

# Is an Injury to a Patient Always Considered Negligence or Malpractice?

written by Nancy Brent | February 1, 2017

## **Avoiding Professional Liability Bulletin - February 1, 2017**

In 2002, a female 79-year-old patient suffered a stroke that resulted in her being “physically helpless”, unable to communicate verbally, and incapable of making decisions.<sup>1</sup> After a short hospital stay, the patient was admitted to a nursing home.

Four days after being admitted, the patient was sexually assaulted. She suffered many injuries, including vaginal bleeding and tearing. Whomever assaulted her was never identified. The patient died about eight months after her assault.

The Administrator of the patient’s estate filed a Motion for Judgment in the Circuit Court against the nursing home alleging, among other things, negligence, sexual assault, and battery under the State’s malpractice statute. The Administrator sought compensatory and punitive damages.<sup>2</sup>

The nursing home’s response to the suit was to file a Motion in Limine (a pretrial request) asking that the evidence in the case be limited to the issue of whether the nursing home “committed malpractice defined as a breach of the standard of care”, which proximately caused damages [to the patient]”.<sup>3</sup>

The Circuit Court granted the nursing home’s Motion. It also held that the Administrator’s allegations were covered under the State’s malpractice statute.

It then granted the nursing home’s Motion for Summary Judgment because it stated that none of the Administrator’s witnesses were qualified to give expert medical testimony on the standard of care.

The Administrator appealed the decision of the Circuit Court to the Virginia Supreme Court.

The Court carefully analyzed the malpractice statute at issue. The Court then stated that the case before it did not involve a tort committed during the course of a medical procedure or treatment administered to a patient. In addition, the Court pointed out that the definition in the statute of health care and professional services may include services beyond those customarily provided in a medical office or hospital setting.

Even so, the Supreme Court continued, the allegations against the nursing home involved its failure to ensure the patient’s safety by providing adequate proper personnel, visitor screening, and security systems. As a result, the Administrator’s allegations speak to conduct unrelated to any health care or professional services that the nursing home should have provided to the patient individually and

therefore, as the Court held, cannot be considered professional malpractice.

The Court reversed the Circuit Court's judgment and remanded the case [back to that Court] for further proceedings consistent with its opinion.

The remand back to the Circuit Court may have resulted in the Administrator being able to file an Amended Complaint and allege the injuries and death of the patient were due to, as an example, the nursing home's breach of its own duties under the Corporate Theory of Liability. The duties include ensuring adequate staffing, security of patients and facility security as a whole, and employment policies and procedures. Or, the Administrator may have filed an Amended Complaint under the state's tort theories of liability. No subsequent case was found.

This case illustrates the importance of filing a case under the proper statute based on the facts of the case. The Administrator thought he had a winning argument for his position.

No nurse was named in the suit. However, had one or more of the nurses not meet any duty they had surrounding the patient and her safety, such as regular monitoring of her because she was "physically helpless", turning the patient according to acceptable protocol, devising a way to communicate with her non-verbally, and following her care requests through a power of attorney or living will, liability might ensue.

Likewise, a nurse or unit manager would need to know and follow facility policies and procedures governing non-care of patients that deal with patient safety, visitor screening, and security systems. A CNO would have a duty to ensure those facility policies and procedures were being followed by nursing staff.

Remember, too, that there is always the state's nurse practice act and rules that guide a nurse in the provision of nursing care. Should violations of the act arise, a professional licensure proceeding could be initiated by the board of nursing against a nurse or nurses who failed to adhere to the act's mandates.

#### FOOTNOTES

1. Alcoy v. Valley Nursing Homes, Inc., 630 S. E. 2d 301 (Va. 2006).
2. Id., at 1.
3. Id., at 1.

*THIS BULLETIN IS FOR EDUCATIONAL PURPOSES ONLY AND IS NOT TO BE TAKEN AS SPECIFIC LEGAL OR ANY OTHER ADVICE BY THE READER. IF LEGAL OR OTHER ADVICE IS NEEDED, THE READER IS ENCOURAGED TO SEEK SUCH ADVICE FROM A COMPETENT PROFESSIONAL.*