

Monitoring the Pulse of the Courtroom:

Recent Developments in Medical Malpractice Law

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ter Neuzen v. Korn (1995), 11 BCLR (3d) (SCC)

It is well settled that physicians have a duty to conduct their practice in accordance with the conduct of a prudent and diligent doctor in the same circumstances.

ter Neuzen, con't

In the case of a specialist, such as a gynaecologist and obstetrician, the doctor's behaviour must be assessed in light of the conduct of other ordinary specialists, who possess a reasonable level of knowledge, competence and skill expected of professionals in Canada, in that field.

ter Neuzen, con't

A specialist, such as the respondent, who holds himself out as possessing a special degree of skill and knowledge, must exercise the degree of skill and knowledge of an average specialist in his field.

Heidebrecht v. Fraser-Burrard Hospital Society, [1996] BCSC

No expert evidence as to the standard of care expected of a registered nurse of average competence was led. The plaintiff says that I can infer such a standard from the expectations doctors hold of nurses and from the evidence of Ms. Killeen.

Heidebrecht, con't

Dr. Griesdale said that a neurosurgeon would expect to be notified of a complaint to a nurse of neck and body stiffness.

...

Heidebrecht, con't

In the absence of expert evidence, I am not satisfied that the failure to warn Dr. Chan of these new symptoms was a breach of the standard of care expected of a registered nurse.

...

Heidebrecht, con't

Nursing is an independent profession with its own practices, procedures, and standards of competence. That fact that Dr. Griesdale would expect to be notified by a nurse of these new symptoms does not, standing alone, demonstrate that the nursing staff was guilty of anything more than a possible error in judgment in failing to bring them to Dr. Chan's attention.

ter Neuzen, con't

It is also particularly important to emphasize, in the context of this case, that the conduct of physicians must be judged in light of the knowledge that ought to have been reasonably possessed at the time of the alleged act of negligence. As Denning, L.J. eloquently stated in *Roe* ..., "we must not look at the 1947 accident with 1954 spectacles." That is, courts must not, with the benefit of hindsight, judge too harshly doctors who act in accordance with prevailing standards of professional knowledge.

ter Neuzen, con't

This point was also emphasized by this Court in *Lapointe* ...
... courts should be careful not to rely upon the perfect vision afforded by hindsight. In order to evaluate a particular exercise of judgment fairly, the doctor's limited ability to foresee future events when determining a course of conduct must be borne in mind. Otherwise, the doctor will not be assessed according to the norms of the average doctor of reasonable ability in the same circumstances, but rather will be held accountable for mistakes that are apparent only after the fact.

ter Neuzen, con't

It is generally accepted that when a doctor acts in accordance with a recognized and respectable practice of the profession, he or she will not be found to be negligent. This is because courts do not ordinarily have the expertise to tell professionals that they are not behaving appropriately in their field. In a sense, the medical profession as a whole is assumed to have adopted procedures which are in the best interests of patients and are not inherently negligent.

ter Neuzen, con't

Given the number of available methods of treatment from which medical professionals must at times choose, and the distinction between error and fault, a doctor will not be found liable if the diagnosis and treatment given to a patient correspond to those recognized by medical science at the time, even in the face of compelling theories.

Carlsen v. Southerland,
2006 BCCA 214

...

In this respect, the trial judge improperly focused only on the result of the surgery, and not on the precise manner in which Dr. Southerland failed to meet the appropriate standard of care. In the result, he held Dr. Southerland to a standard that amounted to a guarantee.

Carlsen, con't

The law does not usually imply a warranty that [a professional] will achieve the desired result, but only a term that he will use reasonable care and skill. The surgeon does not warrant that he will cure the patient. Nor does the solicitor warrant that he will win the case.

Belknap v. Meakes,
[1989] 64 DLR (4th) 452 (BCCA)

...

The defence had a difficult time putting its case. Dr. Meakes was prevented from saying what he did before the operation. He could not specifically remember it. That is understandable. Nearly three years had elapsed between the operation and the time the allegation of negligent blood pressure management was raised.

Belknap, con't

Dr. Meakes said that his "pre-operative assessment is a very standard part of my practice" and that he could say what had happened "because this is a habit from which I do not waiver".

Belknap, con't

The trial Judge said that he did not think the evidence was admissible unless the witness could "remember what he said to Mr. Belknap" and if the evidence of Dr. Meake's practice from which he did not waiver was admitted it carried so little weight that it would be "not much help to me at all".

Belknap, con't ...

If a person can say of something he regularly does in his professional life that he invariably does it in a certain way, that surely is evidence and possibly convincing evidence that he did it in that way on the day in question.



Good charting serves at least three purposes:

1. Facilitation of communication;
2. Promotion of good nursing care; and
3. Meeting professional and legal standards.

Legally, good charting...

- promotes risk management
- preserves evidence –what occurred and when it occurred
- records your recollection
- enhances your credibility
- forms basis for establishing you met the applicable duty of care

Tip 1: Be consistent with published nursing standards

- CRNBC's *Professional Standards* - Nurses must document timely and accurate reports of relevant observations, including conclusions drawn from those observations.
- CRNBC's *Practice Standards – Documentation* – Publication 334
- CRNBC's *Nursing Documentation* – Publication 151

Tip 2: Be consistent with employer's policies

- all hospitals have charting/record keeping policy and forms
- charting by exception or inclusion
- how to record verbal orders
- how to do late entries
- how to create incident reports
- use professional judgment – if change is needed, advocate for it

Tip 3: Chart your actions & observations

- first hand knowledge – no hearsay
- care you personally provide – except in Code Blue/emergency situations if you are designated recorder
- failure to chart important events may be taken as evidence that events did not occur

Shobridge v. Thomas (1999), 47 C.C.L.T. (2d) 73 (B.C.S.C.)

- presacral neurectomy, Sept. 1995
- Policy was to have 8 sponge counts
- abdominal roll not recorded in pre-op or post-op counts contrary to hospital policy - negligence
- left in pt's abdomen
- removed Dec. 1995
- "There will be no paperwork on this" – surgeon
- nurses failed to chart this find or to alert nurse manager - negligence

Jackson v. Kelowna General Hospital, 2006 BCSC 279

- Jaw fractured by sucker punch in 2001 – surgery next day
- 4 hours afterwards found unresponsive and in respiratory distress – Code Blue
- PAR order for 1 to 3 mg IV morphine prn
- PCA ordered as well for up to 15 mg morphine / hour
- Vitals to be monitored "q1h for 2h, then q4h unless otherwise ordered"
- Hourly rounds done but not charted – charting by exception
- Midnight rounds done – pt seemed asleep and no effort made to rouse him
- 10-15 minutes later, the hypoxic event discovered

- Nurses had differing understandings of the PCA monitoring orders
- No evidence in chart that any monitoring done after first assessment
- Some assumed others had assessed the pt because they did Team Nursing but judge held it was “incomprehensible” that no one did
- “The anaesthesiologist was entitled to rely on the nursing staff of 4 West to carry out his PCA standing order. I am satisfied that the nurses on 4 West failed to carry out the order, and by doing so, failed to meet the standard of care required of them.”

- “It is safe to say that the charting performed by the nurses working on 4 West during the night shift of April 19, 2001, does not inspire confidence. It is clear from the evidence before me that it is critical that patient’s hospital charts be fully maintained and that they accurately document the care provided to the patient. This is particularly the case, in my view, on a ward which employs team nursing. Each patient’s hospital chart is an important method of communication between nurses and other health care professionals with respect to the patient.”
- the defendant nurses failed to meet the standard expected of reasonable and prudent nurses.

- “While I heard much evidence about “charting by exception”, which involves the practice of making no chart notes unless something abnormal is noted, it seems contrary to good practice, in my view, to not at least note that rounds were performed or informal assessments were made, even if no abnormal findings were noted.”
- No causation - action dismissed because there was “no indication in the evidence that such monitoring would have revealed any signs of problems developing.”

Tip 4: Record interactions with important others

- telephone orders, reports to doctors, etc.
- failed efforts to communicate – *MacDonald v. York County Hospital (1973)* - nurses failed to document calls to dr. when the patient's toes became dark, cold and numb. The patient ultimately had his foot amputated. Court concluded they didn't actually make the calls

Tip 5: Be accurate, clear and legible

- use ink, write clearly and legibly...please!
- be concise, accurate and factual
- identify your entries with your name/initials
- correct errors by crossing out and writing "charting error"
- make recordings at time of observation or as soon as possible thereafter
- chronological recording is best

Tip 6: Incident reports & later notes

- should be done following unusual occurrences
- record actual care given – no blame or speculation
- report incidents to manager
- purpose is QA and sometimes contemplated litigation
- personal notes/aide memoir

*Tekano (Guardian ad litem of)
v. Lions Gate Hospital, [1999]
B.C.J. No. 1763 (S.C.)*

It is clear, however, that nurses are not responsible for diagnosis, nor are nurses free to depart from a physician's instructions absent "clear and obvious" neglect or incompetence. In *Serre v. De Tilly* (1975), 58 D.L.R. (3d) 362 (Ont. H.C.), the court considered the liability of nurses who, in accordance with a physician's instructions, discharged a patient. The patient later died. In dismissing the action against the nurses, the court stated, at 367:

Tekano, con't

I cannot accept the argument that if any of the nurses or hospital servants disagreed with the findings or direction of the family doctor, that they should have acted independently or called in other medical advice.

Tekano, con't

Diagnosis is surely not a function of the nurse; unless there were clear and obvious evidences of neglect or incompetence on the part of the family doctor, it would be unthinkable that the hospital or its agents should interfere with or depart from his instructions.



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