

# **DID THIS NURSE PRACTITIONER FAIL TO INSPECT THE REMOVED DRAINAGE TUBE SHE REMOVED AFTER LUMBAR LAMINECTOMY SURGERY?**

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## **Avoiding Liability Bulletin - August 2024**

In this Michigan Court of Appeals decision (*Ahern v. Henry Ford Health System, et al*, January 18, 2024), several legal questions arose after a drainage tube was removed postoperatively.

Note that this is an unpublished opinion, meaning that it is not a binding decision in the deciding court and the lower courts in the state in which the case was decided. Even so, it does provide a window into how the court evaluated the facts of the case, and therefore offers some insight as to future potential liability.

### Specifics of the Case

A male patient underwent a lumbar laminectomy at a local hospital. The surgery was performed by a surgeon in a private clinical practice. The surgeon inserted a drainage tube in order to allow for drainage from the surgical site.

In addition to the surgeon, a certified nurse practitioner provided postoperative care to the patient. The nurse practitioner, pursuant to the state nurse practice governing nurse practitioner practice, had a “supervising physician” who was also involved in the patient’s postoperative care.

Two days after the surgery, the nurse practitioner made a notation in the patient’s chart: “D/c drain” and “Drain out”.

The patient saw another orthopedic surgeon several months after his surgery due to back pain that was getting increasingly worse. An MRI was done and showed “moderate stenosis” was still present, and fluid was present where the laminectomy was done.

The second surgeon did a “fusion” surgery. He found and removed about 4” of “broken drain tubing” from the patient. The surgeon did not remove the drain pieces as they would soften and heal the area where he removed scar tissue from the previous surgery. No active infection was present.

### Lawsuit Filed

The patient filed a lawsuit alleging professional negligence, gross negligence, and other claims against the nurse practitioner, the supervising physician, the hospital, and the clinical orthopedic practice.

He died after filing the lawsuit due to unrelated causes. His wife was substituted as plaintiff because she was the personal representative of his estate. The allegations included:

- The nurse practitioner breached the standard of care by breaking or damaging the drain tube when it was removed and failing to provide care to the patient
- The supervising physician breached the standard of care by failing to discover the broken tube and failing to properly supervise the nurse practitioner
- The hospital and the clinical practice were vicariously liable (under the *respondeat superior* doctrine) for the acts of the nurse practitioner, the supervising physician, and the facility employees
- The doctrine of *res ipsa loquitur* (“the thing speaks for itself”) is applicable to the broken drainage tubing being left in the patient

The trial court granted the Motion with [Prejudice](#), citing several reasons, and rules that *res ipsa loquitur* did not apply in this case.

#### Plaintiff Files an Appeal of the Trial Court’s Decision

On appeal, the patient alleged that the Summary Judgment against the nurse practitioner and the other defendants relating to her alleged malpractice (under a vicarious liability theory) was in error because there was a question about whether the nurse practitioner removed the drainage tube.

The Appellate Court evaluated the evidence presented in the lower court and agreed that there was a material issue of fact as to who removed the tube, and, if it was the nurse practitioner, did she breach the standard of care.

As a result, the Summary Judgment was in error.

In support of this finding, the Court highlighted that:

- A question existed as to who removed the tube—the nurse practitioner or a registered nurse staff member
- Enough evidence supported a reasonable suggestion that the nurse practitioner removed the drain
- Based on the patient’s nurse practitioner expert, if the nurse practitioner removed the drain, she should have realized there was a broken piece of tube left in the patient after inspecting it due to fraying at the end of the tube when breakage occurs

- The patient presented enough evidence to establish injury—increasing back pain supported by finding of the second surgeon—and therefore was entitled to an evaluation of the damages sustained

The Court also remanded the case back to the trial court for further proceedings consistent with its opinion.

### What This Case Highlights for Your Practice

What will happen to the case when it returns to the trial court for further proceedings remains to be seen. It may continue to trial (with a judgment for or against the nurse practitioner and some or all of the defendants) or it may settle without going to trial.

Whatever the outcome, as a nurse practitioner, you (and this nurse practitioner) have an ever-present legal duty to conform your practice to current and applicable standards of practice in your clinical specialty.

Keeping abreast of standards can be met through membership in your applicable professional nurse practitioner associations, such as The American Association of Nurse Practitioners (AANP) and the American Psychiatric Nurses Association and its Practice Council (APNA).

Standards can also be kept updated through continuing education requirements, certification in your clinical area of practice, and obtaining an advanced degree(s) in your clinical nursing specialty.

Whenever removing a drainage tube from a patient, inspect the removed tubing carefully. If frayed, broken, not the same length as it was originally before insertion, or any other abnormal condition is observed, contact other applicable team members and document your interventions.

Your documentation of care provided must be accurate, complete, and timely. Had the nurse practitioner in this case documented not only that the tube was “discontinued” but who removed it, the case would not have had to evaluate this pivotal legal issue.

Knowledge of, and conformity with, your state advanced practice act is also essential, not only in terms of your scope of practice but also in terms of what is expected of you as you practice. This includes the requirement of ensuring that you practice with a “supervising physician”, and all that entails, is followed if your state act does not provide for independent practice.

Keep in mind that if a trial verdict occurs against the nurse practitioner, she could also face a professional licensure action by the state board of nursing that governs her advanced practice. She might also face this action if a family member reports her to the state board regardless of the outcome of the case.

Last, it is essential that you carry your own professional liability insurance.

For the price of the policy, professional liability insurance provides you with an attorney to defend against the allegations against you at no additional personal cost. In addition, it provides finances (consistent with your policy) should a monetary verdict or a fine be assessed against you in legal proceedings.

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