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# Nursing Malpractice--The Nurse's Duty to Follow Orders

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# NURSING MALPRACTICE — THE NURSE'S DUTY TO FOLLOW ORDERS

## I. INTRODUCTION

Over the past several decades medical care has seen dramatic advances in knowledge about disease processes and technology for diagnosis and treatment of illnesses. The tremendous number of medical malpractice actions currently being instituted results directly from these highly complex and advanced methods of delivering health care. As medical malpractice insurance costs skyrocket because of the expanding responsibilities of physicians, the cost of health care delivery also climbs. Further increases in the cost of health care come about as revolutionary treatment modes require more complex equipment and procedures. This climbing cost of health care has put "pressure on the health-care system to find and to provide low cost alternatives for the consumer."[1] Consequently, this has led to the need for a greater use of nonphysician health care providers.

Nursing has evolved into an integral part of the health care delivery system. The practice of nursing has undergone a great deal of change over the past years, partly in response to this need for nonphysician, cost effective health care and largely as a means of keeping pace with the ever changing demands of the medical field. "[N]ursing is a dynamic field . . . [and] the practice is becoming increasingly sophisticated as nurses assume more responsibility in patient care."[2] The nurse's greater involvement in health care delivery raises the possibility of more nursing malpractice actions.

## II. THE NURSE'S ROLE

"A number of years has passed since nursing viewed itself as the physician's handmaiden."[3] The more typical expectations of

1. Eccard, *A Revolution in White - New Approaches in Treating Nurses as Professionals*, 30 VAND. L. REV. 839, 840 (1977).

2. Scanlan, *The Nurse and Malpractice: Legal Problems in the Nursing Profession*, 9 W. ST. L. REV. 227, 227 (1982).

3. Walker, *Nursing 1980: New Responsibility, New Liability*, 16 TRIAL 42, 42 (Dec. 1980).

nursing today are illustrated by the West Virginia Nurse Practice Act defining "registered professional nursing":

> . . . (b) [t]he practice of 'registered professional nursing' shall mean the performance for compensation of any service requiring substantial specialized judgment and skill based on knowledge and application of principles of nursing derived from the biological, physical and social sciences, such as responsible supervision of a patient requiring skill in observation of symptoms and reactions and the accurate recording of the facts, or the supervision and teaching of other persons with respect to such principles of nursing, or in the administration of medications and treatments as prescribed by a licensed physician or a licensed dentist, or the application of such nursing procedures as involve understanding of cause and effect in order to safeguard the life and health of a patient and others.[4]

Nursing has undergone internal development to attempt to reach greater professional competency in the delivery of skilled nursing care. First, "nursing training [has become] more formalized" with the establishment of nursing schools, nursing organizations and standards of care.[5] The level of education required for nurses many years ago constituted little more than a high school education. Now nurses achieve baccalaureate, masters and doctorate degrees in nursing and can specialize in various fields of nursing care as well. Nurse licensing has evolved from a time where only a handful of states required such licensing to mandatory licensure of all individuals practicing the profession of nursing.[6] Some states are considering a baccalaureate degree as a minimum requirement for nursing licensure, in an attempt to further promote the competency of the profession. Nursing organizations also have developed standards of care for all nurses to follow in the daily practice of nursing. The American Nurses Association has published an ethical code for nurses to integrate into their delivery of nursing care.[7] Clearly, the members of the nursing community view themselves as professional individuals seeking to promote competency through education, standardization and licensure.

Courts also are beginning to recognize the expansion of the scope of nursing practice. "The changes [taking place in nursing] reflect

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4. W. VA. CODE § 30-7-1 (1986).

5. Eccard, *supra* note 1, at 841.

6. *Id.* at 842-43.

7. AMERICAN NURSES ASSOCIATION, CODE FOR NURSES WITH INTERPRETIVE STATEMENTS (1976) [hereinafter CODE FOR NURSES].

increasing emphasis on high standards for nurses; those with superior education and experience often exercise independent judgment as to the care of patients whether in a hospital setting or elsewhere."[8]

A broad statutory definition of nursing, such as found in the West Virginia statute, can allow the expansion of the lawful practice of nurses. Referring to the breadth of one such definition, the court in *Sermchief v. Gonzales*[9] agreed that:

> a nurse may be permitted to assume responsibilities heretofore not considered to be within the field of professional nursing so long as those responsibilities are consistent with her or his 'specialized education, judgment and skill based on knowledge and application of principles derived from the biological, physical, social and nursing sciences.'[10]

## III. Nurses — Negligence Or Malpractice?

### *A. Negligence and Nursing*

The elements required to establish nursing negligence are the same as those of general tort law. The plaintiff must prove that "the defendant had a duty to the plaintiff which was breached causing damage to the plaintiff."[11]

This section will review these elements as applied to nursing.

#### 1. Duty

A duty is a "legal or moral obligation."[12] Nurses have numerous duties which arise in the course of their work. However, before nurses can be found liable for their actions, there must be a determination that they owed a duty to the plaintiff. There may be a finding that a defendant nurse was negligent in some manner, yet no determination of liability if there was no duty owed to the plaintiff.[13]

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8. Fraijo v. Hartland Hosp., 99 Cal. App. 3d 331, 342, 160 Cal. Rptr. 246, 252 (1979).
9. Sermchief v. Gonzales, 660 S.W.2d 683 (Mo. 1983).
10. *Id.* at 689.
11. E. Hogue, Nursing and Legal Liability 1 (1985).
12. Black's Law Dictionary 453 (5th ed. 1979).
13. W. Prosser & W. Keeton, Torts 164 (5th ed. 1984) [hereinafter W. Prosser].

One such duty frequently identified by the courts is the duty of nurses to follow the orders of the physician. Where "direct and explicit orders" of the physician are proper, a nurse has a duty to execute such orders.[14] However, when orders are "so obviously negligent" that they are likely to result in substantial harm, there is no duty to follow the orders.[15] Confusion often results when the court finds no duty to follow orders but conversely imposes the duty to refrain from executing such orders.

2. Breach

The breach of a duty is stated as "any violation or omission of a legal or moral duty."[16] Thus, once the court determines that the nurse did in fact owe a duty, the focus turns to whether the nurse fulfilled or violated that duty. In one case, failure to execute the order of a physician constituted a breach of the nurse's duty.[17] Failure to follow policy in a procedure manual concerning improper orders and care was found to be a breach of the nurse's duty in another.[18] In contrast, no breach of a duty was found on the part of the nurse where the physician supervised and approved the treatment performed by the nurse.[19]

3. Causation

Causation means that there is a reasonably close relationship between the defendant nurse's conduct and the plaintiff's resulting injury.[20] "A proximate cause of an injury is a cause which, in natural and continuous sequence, produces the injury, and without which the injury would not have occurred."[21] When the nurses in *Abille v. United States*[22] allowed a suicidal psychiatric patient to leave the

14. Toth v. Commun. Hosp., 22 N.Y.2d 255, 265, 239 N.E.2d 368, 374, 292 N.Y.S.2d 440, 449 (1968).

15. Byrd v. Marion Gen. Hosp., 202 N.C. 337, 341, 162 S.E. 738, 740 (1932).

16. CODE FOR NURSES, *supra* note 7, at 741.

17. Abille v. United States, 482 F. Supp. 703, 707 (N.D. Cal.1980).

18. Utter v. United Hosp. Center, 160 W. Va. 703, 705-06, 236 S.E.2d 213, 214 (1977).

19. *Byrd*, 202 N.C. at 343, 162 S.E. at 741.

20. W. PROSSER, *supra* note 13, at 165.

21. *Fraijo*, 99 Cal. App. 3d at 345-46, 160 Cal. Rptr. at 254.

22. *Abille*, 482 F. Supp. 703.

ward unescorted, against the physician's order, the court found that the patient's subsequent suicide "must . . . be considered as a proximate result of the negligent act of the nurses."[23]

In some circumstances, physicians and nurses are subjected to "unjustified lawsuits" as a result of frustration on the part of a patient whose condition just does not improve as hoped.[24] Consequently, it is necessary to focus on whether a nurse's negligence actually caused the plaintiff's condition or whether recovery was unlikely from the beginning.

4. Damages

Injury to the plaintiff is the last requirement to prove a negligence claim against a nurse. The court in *Czubinsky v. Doctors Hospital*[25] referred to the "catastrophic injuries" suffered by the patient as a result of the nurse's negligence.[26]

Even though a nurse may have clearly breached a duty owed to a patient, no liability for negligence will be imposed if the plaintiff has not suffered any damages. Even the possibility of future harm is not sufficient to allow recovery for negligence where no present harm has occurred.[27]

## *B. The Nursing Profession and Malpractice*

Two theories of liability are possible in claims against nurses — negligence or malpractice. Negligence is defined as "the failure of one owing a duty to another to do what a reasonable and prudent person would ordinarily have done under the circumstances, or doing what such person would not have done, which omission or commission is the proximate cause of injury to the other."[28] Malpractice is a restriction on the negligence theory. It is defined as a "violation

23. *Id.* at 707.
24. Scanlan, *supra* note 2, at 233.
25. Czubinsky v. Doctors Hosp., 139 Cal. App. 3d 361, 188 Cal Rptr. 685 (1983).
26. *Id.* at 364, 188 Cal. Rptr. at 686.
27. W. PROSSER, *supra* note 13, at 165.
28. BALLANTINE'S LAW DICTIONARY 840 (3d ed. 1969).

of a professional duty to act with reasonable care and in good faith. . . ."[29] Clearly, malpractice is a specialized form of negligence applied to "professionals" who owe duty to another.

In spite of the revolutionary changes taking place within the nursing community, confusion still exists concerning the status of nursing as a "profession." West Virginia specifically defines nursing as the practice of "registered professional nursing."[30] Yet, "[t]here is a lack of uniformity among the various jurisdictions concerning whether a nurse is to be treated as a member of a profession and, therefore, subject to the special legal provisions limited to malpractice actions."[31] The majority of cases which involve negligence on the part of nurses makes no distinction between whether the cause of action is one for negligence or malpractice.[32] Yet, one court refused to apply the shorter statute of limitations for malpractice suits to the actions of a nurse for negligence.[33] There, it was stated that "malpractice imports an improper treatment or culpable neglect of a patient by a physician or surgeon, and would in no instance be found to have application to a nurse."[34]

In *Duling v. Bluefield Sanitarium*,[35] the West Virginia court focused on negligent acts of nurses, clearly announcing that the case was not a malpractice action because it did not involve the negligence of a physician.[36] Yet, in *Thornton v. Charleston Area Medical Center*,[37] the West Virginia Supreme Court of Appeals specifically referred to nursing negligence as "nursing malpractice." When a case involves the performance of "professional duties" of a nurse, it is difficult to understand why it would not be considered medical mal-

29. *Id.* at 769.

30. W. VA. CODE § 30-7-1 (1986).

31. Morris, *The Negligent Nurse - The Physician and the Hospital*, 33 BAYLOR L. REV. 109, 110 (1981).

32. Annotation, *Nurse's Liability for Her Own Negligence or Malpractice*, 51 A.L.R.2d 970, 971 (1957).

33. Annotation, *Applicability, in Action Against Nurse in Her Professional Capacity, of Statute of Limitations Applicable to Malpractice*, 8 A.L.R.3d 1336 (1966) (citing Isenstein v. Malcomsen, 227 A.D. 66, 236 N.Y.S. 641 (1929)).

34. *Id.* at 1337.

35. Duling v. Bluefield Sanitarium, 149 W. Va. 567, 142 S.E.2d 754 (1965).

36. *Id.* at 581, 142 S.E.2d at 764.

37. Thornton v. Charleston Area Med. Center, 305 S.E.2d 316, 326 (W. Va. 1983).

practice instead of negligence.[38] With the increase in abilities and responsibilities of the modern day nurse, as well as the internal promotion and development of the nursing community, it is reasonable that nursing should be recognized as a profession.

The term malpractice has often been reserved by the courts for defining the liability of a physician or surgeon. However, the concept of professionalism, and therefore the application of a malpractice theory of liability, has been extended to "dentists, pharmacists, psychiatrists, veterinarians, lawyers, architects and engineers, accountants, abstractors of title, and many other professions and skilled trades."[39] Though not specifically addressed in this series of "professions," the expectation is that nurses will probably be included with such occupations.

Nursing duties have expanded into previously unrecognized areas of health care as a result of the technical, complex nature of the medical field. This growth of the nursing profession virtually guarantees that nurses will be subject to greater potential liability for their actions. "Nurses are held to be professional persons employed to exercise their calling on their own responsibility under the general direction of the physician in charge, and are grouped with physicians and surgeons and not with cooks, chambermaids, etc., employed in purely ministerial and administrative functions."[40]

### *C. West Virginia Applicable Statutes*

The question of whether a nurse's actions are considered negligence or malpractice can have an impact on a court's treatment of the cause of action. For example, the applicable statute of limitations will depend, in some jurisdictions, upon whether nursing would be classified as a profession subject to a malpractice standard. In West Virginia, the distinction between a nursing negligence case or nursing malpractice case is relatively unimportant in relation to the applicable statute of limitations. No difference in the statute of

38. Comment, *Medical Practice - The Line Between Malpractice and Negligence*, 68 W. VA. L. REV. 86, 87 (1965).

39. W. PROSSER, *supra* note 13, at 185-86.

40. Volk v. City of N.Y., 259 A.D. 247, 19 N.Y.S.2d 53, 61 (1940).

limitations exists between negligence and malpractice actions.

Prior to June 1986, the right to bring actions against nurses for negligent acts came within the limitations of "personal actions not otherwise provided for" in Section 55-2-12 of the West Virginia Code.[41] According to this section, generally a suit may be brought "within two years next after the right to bring the same shall have accrued if it be for damages for personal injuries; . . . ."[42] West Virginia follows the discovery rule, which means that courts have construed the language of the statute to allow two years from the time that the person reasonably should have discovered or become aware of the injury before the action will be barred. It is notable that physicians are also subject to liability under this section of the West Virginia Code. Therefore, no distinction has been made between nursing negligence and nursing malpractice, at least as far as the West Virginia statute of limitations is concerned.

The West Virginia legislature specifically added a separate article on "medical professional liability," effective June 1986.[43] According to this statute, the time limitation for bringing an action against what are now termed "health care providers" is identical in length to the previous Code section (*i.e.*, two years).[44] However, one section of this article clearly defines "medical professional liability" as "any liability for damages resulting from the death or injury of a person for any tort or breach of contract based on health services rendered, or which should have been rendered, by a health care provider or health care facility to a patient."[45] Further, the statute clearly defines "health care provider" as:

> a person, partnership, corporation, facility or institution licensed by or certified in this state or another state to provide health care or professional health care services, including, but not limited to, a physician, osteopathic physician, hospital, dentist, registered or licensed practical nurse, optometrist, podiatrist, chiropractor, physical therapist, or psychologist, or an officer, employer or agent thereof acting

41. W. VA. CODE § 55-2-12(b) (1986).
42. *Id.*
43. *Id.* §§ 55-7B-1 to -10 (1986).
44. *Id.* § 55-7B-4 (1986).
45. *Id.* § 55-7B-2(d) (1986).

in the course and scope of such officer's, employee's or agent's employment.[46]

The legislature declared that one of the policy rationales behind this article is to ensure that health care providers deliver the best medical care and provide the best facilities available to the citizens of the state.[47]

West Virginia's recent enactment of this specific medical professional liability statute included registered nurses and all other health care employees with the traditionally recognized profession of physicians. Therefore, in this state, the question of whether nursing actions should be tried under a malpractice or negligence standard, as far as the statute of limitations is concerned, is unnecessary. It is clear that the trend in West Virginia is toward holding all health care providers responsible for their actions, whether it be termed negligence, malpractice or medical professional liability. Nurses, therefore, can and should expect to be held accountable for their actions in the delivery of professional nursing care.

## IV. Specific Nursing Duties—The Nurse's Duty to Follow Orders

Clearly nurses may be exposed to liability for their actions; and greater participation in the care of patients can only lead to greater exposure to potential liability. "Nursing must be better understood regarding its growing autonomy, the recent expansion of its role into heretofore sanctioned areas, and the increase in legal responsibilities."[48] What follows is a more specific focus on a particular aspect of nursing—the duty of a nurse regarding physician orders. This focus will illustrate how the advancement of nursing into the area of professional decision-making has imposed additional and more exacting duties upon nurses. Therefore, an increase in the number of malpractice actions based on those duties and responsibilities is likely.

46. *Id.* § 55-7B-2(c) (1986).
47. *Id.* § 55-7B-1 (1986).
48. Walker, *supra* note 3, at 43.

### *A. The General Duty To Follow Orders*

A physician caring for a patient writes orders for the patient's plan of care. The nurse's duty in relation to these orders arises from his or her responsibility to assist the patient in meeting the plan of care and in carrying out the orders. The duty to execute the physician's order has been long recognized by nurses and physicians. The Nurse Practice Act of West Virginia specifically includes in its definition of registered professional nurses "the administration of medications and treatments as prescribed by a licensed physician or a licensed dentist. . . ."[49] Courts have also formally recognized the nurse's duty to execute orders. "The nurses and interns at a general hospital are charged with the duty of carrying out the instructions of the attending physician."[50] This duty, according to the court in *Mesedahl v. St Luke's Hospital Association*,[51] arises from the patient's belief and trust in the physician. A patient in the hospital on his doctor's advice "naturally desires and expects, and has the right to expect, that the instructions of his physician will be complied with."[52]

The courts have found nursing negligence based on the failure of the nurses to follow the orders of the physician. In *Toth v. Community Hospital*,[53] the court stated that the primary duty of a hospital staff is to follow the physician's order. In *Toth*, the nurses administered oxygen at a rate in excess of the physician's specific orders, causing the premature infant twin patients to suffer blindness. The *Toth* court stated that the direct and explicit orders of the physician did not authorize the nurses to determine for themselves what was proper medical treatment.[54]

This general rule requiring nurses to follow orders, considered alone, would seem to indicate that a nurse need only follow such orders. Then, nurses would be insulated from liability for any sub-

49. W. VA. CODE § 30-7-1 (1986).
50. Mesedahl v. St. Luke's Hosp. Ass'n, 194 Minn. 198, 204, 259 N.W. 819, 822 (1935).
51. *Id.*
52. *Id.*
53. *Toth*, 22 N.Y.2d 255, 239 N.E.2d 368, 292 N.Y.S.2d 440.
54. *Id.* at 265, 239 N.E.2d at 374, 292 N.Y.2d at 449.

sequent harm because they were just doing their duty. However, "[n]either the physician's prescriptions nor the employing agency's policies relieve the nurse of ethical or legal accountability for actions taken and judgments made."[55] Further examination of judicial views of the nurse's general duty to follow orders illustrates that merely following orders, without consideration of the appropriateness or consequences of such orders, often may be insufficient.

Courts have upheld the general duty to follow orders and have also specified that certain situations require that a nurse use professional judgment, knowledge and skill in determining the appropriate response to the order. One such example of where the general duty to execute orders is modified arises in an emergency situation. Here, the nurse must exercise independent professional judgment and initiate medical treatment in the absence of a physician's order until definite instructions are obtained from the physician.[56] In *Mesedahl*, the nurses were not required to initiate treatment where there were no orders from the physician and no emergency situation was present.[57]

Other cases have upheld the general duty of a nurse to follow orders while adding some clarification of the duty. The court in *Byrd v. Marion General Hospital*[58] stated that the nurse must "obey and diligently execute the orders of the physician . . . unless, of course, such order was so obviously negligent as to lead any reasonable person to anticipate that substantial injury would result to the patient from the execution of such order. . . ."[59] It is obvious that the court requires more than blind obedience to the physician's directives. It is essential that a nurse evaluate the appropriateness of the order in terms of the likelihood of resulting harm. From the duty to follow the orders of a physician arises the obligation of the nurse to consider and evaluate the order, making a professional decision regarding its "reasonableness."

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55. CODE FOR NURSES, *supra* note 7, at 10.
56. Mesedahl, 194 Minn. at 204, 259 N.W. at 822.
57. *Id.*
58. *Byrd*, 202 N.C. 337, 162 S.E. 738.
59. *Id.* at 341, 162 S.E. at 740.

A further view related by the court in *City of Somerset v. Hart*[60] recognized that unless "the orders are so obviously improper that the ordinarily prudent nurse would not obey them," the nurse is exculpated from liability for harm which results when these orders are followed.[61] Again, the general duty to follow orders was upheld. If the order was such that a reasonably prudent nurse could not anticipate the resultant harm, then executing the order would not be a basis for nursing liability. Yet, the court also said that merely following orders will not always relieve the nurse of liability if an order is clearly improper. The nurse must act as an "ordinarily or reasonably prudent nurse" in the assessment of orders prior to their execution. The court in *Darling v. Charleston Community Memorial Hospital*[62] also upheld this position, stating that no liability exists when a nurse is merely following orders "unless such order is so obviously negligent" that the nurse should anticipate injury.[63]

In *Abille v. United States*,[64] the court determined that the actions of defendant nurses fell below the permissible standard of care in their treatment of a suicidal patient.[65] The patient had been classified by the physician's orders as one who required supervision. The nurses were apparently under the impression that the physician had altered the patient's classification, requiring a lower level of supervision. They permitted the patient to leave the ward unescorted, whereupon he committed suicide. When no order was found authorizing such a change in status, the court held that the nurses' "good faith error, however, in no way relieve[d] the defendant of its duty to adhere to the security requirements prescribed by the treating physician. . . ."[66] Once again, the court recognized the duty to follow orders, ruling that even a good faith belief is not an excuse for failing to comply with the physician's order.

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60. City of Somerset v. Hart, 549 S.W.2d 814 (Ky. 1977).
61. *Id.* at 817.
62. Darling v. Charleston Commun. Mem. Hosp., 33 Ill. 2d 326, 211 N.E.2d 253 (1965).
63. *Id.* at 330, 211 N.E.2d at 256.
64. *Abille*, 482 F. Supp. at 707.
65. *Id.*
66. *Id.*

### B. *The Nurse's Duty To Defer An Order*

The American Nurses Association states that "[t]he nurse's primary commitment is to the client's care and safety."[67] The courts also have focused on the nurse's duty to ensure the safety of his or her patients. As important as is the general duty to follow the orders of a physician, there are certain specific situations in which a duty to not carry out the order of the physician has been recognized. Quite often, this situation comes about where the duty to fulfill an order of the physician will prevent the nurse from fulfilling his or her duty to safeguard her patient.

One instance where the nurse has a duty to refrain from executing an order occurs when the order is obviously improper. Where the "order [was] so obviously negligent as to lead any reasonable person to anticipate that substantial injury would result . . . from the execution of such order," the nurse has a duty to defer the order.[68] In these situations, if nurses execute the orders, they can expect that they will be subject to liability for their actions. They cannot claim that they were just doing their duty or just following orders. In this type of situation the court has clearly identified that there is a duty to refrain from executing the order. Therefore, nurses fail to responsibly fulfill their duty to the patient by carrying out such an order.

As stated above, courts have determined that a nurse may be held liable for injury resulting from following a physician's improper order. In one case, the physician requested a particular needle for a liver biopsy.[69] The nurse, engaged in assisting another physician, informed him that she would get it for him when she completed her present task. When the physician stated that he would get the needle, the nurse allowed him to do so and did not inform the physician that it was standard procedure for the nurse to issue needles to the physicians. When the physician inadvertently picked up an unsterilized needle for the procedure, his patient was exposed to

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67. CODE FOR NURSES, *supra* note 7, at 8.

68. *Byrd*, 202 N.C. at 341, 162 S.E.at 740. *See also Hart*, 549 S.W.2d at 817; *Darling*, 33 Ill. 2d at 330, 211 N.E.2d at 256.

69. Suburban Hosp. v. Hadary, 22 Md. App. 186, 322 A.2d 258 (1974).

infectious hepatitis. Therefore, breach of the duty to defer the physician's order formed the basis for liability of the nurse. "If the order appears erroneous, a reasonably prudent and competent nurse would question the physician. The nurse should not believe that the physician would bear all responsibility for the mistake; the nurse, too, could be liable."[70]

On the other hand, the court in *Paris v. Michael Kreitz*,[71] found no negligence on the part of the defendant nurse for following the instructions of the physician where "the negligence was not so obvious as to require [the nurse] to disobey an instruction or refuse to administer a treatment."[72] The court agreed with the general rule that a nurse has a duty to defer orders where obvious harm will result.[73] However, the court was not willing to extend liability to the situation where the nurse could not reasonably anticipate that harm would occur as a result of carrying out the order.

Another example of the duty to refrain from executing a physician's order is when the order is either incomplete, uncertain or unclear. The nurse not only must refrain from following the order as given, but must also fulfill the duty of questioning and clarifying the order with the physician before executing it. An incomplete order in *Norton v. Argonaut Insurance Company*[74] failed to specify in what way medication should be administered.[75] The nurse, familiar with one method of administration, questioned another physician regarding the amount of the drug prescribed. That physician, not realizing the nature of the nurse's confusion, *i.e.*, what route to use for administration of the drug, stated that the amount was appropriate for an infant. The nurse proceeded to administer the drug in the way in which she was familiar, by injection rather than orally. Her method was inappropriate for an infant and resulted in the death of her patient.

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70. Katz, *Reporting and Review of Patient Care: The Nurse's Responsibility*, in 1983 LAW, MEDICINE & HEALTH CARE 77.

71. Paris v. Kreitz, 75 N.C. App. 365, 331 S.E.2d 234 (1985).

72. *Id.* at 381, 331 S.E.2d at 245.

73. *Id.*

74. Norton v. Argonaut Ins. Co., 144 So. 2d 249 (La. App. 1962).

75. *Id.* at 254.

The court in *Norton* found that uncertainty regarding the order imposed a duty to clarify the order with the physician who wrote it.[76] Thus, not only did the nurse fail to fulfill the duty to refrain from executing the order, she also failed to clarify the confusion with the appropriate physician before attempting to carry out the order. Though nurses may generally be protected from liability when following orders of licensed physicians, "blind conformity to those orders will not satisfy the requisite standard of care where the orders are unclear."[77] Moreover, if an order is illegible or incomplete, the nurse's duty is to contact the physician who wrote it and obtain clarification.[78]

On occasion, a nurse may be confronted by a physician's order which directly conflicts with written hospital policy. Such was the case in *Czubinsky v. Doctors Hospital*[79] where a physician ordered a nurse to leave a post-operative patient in order to assist him. A specific hospital policy required that one member of the surgical team remain with a post-operative patient. Although the nurse initially refused the physician's order, upon his continued insistence she complied. When her patient suffered a cardiac arrest, the anesthesiologist who was present was unable to successfully resuscitate the patient without the nurse's assistance quickly enough to prevent serious brain injury. The court in *Czubinsky* found the nurse liable for the "catastrophic injuries" to the patient.[80] Although she was only "following the physician's orders," she had abandoned her patient and was clearly in violation of written hospital policy.

The court's ruling in *Czubinsky* emphasizes once again that merely following the orders of a physician will not necessarily preclude a nurse from liability for harm which occurs as a result of compliance. The nurse's duty in a situation such as this is to refrain from following such an order and to inform the physician of the applicable hospital policy. If the physician continues to insist, the nurse must

76. *Id.* at 260.
77. Scanlan, *supra* note 2, at 233.
78. Katz, *supra* note 69, at 77.
79. *Czubinsky*, 139 Cal. App. 3d 361, 188 Cal. Rptr. 685.
80. *Id.* at 364, 188 Cal. Rptr. at 686.

realize that she will be responsible for the consequences of her actions should she fail to conform to hospital policy.

As indicated from the cases discussed above, a nurse will not be insulated from liability because she was just following orders. These cases illustrate that the general duty to follow orders, though still widely upheld, has some variations. These variations will often impose further duties upon the nurses, requiring that they exercise skill and knowledge in rendering a professional nursing judgment.

### *C. The Nurse's Duty To Question Improper Orders And Treatment*

In the West Virginia case of *Utter v. United Hospital Center*,[81] a physician was treating Mr. Utter for serious injuries suffered in a fall. The physician applied a cast to one arm, and the nurses were then responsible for care of the patient and observation of the arm. Upon noticing swelling, drainage and other symptoms indicating deterioration of the patient's arm and general condition, the nurses notified the treating physician. When the physician did nothing further, such as instituting further medical treatment or changing the current plan, the nurses took no further action. A hospital policy in *Utter* required that a nurse bring any doubtful or questionable care to the physician's attention. If upon doing so the matter was not resolved, the nurse should than bring the question to the attention of the appropriate departmental chairman.[82] Instead, the nurses in *Utter* continued to carry out the treatment plan of the attending physician—just following orders. The patient was transferred to another hospital when his condition seriously worsened. His arm was subsequently amputated.

The court in *Utter* found that the nurses' actions in merely following the treatment plan of the physician were not enough to escape liability. Especially in view of the written hospital policy, the court determined that the nurses failed to "properly treat and care for the injured plaintiff."[83] The nurses were negligent because they fol-

81. *Utter*, 160 W. Va. 703, 236 S.E.2d 213.
82. *Id.* at 706, 236 S.E.2d at 214.
83. *Id.* at 706, 236 S.E.2d at 215.

lowed orders and did nothing further. The court required a greater responsibility from the nurses in this case, especially in regard to the hospital policy—to confront the treating physician and, in the absence of a satisfactory response, to report to the appropriate departmental chairman.

In *Darling v. Charleston Community Memorial Hospital*,[84] the court discussed a similar duty on the part of the nurses to do more than follow the current orders and treatment plan of the physician. The patient's casted leg became swollen, dark and cold; and the nurses noticed blood, seepage and a terrible smell from the cast. No further actions were taken by the nurses, even though the doctor's care of the patient was inadequate. The patient's lower leg was later amputated. The court in *Darling* held that the nurses could not sit back and merely follow the physician's orders. "[I]t became the nurses' duty to inform the attending physician, and if he failed to act, to advise the hospital authorities so that appropriate action might be taken."[85]

This duty to question the adequacy of care provided by a physician enters into an area of nursing that was "heretofore unsanctioned," and the correlative increase in legal responsibilities is significant.[86] Historically, it was unheard of for a nurse to question a physician's practice. Nurses traditionally were expected to assist the physician and to follow orders without questioning the competency of the medical profession. Now, nurses possess a greater degree of knowledge and skill because of their higher education. Nurses spend the greatest amount of time with patients. Nurses are more readily available to assess the patient and the effectiveness of his care. The American Nurses Association recommends that the role of a nurse be that of a client advocate, where the nurse is "alert to and take[s] appropriate action regarding any instances of incompetent, unethical, or illegal practice(s) by any member of the health care team . . . ."[87] The *Utter* court also recognized that "[n]urses

84. *Darling*, 33 Ill. 2d 326, 211 N.E.2d 253.
85. *Id.* at 333, 211 N.E.2d at 258.
86. Walker, *supra* note 3, at 43.
87. CODE FOR NURSES, *supra* note 7, at 8.

are specialists in hospital care who, in the final analysis, hold the well-being, in fact in some instances, the very lives of patients in their hands."[88]

Generally, then, negligence is not found when a nurse is following the orders of a physician. However, there is "an exception in those situations in which the nurse knows that the order is not in accordance with accepted practice."[89] Moreover, if the nurse fails to "question a doctor's orders when they are not in accord with standard medical practice and the omission results in injury to the patient . . .," liability will ultimately result.[90]

## V. Imputed Negligence

Confusion arises when it is recognized that a nurse may owe a duty to the physician, to the patient, and to the hospital at the same time. Problems occur if a duty to one encroaches upon the fulfillment of a duty to another. Further problems surface in the determination of which parties may be held responsible for the negligence of the nurse when an act or omission results in harm to a patient. Therefore, liability for a nurse's negligent actions is not an isolated issue which concerns the nurse alone.

Traditionally, the acts or omissions of nurses have been imputed vicariously to physicians, hospitals, or both. This is so because the nurse is often financially incapable of sufficiently compensating an injured plaintiff. Thus, the person suffering from the harmful effects of the nurse's negligence seeks out the deep pocket—the physician or the hospital.[91] Several theories of vicarious liability are used to hold either the supervising physician or the employing hospital liable for the negligence of the nurse.

### *A. Respondeat Superior*

The doctrine of *respondeat superior*, "let the master answer," imposes liability based on a master-servant relationship. The master

88. *Utter*, 160 W. Va. at 707, 236 S.E.2d at 216.
89. Katz, *supra* note 69, at 76.
90. Poor Sisters of St. Francis v. Catron, 435 N.E.2d 305, 308 (Ind. Ct. App. 1982).
91. Morris, *supra* note 32, at 123.

(employer) can be vicariously liable for the negligent acts of his servant (employee), as long as the act occurred while the servant was acting within the scope of his employment.[92] Therefore, an employer physician or an employer hospital may be liable for the negligence of a nurse for acts undertaken within the scope of the nurse's employment.[93] The rationale behind this doctrine is that the employer, physician or hospital, is in the best position to supervise and direct the nurse within the scope of employment.[94] The courts have repeatedly recognized this basis for imputed liability. The "employer, the hospital, can be held responsible for the negligence of . . . [the] employee nurse pursuant to the doctrine of *respondeat superior*."[95] The nurses' failure to fulfill the duty to question improper orders and care imputed liability to the employing hospital in *Utter*. "[T]here was credible evidence that the defendant hospital, acting through its agents and employees, negligently failed to properly treat and care for the injured plaintiff."[96] Simply following the orders of the treating physician, without questioning or referring the care to higher authority, was a failure to fulfill the duties required of the nurses and was imputed to the hospital. In another case, the negligent failure of a nurse to follow the appropriate orders of a physician regarding intravenous solutions resulted in brain damage to a child.[97] Even though no improper treatment by the physician was found in that case, the court in *Beardsley v. Wyoming County Community Hospital*[98] stated that a hospital may be found "liable for malpractice despite the absence of physician malpractice if its nursing staff negligently fails to carry out a physician's orders."[99]

Generally, a hospital will not be liable for negligent acts of a nurse when she is merely executing the orders of a physician if the nurse has no reason to doubt the appropriateness of the order.[100]

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92. W. PROSSER, *supra* note 13, at 500.

93. Greenlaw, *Liability for Nursing Negligence in the Operating Room*, in 1982 LAW, MEDICINE & HEALTH CARE 222.

94. S. CALLOWAY, NURSING & THE LAW 61 (1985).

95. *Fraijo*, 99 Cal. App. 3d at 342, 160 Cal. Rptr. at 252; *see also Norton*, 144 So. 2d at 260.

96. *Utter*, 160 W. Va. at 706, 236 S.E.2d at 215.

97. Beardsley v. Wyoming County Commun. Hosp., 79 A.D.2d 1110, 435 N.Y.S.2d 862 (1981).

98. *Id.*

99. *Id.* at 1110, 435 N.Y.S.2d at 863.

100. *Darling*, 33 Ill. 2d at 330, 211 N.E.2d at 256.

But the hospital may indeed be found liable for a nurse who follows an obviously improper order[101] or who fails to question the improper treatment by a physician.[102]

An employer-physician may also be held vicariously liable for the negligent acts of his nurse. Although the court in *Levett v. Etkind*[103] found no liability for injury when the patient refused the nurse's assistance, it also stated that "the nurse was the defendant's [doctor's] employee, and . . . the defendant was responsible for any wrongful conduct on her part in following his instructions as well as her failure to follow such instructions. . . ."[104] The doctrine of *respondeat superior* has also been applied to an employer-surgeon for the negligence of his nurse arising out of her assistance in an operation.[105]

There are some limitations to the imposition of liability under the doctrine of *respondeat superior*. First, should the negligent act of a nurse occur outside the scope of employment, the hospital would not be found liable. For example, if a nurse was involved in an automobile accident on the way home from work, she would not be within the "scope" of her hospital employment.[106] Liability would not be imputed in this situation. An intentional act of harm, such as striking a patient, would generally not impute liability to the employer. Independent contractors, such as private duty nurses, are usually not considered to be under the hospital's direct supervision and control. Therefore, liability will not be imputed to the hospital where no master-servant relationship exists.[107]

### *B. The "Borrowed Servant" and "Captain Of The Ship" Doctrines*

Vicarious liability of a physician or surgeon, who is not the employer of a nurse but is associated with the hospital and the nurse,

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101. *Suburban*, 22 Md. App. at 190, 322 A.2d at 262.

102. *Utter*, 160 W. Va. at 707, 236 S.E.2d at 216.

103. Levett v. Etkind, 158 Conn. 567, 265 A.2d 70 (1969).

104. *Id.* at 576, 265 A.2d at 74.

105. Annotation, *Liability of Operating Surgeon for Negligence of Nurse Assisting Him*, 12 A.L.R.3d 1019 (1967).

106. S. CALLOWAY, *supra* note 94, at 65.

107. Walker, *supra* note 3, at 44.

typically arises from either the "borrowed servant" doctrine or the "captain of the ship" doctrine. Both of these doctrines have been primarily limited to the operating room situation.[108] On occasion, the "borrowed servant" doctrine has been applied in negligence situations occurring outside of the operating room.

The "borrowed servant" concept arises out of the doctrine of *respondeat superior*. Here, the physician or surgeon is "borrowing," while the master-hospital is "lending," the services of the hospital's servant-nurse for particular duties. The focus of the borrowed servant doctrine usually is upon who was "in control" of the nurse at the time of the negligent act or omission.[109] When a physician is "in control" of a nurse for specific functions, that physician then may be liable for any negligent acts arising under his supervision and control.

According to *Byrd v. Marion General Hospital*,[110] when a nurse performs treatment without instruction from the physician, liability will rest with the nurse and her employer-hospital. However,

> if the physician is present and undertakes to give directions, or, for that matter, stands by, approving the treatment administered by the nurse . . . in such event the nurse can then assume that the treatment is proper under the circumstances, and such treatment, when the physician is present, becomes the treatment of the physician and not that of the nurse.[111]

In *Striano v. Deepdale General Hospital*,[112] the physician was not found liable for the negligence of a nurse when she failed to follow his orders and therefore was not under his "control." The court stated that the nurse "acted contrary to his instructions and was under the control of the hospital."[113] Similarly, no liability of a surgeon was found where the nurse failed to follow the surgeon's order to watch the patient's blood transfusion.[114]

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108. Greenlaw, *supra* note 93, at 222.
109. *Id.*
110. *Byrd*, 202 N.C. 337, 162 S.E. 738.
111. *Id.* at. 343, 162 S.E. at 741.
112. Striano v. Deepdale Gen. Hosp., 54 A.D.2d 730, 387 N.Y.S.2d 678 (1976).
113. *Id.* at 730, 387 N.Y.S.2d 679.
114. Annotation, *supra* note 105, at 1031 (citing Sherman v. Harman, 137 Cal. App. 2d 589, 290 P.2d 894 (1955)).

Under the "borrowed servant" doctrine, confusion sometimes results from the belief that there is no liability as to the "lender." Generally, when a hospital nurse is borrowed from the hospital by a physician, she continues to fulfill hospital duties. "[A] person may be the servant of two masters, not joint employers, at one time as to one act. . . ."[115] Therefore, a hospital employer and a physician who "borrows" a hospital nurse could, under the correct set of facts, both be held liable for the nurse's harmful actions.

The "captain of the ship" doctrine has historically been applied in the operating room situation, imputing liability to the surgeon for any negligent acts associated with the operation. The rationale for the imposition of such liability was predicated on the belief that the physician "is the one who is looked to by the patient as responsible for the patient's welfare and safety generally."[116] The court in *Mazer v. Lipschutz*[117] went so far as to find that a surgeon, as "captain of the ship," could properly be held liable for the erroneous administration of incompatible blood during an operation as a result of a hospital laboratory clerical error.[118] However, this doctrine is gradually eroding in today's modern medical practice because of the complexity of activities involved in surgery.[119] It is thought unreasonable to expect a surgeon to be in direct "control" of every action that goes into the functioning of an operating room setting in today's medical field.

## VI. Conclusion

With the advances in medical care and the expansion of nursing duties, more legal actions can be expected based on a nurse's commissions or omissions. The nurse's duty to follow orders requires the use of professional, knowledgeable nursing judgment to determine whether the order is proper or erroneous, clear or uncertain. "While nurses traditionally have followed the instructions of atten-

115. *Hart*, 549 S.W.2d at 817.

116. Greenlaw, *supra* note 93, at 222.

117. Mazer v. Lipschutz, 327 F.2d 42 (3d Cir. 1964).

118. *Id.* at 50.

119. Greenlaw, *supra* note 93, at 222-23 (citing Truhitte v. French Hosp., 128 Cal. App. 3d 332, 349, 180 Cal. Rptr. 152, 160 (1982)).

dant physicians, doctors realistically have long relied on nurses to exercise independent judgment in many situations."[120] Sometimes further action is required by the nurse to clarify or question the order with the doctor. Finally, the duty may sometimes necessitate that the nurse seek the assistance of higher authority when medical treatment plans are obviously harmful or patients are not receiving adequate medical care. "Nurses today are not expected to follow a physician's orders blindly. In fact, to do so may be disastrous."[121]

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120. *Fraijo*, 99 Cal. App. 3d at 342, 160 Cal. Rptr. at 252.

121. Norman, *Nurses and Malpractice*, 11 LEGAL ASPECTS OF MEDICAL PRACTICE 7 (1983).