

CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

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Massey v Mercy Medical Center Redding (12/22/09)

Medical Negligence; Requirement of Expert Testimony; Common Knowledge Exception

Plaintiff Carl Massey, age 65, underwent bi-femoral bypass surgery on March 3, 2006. After the procedure, nurses caring for him (including defendant O'Bar) noted that he was a substantial fall risk and placed him in a fall protocol that included a walker and assistance. On the evening of March 9, 2006, plaintiff used his call light to summon a nurse to help him go to the bathroom. Nurse O'Bar arrived, set him in a walker, and then told plaintiff he (O'Bar) had to do something and would be right back. After waiting for 15 minutes, plaintiff lost patience and tried to move on his own with the walker. He fell and suffered a compression fracture to his back.

Plaintiff sued O'Bar and his employer, Mercy for medical negligence. At trial, the court found that plaintiff's expert on nurse O'Bar's conduct was unqualified to testify. Following opening statement by plaintiff's counsel, the defendants O'Bar and Mercy moved for nonsuit on the basis that without an expert, plaintiff could not meet his burden of proof on the question of the nurse's alleged negligence. The motion was granted and the case was dismissed. Plaintiff appealed, raising the issue that the trial court erroneously required expert testimony to establish the nurse's negligence, and also erred in finding his expert unqualified. The Third District Court of Appeal noted that generally, negligence is the failure to exercise the care a reasonable person would exercise under the circumstances. (*Delaney v Baker* (1999) 20 Cal.4th 23) Medical negligence is one type of negligence to which general negligence principles apply. (*Flowers v Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992)

Accordingly a nurse is negligent if he or she fails to meet the standard of care—that is, fails to use the level of skill, knowledge, and care that a reasonably careful nurse would use in similar circumstances. (*Alef v Alta Bates Hospital* (1992)

5 Cal.App.4th 208) The standard of care against which the acts of a medical practitioner (including a nurse) are to be measured is a matter peculiarly within the knowledge of experts; it presents the basic issue in a malpractice action and can only be proved by their testimony, unless the conduct required by the particular circumstances is **within the common knowledge of laymen**. In other words, expert opinion testimony is required to prove that a defendant nurse did not meet the standard of care and therefore was negligent, *except in cases where the negligence is obvious to laymen.* (*Kelly v Trunk* (1998) 66 Cal.App. 4th 519) The Justices then looked at the opening statement given by plaintiff's counsel. Plaintiff had just undergone surgery to improve the femoral artery circulation in his legs. Nurses caring for plaintiff noted he scored a 60 on the Morse Fall Scale where any score over 45 is deemed a fall risk. Plaintiff was placed in a fall prevention protocol. His bed rails were up, and he was to use a walker and assistance to ambulate. His gait was weak, and his physical therapist stated that plaintiff needed assistance with walking.

The Appellate Court concluded the fall in this case was similar to the case of *Stevenson v Alta Bates, Inc.* (1937) 20 Cal.App.2d 303) where a patient recovering from a paralyzing stroke to her left side was being assisted in walking by a nurse on each side. The patient fell when the left sided nurse released the patient's arm to prepare the chair for the patient to sit. The patient's recuperative status was such that she could stand and walk short distances with the assistance of one person and her cane. On these facts, the *Stevenson* court concluded that the application of the common knowledge exception was "well founded." (See also, *Griffin v County of Colusa* (1941) 44 Cal.App.2d 915)

Instances in which nursing neglect can be inferred from common knowledge and experience include the following: insufficient attendance on helpless or severely disabled patients. (California Tort Guide (Cont. Ed.Bar 3d ed. 2009)

Defendants argue that even under the facts provided in the opening statement, an expert opinion is required to determine whether plaintiff had the ability to be out of bed, his ability to ambulate independently with a front wheel walker, and whether he required constant assistance to ambulate with a walker to and from the bathroom. But that is not what *Stevenson* held, and here, the Third DCA determined that common knowledge and experience can be used to determine whether the patient fell because she or he was insufficiently attended to by medical personnel.

Undoubtedly, today's nurses are held to strict professional standards of knowledge and performance. (*Fraijo v Hartland Hospital* (1979) 99 Cal.App.3d 331) But some difficulties are presented in the nursing malpractice context by the fact that a nurse's traditional role has involved both routine nontechnical tasks as well as specialized nursing tasks. Nurse O'Bar was engaged in a routine, nontechnical task of assisting a fall-risk patient to walk a short distance to the bathroom. The common knowledge exception applies to this task.

The Justices concluded that plaintiff could pursue his fall based negligence action against O'Bar and Mercy without expert opinion testimony on the standard of care and breach. Thus, the issue of the disqualification of plaintiff's expert is moot. The judgment of the trial court is reversed and plaintiff is awarded his costs on appeal.