d __, 2012 WL 540577 (Miss. App., February 21, 2012).**

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Carpal Tunnel Syndrome: Court Turns Down Nurse's Disability Discrimination Claim.

The assistant director of nursing in a nursing home began to have trouble doing her job because of carpal tunnel syndrome. Her job required a substantial amount of handwriting to prepare and revise the comprehensive care plans necessary for each resident of the facility.

She never returned after having to leave work and go to the E.R. for a rapid heartbeat which was diagnosed as an anxiety attack. She was placed on medical leave for twelve weeks and then fired when she did not return after her leave expired.

After being fired she sued her former employer for disability discrimination related to her carpal tunnel syndrome. The US District Court for the Eastern District of Arkansas dismissed her case.

Reasonable Accommodation Does Not Include Medical Procedures

The Court ruled that the US Americans With Disabilities Act does not require an employer, under the rubric of reasonable accommodation, to pay for medical procedures such as carpal-tunnel decompression surgery which a disabled employee requests in order to be able to do his or her job.

In fact, the nurse eventually did obtain a ruling from the Arkansas Worker's Compensation Commission that her carpal tunnel was an occupational condition and the nursing home had to pay for her surgery, but that did not change the outcome of her Federal disability discrimination case.

Reasonable Accommodation Employee Must Communicate a Request Participate in Communication Process

The former assistant nursing director also claimed that her employer turned down her request to purchase a computer software program to streamline the process of care plan development and revision and thereby reduce the need for so much handwritten documentation.

On the face of it that would appear to be a reasonable accommodation well suited to meet this disabled employees needs, but the Court still saw a major problem which did not work in favor of the nurse's case.

Reasonable accommodation pertains to physical changes in the work environment or to changes in the way things are customarily done, changes which will enable an individual with a disability to enjoy equal employment opportunity compared with non-disabled individuals.

The nurse's request that her employer pay for her carpal-tunnel decompression surgery under worker's comp is beyond the scope of reasonable accommodation required by the US Americans With Disabilities Act.

UNITED STATES DISTRICT COURT
ARKANSAS
March 1, 2012

The nurse did ask for the new software, but not as reasonable accommodation to her disability. She reportedly only mentioned the software to management as something she believed her employer the Veterans Home needed to have to keep up with standards set by the US Veterans Administration.

Whether that was true was not relevant. She did not mention her disability or ask for reasonable accommodation.

The Americans With Disabilities Act requires a disabled individual to initiate the communication process by informing the employer that he or she has a specified disability, by asking for a specific accommodation for the disability and by remaining involved in what the law refers to as the interactive communication process once the gears have been set in motion. **Compton v. Veterans Home, 2012 WL 692896 (E.D. Ark., March 1, 2012).**

Discrimination: Employer Can Verify Employee's Credentials.

The US District Court for the Southern District of New York ruled the nursing home committed no discrimination.

The facility refused to allow a minority CNA who was sent to the facility on a temporary basis by a nursing agency to participate in employee orientation or start work.

The facility insisted she first had to produce a copy of her current CNA certification and photo identification to verify that she was not the same person as someone with a similar name who had been fired from the facility just two days before.

There also was no discrimination committed when the CNA was told to leave the premises or when she was threatened the police would be called if she did not. **Reid v. Hebrew Home, 2012 WL 698135 (S.D.N.Y., March 5, 2012).**

Choking Death: No Expert Report, Case Dismissed.

After his father's death the son sued the nursing home alleging that his father was negligently left unsupervised while eating and choked to death on his food.

The Court of Appeals of Texas dismissed the case.

The Court ruled that assessing a nursing home resident's needs and providing care and supervision are professional healthcare services, even if it is something as simple and straightforward as sitting with a patient while eating to make sure he does not eat too fast or put too much in his mouth before swallowing and to help him or call for help if he begins to choke.

A lawsuit alleging deviation from the standard of care in the rendering of professional healthcare services in Texas as in most US jurisdictions requires an expert opinion, which the son did not have, to back up the case or the suit must be dismissed. **Martinez v. Coronado Nursing Ctr., 2012 WL 760801 (Tex. App., March 8, 2012).**

Medication Error: Court Approves Nurse's Firing.

An LPN was fired from her position in a nursing home after she transcribed via the facility's computer system a telephone order into a resident's chart from the resident's physician for 5 mg of sublingual Roxanol q 4-6 hours prn for pain as 5 ml instead of 5 mg.

The Roxanol at the facility in po liquid form contains 20 mg of morphine per ml.

5 ml of liquid Roxanol contains 100 mg of morphine, twenty times the 5 mg sublingual dose of morphine prescribed for the patient.

When confronted about the error the LPN told her charge nurse she thought a ml and a mg were basically the same thing.

COURT OF APPEALS OF OHIO
February 27, 2012

The Court of Appeals of Ohio ruled the nursing home had legal grounds to terminate the LPN for cause, that is, the LPN was not entitled to unemployment benefits.

The Court said it was not a factor in the LPN's favor that her charting error was discovered through the facility's own internal system of checks and balances before any actual harm occurred to a patient.

The LPN was not entitled to progressive discipline, that is, a write-up and plan of correction before being fired, as her error was so severe that it amounted to a violation of the law.

By law all medications must be administered according to the physician's directions and, by law, an LPN is required to have at least baseline competence in the administration of medications.

Error Could Have Killed the Patient

The magnitude of the error, which could have caused a patient's death, justified the decision to terminate her for cause, the Court concluded. **Hale v. Dept. of Job & Family Services, 2012 626261 (Ohio App., February 27, 2012).**

Labor Law: Charge Nurses Did Not Coerce Subordinates, Hospital Must Recognize Union.

Coercion of rank-and-file employees by one side or the other can invalidate the voting on the issue of union representation.

To determine if coercion occurred the question is whether a supervisor's pro-union conduct realistically tended to coerce or interfere with the employees' exercise of free choice in the union voting.

That depends upon the nature and degree of supervisory authority possessed by the supervisors who engaged in pro-union advocacy and the nature and extent of the conduct they are accused of.

It must also be determined if the supervisors' pro-union conduct interfered with freedom of choice by materially affecting the outcome of the election, taking into account:

The margin of victory in the election;

Whether the conduct in question was widespread or isolated;

The timing of the conduct;

The extent to which the conduct became known; and

The lingering effect of the conduct.

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
March 13, 2012

After a majority of the hospital's nurses voted in favor of union representation and the vote was validated by the US National Labor Relations Board (NLRB) the hospital nevertheless refused to recognize the union as its nurses' bargaining representative.

The hospital's argument in support of its stance was that the pro-union vote was tainted by pro-union coercion of subordinate nurses by pro-union charge nurses and was invalid for that reason.

The union responded with unfair labor practice charges against the hospital which the NLRB upheld. The NLRB ordered the hospital to recognize the union as the nurses' bargaining representative.

The hospital appealed. The US Court of Appeals for the District of Columbia Circuit ruled the pro-union charge nurses did not coerce their subordinates.

Thus the pro-union vote was valid, the hospital was required to recognize the union and was guilty of an unfair labor practice for refusing to do so.

No Coercion of Nurses By Charge Nurses' Pro-Union Advocacy

The charge nurses in question actively encouraged the nurses to support the union. They talked about and sent text messages reminding nurses about upcoming union meetings and urged them to encourage other nurses to attend. That is not considered coercive.

Supervisors Improperly Solicited Authorization Cards

The charge nurses also urged nurses to sign and mail in authorization cards and reminded them about the deadlines for the cards to be recognized by the NLRB as a basis for coming in and conducting a union election. A supervisor soliciting authorization cards is considered coercive.

The Court ruled, however, that any coercion was cancelled out by the charge nurses in question having switched to an outspoken anti-union stance after the election was scheduled and they had been promoted from charge nurses to management employees. **Veritas Health v. NLRB, __ F. 3d __, 2012 WL 811520 (D.C. Cir., March 13, 2012).**

Graduate Nurse Education: Grant Program Funding Available From CMS.

On March 22, 2012 the US Centers for Medicare & Medicaid Services announced that funding will be available for up to five selected hospitals to partner with schools of nursing and non-hospital community-based care settings to provide training for advanced practice registered nurse students.

The application deadline is May 21, 2012.

Details can be obtained by accessing CMS's announcement from the Federal Register which is on our website at http://www.nursinglaw.com/CMS032212.pdf

FEDERAL REGISTER March 22, 2012
Pages 16841-16842

Dystocia: Nurses' Notes Corroborate Physician's Testimony.

The US Court of Appeals for the Second Circuit concurred with the lower court's dismissal of a lawsuit against the US government for alleged medical malpractice involved in the birth of an infant at a Federally-funded medical facility.

The infant's father claimed that the obstetrician erred by failing to start the McRoberts maneuver when the shoulders became stuck and instead continued with traction while others applied suprapubic pressure to hasten the delivery. The lawsuit further contended that the obstetrician altered the medical records after the fact.

The Court, however, looked to the nurses' notes from the case which corroborated that they participated in the McRoberts maneuver as directed by the obstetrician. That was correct obstetric practice under the circumstances and he did not alter the records. **Kawache v. US, 2012 WL 933982 (2nd Cir., March 21, 2012).**

Abuse Reporting: Defamation Suit Dismissed.

The mother of a thirty year-old daughter who since age twelve has had a seizure disorder that has resulted in brain and nervous system damage filed a civil lawsuit for defamation against a hospital and several private-practice physicians.

While taking care of the daughter in her home the mother called an ambulance to take the daughter to the hospital because she thought the daughter might be coming down with pneumonia.

An advanced decubitus ulcer on the patient's back caused personnel from the hospital to contact adult protective services whose investigation resulted in the daughter being removed from the home.

Healthcare personnel are mandatory reporters of suspected abuse or neglect of a dependent adult by a caregiver.

The law clearly gives mandatory reporters immunity from civil lawsuits over the making of such reports.

Non-mandatory reporters are immune from suit unless it can be proven that the report was intentionally made with actual knowledge that it was false.

CALIFORNIA COURT OF APPEAL
March 21, 2012

The California Court of Appeal dismissed the lawsuit.

The daughter met the definition of a dependent adult. Her mother was her caretaker. By law, healthcare personnel are mandatory reporters of suspected abuse or neglect of dependent adults by their caretakers. Failure to report is a criminal offense for a mandatory reporter. The other side of the coin is that the law gives mandatory reporters immunity from civil liability for reporting as they are required. **Kirby v. Prime Healthcare, 2012 WL 946309 (Cal. App., March 21, 2012).**

Reverse Age Discrimination: Court Turns Down Nurse's Case.

A fifty-one year-old occupational health nurse employed by the United States Postal Service filed a lawsuit alleging she was a victim of age discrimination because all of the other nurses working in the on-site medical unit at a large postal processing facility were older.

The US District Court for the Southern District of Texas pointed to a 2004 US Supreme Court ruling that the US Age Discrimination in Employment Act does not prohibit employers from favoring older versus younger workers. **Duplechin v. Potter, 2012 WL 845160 (S.D. Tex., March 12, 2012).**

Correctional Nursing: Court Finds Deliberate Indifference.

The US District Court for the Eastern District of Tennessee ruled that a former county jail inmate had grounds for a civil rights lawsuit alleging that county employees were deliberately indifferent to her serious medical needs.

When the inmate was assigned to a work detail in the jail laundry she told the jail nurse she was pregnant and asked for a pregnancy test. The jail nurse did not believe her and would not give her a pregnancy test.

Three months later when she was obviously pregnant a nurse examined her but did so in a rough and abrupt manner and then sent her back to her cell.

Later that night the inmate miscarried in the commode in her cell. The guards had her remove the fetus from the toilet and put it in a bucket of ice without examining it for signs of life. The Court ruled the nurse herself was not responsible for the circumstances surrounding the miscarriage because she was not on duty at the time. **Norton v. Greene Co., 2012 WL 879837 (E.D. Tenn., March 6, 2102).**

Emergency Room: Nurse Terminated For Failing To Take Report.

When a nurse arrived for her day shift in the E.R. she was alerted by the charge nurse that there was an acute MI in progress involving a patient in her assigned area of responsibility.

The nurse went to the treatment room, saw that there were four night-shift nurses and two physicians in the room and simply walked away without entering the room to take report and become involved in the patient's care.

The nurse was terminated the next day and then sued the hospital for wrongful termination.

A hospital can terminate a nursing employee for failing to follow conduct and quality of work protocols designed to ensure the safety and proper care of its patients.

APPELLATE COURT OF CONNECTICUT
March 6, 2012

The Appellate Court of Connecticut ruled the hospital had just grounds to fire the nurse.

The nurse was not covered by a union collective bargaining agreement that defined grounds for termination.

She previously had been disciplined and suspended for two days for an episode of insubordination. She was expressly warned at that time that one more patient-care infraction would result in her termination.

More importantly, the Court said, a nurse failing to take report when coming on duty adversely impacts patient safety.

The Court discounted the argument raised by the nurse in her defense that she was fired in retaliation for her advocacy in favor of proper critical care for patients in the emergency room. That could be a valid argument except there was no factual basis for it in this case, the Court said. **Armshaw v. Greenwich Hosp., __ A. 3d __, 2012 WL 653752 (Conn. App., March 6, 2012).**

Emergency Room: Nurse Faulted For Child's Death.

The parents took their seven-month-old to the E.R. because of a fever, rapid breathing and rapid pulse.

The child was discharged three hours later, stopped breathing at home and was brought back to the hospital where she soon died.

It was below the standard of care for the nurse to obtain the child's temperature of 103.6° at the time of discharge and fail to communicate that important fact to the E.R. pediatrician.

COURT OF APPEALS OF GEORGIA
March 13, 2012

The Court of Appeals of Georgia upheld the jury's verdict which found no liability on the part of the emergency room pediatrician who examined and then discharged the child, even though the parents' expert in emergency pediatric medicine testified that the pediatrician was negligent for discharging the child home in unstable condition.

Expert Also Sees Nursing Negligence Behind Child's Death

The parents' emergency-pediatrics expert also testified it was below the nursing standard of care for the E.R. nurse not to have informed the E.R. pediatrician that the child's temperature was still markedly elevated and that her respirations were still abnormally rapid, data that would be very relevant to the pediatrician's decision whether or not to send the child home.

The jury apparently decided it was only the nurse's and not the pediatrician's fault that the child died. The hospital and the nurse were not sued by the parents as defendants in the lawsuit.

The child's temperature (103.6°) was entered by the E.R. nurse into the child's records on the hospital computer system shortly before the child was discharged but it was never expressly communicated to the pediatrician in the E.R. **Perry v. Gilotra-Mallik, __ S.E. 2d __, 2012 WL 798933 (Ga. App., March 13, 2012).**

Vaginal Exam: No Malpractice Or Invasion Of Privacy By School Nurse.

The seven year-old student raised her hand in class, said her private part was hurting, looked very uncomfortable and had her hands cupped in her groin area. The teacher sent her to the school nurse.

The school nurse was a licensed adult family practice nurse practitioner employed by a Federal program which provides healthcare to students in a Brooklyn, New York public school.

The nurse practitioner got a urine sample for a dipstick test which pointed to a urinary tract infection.

The nurse had a medical assistant try all of the mother's phone numbers on file but got no answer. A signed consent form was on file so the nurse practitioner went ahead with a gloved-hand external vaginal visual exam without the mother present.

The child's mother could not be reached by phone, but she had signed a generic medical consent form. The nurse practitioner's external exam was indicated by the signs and symptoms and was done properly in a curtained exam cubicle with the child's acquiescence.

UNITED STATES DISTRICT COURT
NEW YORK
February 16, 2012

The US District Court for the Eastern District of New York dismissed the mother's lawsuit which alleged malpractice and invasion of privacy.

The Court ruled that a gloved-hand visual inspection of the exterior of the genitalia was indicated by the child's symptoms and by the urine dipstick and was conducted properly in all respects from a medical standpoint. **"K.R." v. US, __ F. Supp. 2d __, 2012 WL 512947 (E.D.N.Y., February 16, 2012).**

LEGAL EAGLE EYE NEWSLETTER
For the Nursing Profession

Hospital Negligence: Hospital's Nurses Spoke With Patient's Family's Attorneys.

The patient's family's lawsuit arose out of a mix-up in the hospital's surgical department that resulted in the patient's death.

The ventilator-dependent patient was being moved from his room to the surgical department for a tracheostomy. On the way he was being bagged by a first-year resident physician. When they got to the surgical department they were informed the surgery could not go forward because there was no anesthesiologist available. The resident decided it was best for this patient to wait in the post-anesthesia recovery room, but they were denied entrance because he was not a post-anesthesia patient. The resident dropped him off in the pre-surgical holding area.

About an hour later the patient was found in the pre-surgical holding area without a pulse. A code was called but the patient died.

The family's lawsuit alleged negligence due to inadequate nursing assessment, monitoring and care in the pre-surgical holding area as well as a wider failure by the hospital to have policies and procedures in effect to cover the situation of a pre-surgical patient like this one with very special and urgent medical needs.

At this stage in the litigation the New York Supreme Court, Kings County, has not yet ruled on the basic issue of negligence but is still setting the rules for pre-trial evidence gathering.

Patient's Lawyers Contacted Present and Former Nursing Employees

The ethical disciplinary rules for lawyers make it improper for a lawyer to communicate directly with persons on the opposite side of a lawsuit without going through the lawyer or lawyers representing those persons. If the opposite party is a corporation a lawyer may not directly contact the corporation's present employees.

The family's lawyers were not out of bounds contacting the now-retired head of surgical nursing at the hospital, as he was not a hospital employee at the time he was contacted.

However, the family's lawyers were wrong to send their own employee, a private investigator, to contact one of the hospital's present supervisory surgical nurses. The Court expressly ordered the lawyers to cease and desist and ruled that any statement given to the investigator by that nurse will not be admissible in court. **Dixon-Gales v. Brooklyn Hosp. Ctr., __ N.Y.S.2d __, 2012 WL 786854 (N.Y. App., March 7, 2012).**

Medication Misappropriation: Nurse Gave Friend Heparin, Board Revokes Nursing License.

A registered nurse obtained Heparin from the facility where he worked and administered it to a personal friend who was a patient at another hospital where the nurse did not work.

The friend's medical diagnosis or the nurse's rationale for giving the medication was not explained in the court record.

The state Board of Nursing revoked the nurse's license for misappropriating medication, failing to meet minimal standards of practice and engaging in unprofessional conduct.

Disciplinary action against a nurse for misappropriation of medication most commonly involves theft of narcotics by a nurse for the nurse's own use, but there is no reason it cannot apply to other medications or to medication given to someone else.

Unprofessional conduct as grounds for disciplinary action against a registered nurse can include misappropriating medication and engaging in actions for which the licensee is not authorized by law or qualified by reason of training and experience.

However, the Board of Nursing is required to specify the range of penalties before the fact.

DISTRICT COURT OF APPEAL
OF FLORIDA
March 21, 2012

Failing to meet minimum standards of practice can include actions which are beyond the scope of the licensee's training and experience. This nurse had no authority to prescribe medication for his friend or to administer any medication without a physician's order.

The District Court of Appeal of Florida, even though the nurse basically admitted what he did, nevertheless overturned the Board's revocation of his license on technical legal grounds.

The Board has the authority to impose a harsher penalty for a first offense than the usual penalty of a fine, license suspension and probationary period, but the Board never took the required step of formulating guidelines before the fact defining what circumstances would justify such a harsher penalty. **Fernandez v. Dept. of Health, __ So. 3d __, 2012 WL 933082 (Fla. App., March 21, 2012).**