

The legal implications of nursing shortages

By L.E. and F.A. Rozovsky

From time to time, almost every health facility in the country faces a nursing shortage. What are the legal ramifications for the institutions and for the nurses? In filling the shortages, what are the legal effects and implications?

The duty of the hospital

The Canadian Hospital Accreditation Guidelines of the Canadian Council on Health Facilities Accreditation set standards for nursing manpower. The guidelines state that there shall be sufficient nurses on duty at all times to give nursing care that requires professional judgement and skills to plan, assign, supervise and evaluate care given.¹

While the council may deny that it is creating law, that is what is being done. In a lawsuit against a hospital alleging that a nursing shortage caused the patient's injury, the Accreditation Standard may be used as the legally required norm. It may be adopted by the court as the basis for the facility's duty to have an appropriate number of nurses carrying out the tasks which the facility has accepted.

In accepting a task of providing particular services, whether surgical, obstetrical, or intensive care, the hospital is under a legal duty to provide that care according to average, reasonable and prudent standards. If the hospital does not have sufficient staff to meet these standards and as a result causes patient injury, the hospital can be found negligent. A court order will force it to compensate the patient.

If, however, unusual circumstances arise such as an unexpected surge of emergency patients, the hospital may not be found negligent in having too few nurses. This would also apply if there was an unexpected outbreak of staff illness or resignations. The standard for reasonable care is determined by the circumstances of the case. What is reasonable in one set of circumstances may not be in another.

A hospital cannot be expected to have sufficient staffing in anticipation of circumstances which may or may not arise. However, the hospital would be negligent if it was consistently understaffed. A court could find that it had not staffed on a reasonable basis given the functions it was attempting to carry out.

The duty of the nurse

When an institution is short-staffed, how should the nurse react? The first reaction should be to advise the hospital through the appropriate nursing supervisor that there are staff shortages. The hospital is then under a duty to take whatever action is reasonable to deal with these shortages.

As in any situation, the nurse cannot abandon his/her duty to the patient. The law still requires that he/she abide by average, reasonable and prudent nursing standards in the circumstances.

The key is "*in the circumstances.*" The nurse cannot wash his/her hands of all nursing responsibilities because of short staffing. The nurse must "make the best of a bad lot," even though the standards may not be as high as they would be in better circumstances. The problem becomes serious when a nurse is asked to undertake a task which, because of the shortage, may cause patient injury. Following the same principle, the nurse is expected to act as an average, reasonable, prudent nurse would act in the same or similar circumstances.

Such a standard imposed on the nurse by the nursing profession itself through the courts may require the nurse to refuse to carry out the task. The problem is that, if by refusing to carry out the task the nurse creates a reasonable foreseeability of patient injury, the task cannot be refused. It must be carried out in a manner which is least likely to cause in-

1. (1986), Standard No. III, page 36.

jury. This creates a dilemma for which there is no definite answer. Only the nurse faced with the problem can make the decision. If the decision is wrong, it is not necessarily negligence. It may be an error in judgement for which the nurse cannot be held responsible, even though the patient has been injured.

Solutions to personnel shortages

1. Close down the service

If a facility cannot abide by average, reasonable prudent standards in the provision of certain services, it must close down those services. The patient is entitled by law to this basic standard of care. Except in unusual circumstances, the hospital that fails to abide by this duty and injures a patient may be considered negligent in a malpractice suit.

2. Cross-training

In order to fill the personnel gaps, it may be possible to train individuals to take over extra nursing duties. If such individuals are not nurses, great care must be exercised to ensure that they do not contravene nursing legislation.

If they are nurses and being given extra specialist training, they must be able to perform as would the average, reasonable nurse who is specialized in that area. Superficial training may not enable the nurse to meet this standard.

3. Floats

The use of floats who are untrained in the service to which they are sent can create serious legal difficulties for the hospital and the nurses. The grave danger is that they will not be able to meet the legally required standards, will injure patients and attract legal responsibility in a lawsuit.

4. Transfer of functions

Great care must be taken not to transfer functions to those who are not legally entitled to accept them, or to those who cannot maintain the required standards of performing those functions.

5. An in-house registry system

One method of co-ordinating under-staffed areas is to maintain a registry. Such a registry would list those staff nurses who possess qualifications which will enable them to be shifted, or to take on duties outside of their ordinary practice. Such a system must be kept up-to-date. This should eliminate the possibility of staff being moved into work situations in which they are totally inexperienced.

6. Refusal policy

A firm policy must be established in which nurses are advised not to take on tasks which they are untrained to carry out. This policy must receive the support of administration and the board of trustees,

and be made known to the members of the medical staff. Nurses should not be permitted to take on tasks which they are not capable of. The offer of a member of the medical staff to "take responsibility" or the threat of dismissal from a nursing supervisor should not provide an exception to this rule.

7. Private agencies

Attempts may be made to overcome nursing shortages by contracting for staff with independent private nursing agencies. Even though the substitute nurses are employees of the agency and not the hospital, the hospital is responsible for their negligent acts. The reason is that these nurses are carrying out the hospital's undertaking to the patient. The fact that the hospital is carrying out this obligation by contracting with an agency does not remove its duty to provide services at the required standard. The contract between hospital and agency should specify areas of specialization. Even after the nurses arrive, they should not be expected to carry out functions which a trained hospital nurse could not be asked to perform.

8. Students and foreign recruitment

Use of nursing students to overcome nursing shortages raises the danger that they may not have the ability to perform at the same standard as would the average graduate nurse. By law, they are expected to meet those standards. Special attention should therefore be paid to supervising students.

Assuming that foreign nursing graduates received training equivalent to Canadian standards, an institution which entices foreigners may encounter serious legal contractual problems. A temporary license may not necessarily lead to a permanent license to practice, or a landed immigrant visa. If a contract is signed on that basis, the institution may find itself being sued for breach of contract.

Considering all of these factors, it becomes obvious that nursing shortages can cause considerable legal problems to employing institutions and to individual nurses. The solution is that institutions should adopt nursing shortage policies before such shortages arise. These policies should be written in consultation with legal counsel and should receive the active support of the board of trustees, administration and the nursing staff. ■

About the authors

Lorne Rozovsky, is a Halifax lawyer with the law firm of Patterson Kitz, and adjunct associate professor of law and medicine at Dalhousie University. Fay Rozovsky, J.D., M.P.H., president of the management consulting firm, LEFAR Health Associates, Inc., is a visiting lecturer in health law, Harvard School of Public Health.