Canadian Nurses Protective Society

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The Nurse as an Advocate

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In the nursing profession, patient advocacy is usually discussed within an ethical framework. Is there a corresponding legal duty? Canadian court decisions have recognized the existence of a legal nursing duty to obtain proper care for patients, even when this requires nurses to seek assistance outside the usual treatment team (i.e. by speaking to someone other than a trusted colleague or an immediate supervisor). What is the extent of this duty?

Advocating Outside the Treatment Team

A few court decisions provide guidance as to when a nurse may be expected to seek assistance outside the treatment team:

a) Patient not receiving adequate care: Nurses are not generally expected to cross professional boundaries and monitor the performance of other medical professionals. However, a nurse may have a legal duty to seek assistance outside the treatment team where a patient is not receiving adequate care within the treatment team. This was the conclusion reached by the Court in the case of an unresponsive baby delivered after shoulder dystocia. The Court observed that a "nurse's standard of care will include intervention, such as calling for assistance from another physician, only in exceptional circumstances, such as [where there is] clear and obvious evidence of neglect or incompetence. To describe the duty of care any more broadly risks imposing an obligation on nurses to "second-guess" doctors' decisions, an unfair burden in a standard treatment setting, and a possibly dangerous one during an emergency."[1] With that caveat in mind, the Court held there was a breach of the standard of nursing care when the two nurses did not immediately call for another doctor to intubate the baby when it was obvious that the attending physician was "emotionally distressed by the outcome"[2] and could not provide the care needed. More recently, an Ontario court decision concluded that a nurse should have made greater efforts to seek medical attention for her patient when it became apparent that a call made to the doctor by the charge nurse had not received a timely response. A similar rationale might be invoked to require health care professionals to take action when a colleague appears to be impaired. In fact, in certain provinces, nurses have a positive duty to report a colleague who may be unable to practice.

b) Scarce resources: Scarce resources can pose another type of urgent risk. While courts have not yet found that nurses have a legal duty to advocate in the face of scarce resources, it is helpful, especially for nurses giving primary care, to know what direction the courts have provided to physicians on this subject. In a British Columbia case, physicians defended the decision not to order a CT scan that might have diagnosed a ruptured aneurysm on the basis of budgetary constraints at the hospital. The Court held that the physicians' duty of care to their patient took precedence over any responsibility they had to the health care system overall.[3]

c) Imminent risk of harm: The Supreme Court of Canada has recognized that a health care professional's duty of confidentiality is outweighed by safety concerns in circumstances where he or she learns, in the course of providing professional services, that another person or identifiable group is at risk of serious and imminent harm (e.g. the patient openly threatens that individual and has the means to carry out the threat).[4] This exception to the

To speak up, or not speak up.

That is the question.

duty of confidentiality has since been incorporated into provincial privacy legislation applicable to health information. In the United States, the courts have held not only that there is a public interest in setting aside the duty of confidentiality, but that in such circumstances, professionals have a duty to take reasonable care to protect the intended victim against the risk of harm.[5] Canadian courts could well adopt the same rationale.

Reconciling Advocacy and the Duty of Confidentiality

These cases indicate that health care professionals can be required, in exceptional circumstances, to address problems by taking action beyond what is usually done in the normal course of treatment. This could include speaking to people outside the treatment team such as a physician other than the patient's most responsible physician, or clinical managers, risk managers, or licensing bodies, all of whom have a role to play in the quality of patient care. If such a report seems to be justified, confidentiality of patient health information must be borne in mind.[6] Reporting to those who have clinical, administrative, or regulatory authority and responsibilities is not a breach of confidentiality, and in fact may be required by law,[7] whereas using social media to air concerns may be a breach of a patient's privacy and defamation of the health professionals subject to the complaint.[8] In deciding the best course of action, employer policies (and contractual obligations, the case of independent contractors) should also be taken into account. Reaching the decision to report concerns outside the treatment team requires careful deliberation, although in an emergency, the welfare of the patient should be the first consideration. Nurses facing such a situation would be very prudent to seek advice, whenever time permits. The CNPS can provide this advice.

Other best practices include:

- Proceeding through official channels, in accordance with employer policies, when applicable
- Using professional language
- Reporting the relevant facts as accurately as possible
- Explaining the urgency and potential implications of the situation for the patient
- Requesting action/feedback within a specific time frame, as warranted in the circumstances
- Where time permits, communicating concerns in writing in a professional and factual manner
- Documenting measures taken to address the problem — in the chart, where they relate to patient care, or in a letter to a supervisor or employer
- Following-up if necessary, escalating through the layers of administration

Nurses should avoid:

- Making assumptions or inferring facts
- Venting frustrations to the patient, in the patient's record, or in social media
- Using inflammatory language
- Publicizing concerns any more widely than is strictly necessary
- Breaching the duty of confidentiality. Proper reporting is an exception to the duty of confidentiality.

If you have any questions, please contact CNPS at **1-800-267-3390** or visit our website at **www.cnps.ca**.

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1. *Skeels (Estate of) v Iwashkiw*, 2006 ABQB 335 at para 95.
2. *Ibid* at para 260.
3. *Law Estate v Simice* (1994), 21 CCLT (2d) 228 (BCSC), aff'd (1995), 27 CCLT (2d) 127 (BCCA).
4. *Smith v Jones*, [1999] 1 SCR 455 at para 78.
5. *Tarasoff v Regents of University of California*, 551 P 2d 334 (Cal 1976); *Thompson v County of Alameda*, 614 P 2d 728 (Cal 1980).
6. *infoLAW®,* Confidentiality of Health Information (Vol. 1, No. 2, October 2008, Revision of September 1993).
7. *infoLAW®,* Reporting & Disclosure of Adverse Events (Vol. 17, No. 1, October 2008).
8. *infoLAW®,* Defamation (Vol. 12, No. 3, September 2003).