

RWBH

Legal Issues for Nurse Educators

Nurse Educators

Presentation Sponsored by the
**Registered Nurses Association
of Ontario (RNAO)**
Legal Assistance Program

Nurse Educators

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Structure of Presentation

- Potential liability for the actions or inactions of student learners
 - Before the courts
 - At the CNO
- Student complaints or other legal actions, and how that might affect Nurse Educators
- Duty to accommodate

Potential Sources of Liability

- Nurse Educators/Nurses **may** be held liable for the actions/negligence of a student they're supervising
- Each case depends on the facts and circumstances – Educators are NOT always or automatically held legally liable for the actions of students

Granger v. Ottawa Hospital

- Team leader was found to be negligent and liable for damages in part as a result of her supervision of a novice nurse
- Facts – child suffered severe oxygen deprivation during birth and as a result was left with severe brain damage and numerous physical disabilities.
- At issue were the actions and inactions of a nurse that turned out, through the evidence led in the case, to be incompetent and ill-equipped to deal with the situation that resulted in the child's birth: "Nurse A."
- But court didn't just hold Nurse A responsible – also held the Team Leader responsible

Granger v. Ottawa Hospital

- Team leader was aware that Nurse A was having problems and was incompetent
- The nurse was very junior
- She'd been given very little training in fetal heart monitoring, yet the team leader assigned her to do just that for this birth
- The team lead had been spoken to by management about this nurse's low test scores and performance issues
- Court found that the Team Leader had completely failed to perform her assigning and supervisory duties in accordance with an "appropriate standard of nursing care"

Granger v. Ottawa Hospital

- Awarded damages against the hospital, the novice nurse *and* the Team Leader
 - The total damages awards came out to over two million dollars
- Present-day value: equivalent to over 3 million dollars
- Not clear who paid what of this amount
- Case involved a Team Leader with supervisory functions, and she was lambasted by the judge as she assigned an inept, rookie nurse to a job she clearly couldn't do
- So not 100% applicable to nurse educators
- But – gives some sense of the obligations that exist for nurses in positions of leadership or responsibility in a hospital, which includes Nurse Educators

Roberts v. Cape Breton Regional Hospital

- A patient incurred injury from an injection administered by an unsupervised nursing student in a busy emergency department
- Patient ended up with severe nerve damage and severe limitations and was unable to work afterwards
- Court determined that the student nurse was negligent in administering the medication

Roberts v. Cape Breton Regional Hospital

- Court found the hospital was negligent because:
 - It permitted student nurses in a busy emergency department to give unsupervised injections
 - Knowing that the type of injury the patient suffered was common for the type of injection being given
- So, the hospital was held liable

Roberts v. Cape Breton Regional Hospital

- Worth noting in this case that the judge said that even if hospital wasn't liable for letting the students given unsupervised injections in a busy emergency department, he would've found the hospital vicariously liable
- Damages in *Roberts*:
 - Plaintiff, Roberts, couldn't work after this injury, suffered severe limitations as a result of this injury
 - \$611,000 awarded as damages (present value: \$832,000)
 - Throw in legal fees and other incidentals and you're easily over a million dollars

Cowherd v. Mission Memorial Hospital Foundation

- British Columbia case in which a defendant sued not just the hospital, physicians and nurses
- But also a student nurse and the University where the student was studying
 - Basis: Hospital advised the patient that the nurse was not “an employee”
- While plaintiff was successful at adding the University as a party to the action, the case was ultimately dismissed

The CNO

- CNO has a Practice Guideline entitled Supporting Learners
- It appears conceivable that a nurse educator *might* be held accountable by the CNO for some act or inaction on the part of a student nurse or nurse learner
- This guideline makes clear that a nurse is accountable for sharing appropriate knowledge and info with the student nurse
- CNO makes clear in this document, and almost always makes clear, that the context of every situation is taken into account

The CNO

- No CNO discipline decisions where an educator was held accountable by the CNO for the actions of a student
- But, the Guideline states that generally, a nurse working with the learner is NOT accountable for the learner's actions IF the nurse has fulfilled his/her responsibilities (e.g. learning plan, appropriate supervision) and if the nurse had no way of knowing that the error was going to occur.
- But there's a few big "ifs" in that sentence

The CNO

- Reverse the sentence, and you *are* responsible/liable for actions of a student if:
 - CNO finds that you *haven't* fulfilled your responsibilities
 - It's found that you had some way of foreseeing the error
- There are CNO cases suggesting that Nurse Educators, given their role, duties, responsibilities, are held to a somewhat higher standard of care in disciplinary matters before the CNO: *Reyes, Andrew, 2009.*

Student Legal Actions

- Several primary legal mechanisms:
 - Human Rights Tribunal of Ontario
 - Courts
 - Judicial review for failing grades and other academic decisions (e.g. expulsion)
 - A lawsuit (breach of contract, negligent misrepresentation)

Human Rights Tribunal

- Hears and determines complaints or applications from individuals who claim they have been discriminated against or harassed on a prohibited ground of discrimination under the Human Rights Code in relation to services, accommodation, contracts, employment, and vocational associations (unions).
- NO claims for costs

“Prohibited grounds of discrimination”

- Race
- Ancestry
- Place of origin
- Colour
- Ethnic origin
- Citizenship
- Creed
- Family Status
- Disability
- Sex
- Sexual orientation
- Gender identity
- Gender expression
- Age marital status

Human Rights Code

- Harassment – “a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome”
- Discrimination – harder to define, but generally, that some rule or standard is applied in such a way that it negatively affects an individual based on a prohibited ground of discrimination

Harris v. Humber College (HRTO, 2009)

- Student complained that a prof had engaged in discriminatory conduct when he asked if she had a learning disability.
- The HRTO dismissed this aspect of the student's complaint, noting that the student had been having significant problems in school and poor grades, and that it was a good faith inquiry aimed at helping the student

Courts

- Two primary types of proceedings that might bring a nurse educator to court:
 - Judicial reviews of academic decisions
 - Lawsuits

Courts – Generally

- The courts have held that they will defer to universities in matters of academic disputes except in narrow circumstances.
- Have held that universities enjoy very broad discretion in relation to academic matters

Courts – Generally

- *Jaffer v. York University (ONCA)*: “[B]y enrolling at the university, it is understood that the student agrees to be subject to the institution's discretion in resolving academic matters, including the assessment of the quality of the student's work and the organization and implementation of university programs. As a result, **a student will usually have to do more than simply argue that an academic result is wrong or a professor is incompetent in order to make out a cause of action** in breach of contract or a duty of care.”

Judicial Reviews

- Students seeking to appeal academic decisions are carried out through a procedure called “judicial review”
 - An administrative law mechanism distinct from suing in tort or for breach of contract
- Trying to review a decision made by some type of public or quasi-public body that owes individuals some duty of procedural fairness and accountability that can be enforced in the courts

Judicial Reviews

- Focus is procedural fairness – a review of the **PROCESS**, not the result (usually)
- Three questions in these cases:
 - a) Did the university or public body or institution owe any duties or obligations of procedural fairness to the student? Was the student even entitled to procedural fairness?
 - b) What were those duties, and what was the scope of those duties?
 - c) Were any of those duties breached?

Duty of Fairness

- If a duty of procedural fairness isn't owed, then that's the end of the case
- Courts have generally accepted that universities and colleges have obligations of procedural fairness to students facing suspension, expulsion, or a failing grade that tacks on an extra semester to their degree
- For hospitals involved in the testing, etc., of students, same may apply (though haven't seen any cases where that's come up explicitly)

Duties of Procedural Fairness

- What they are, and how they're breached are best demonstrated through a few case law examples
- Scope of procedural fairness is **not** the same in all cases
- Varies with the circumstances and potential consequences
- Generally, the more serious the potential consequences, the more procedural fairness entitlements a person will have

Khan v. University of Ottawa (1997, ONCA)

- Law student failed her evidence law exam and failed her year as a result; told she'd have to do an extra semester to graduate
- She asked to review her test. Upon review, she saw that three exam booklets had been submitted, when she had in fact completed 4 booklets
 - This fourth booklet was completely lost
- So she appealed her grade, arguing that one of her exam booklets with answers seems to have been lost and asked to rewrite the test

Khan v. University of Ottawa (1997, ONCA)

- Examination committee considered her appeal and denied it
 - The committee doubted whether a fourth book actually existed
- But, the committee didn't tell her when they would be considering her appeal
- Didn't give her a chance to appear and make oral representations
- Didn't release reasons to her stating why they denied it – didn't tell her the factors they took into account in arriving at their decision

Khan v. University of Ottawa (1997, ONCA)

- She appealed to the university senate, which also denied her appeal
- Like the Examinations Committee, the Senate:
 - Doubted whether a fourth book existed
 - Didn't tell her when they'd be considering her appeal
 - Didn't give her a chance to appear and make oral representations
- She takes issue to court, and Court allows her appeal – says university breached its duties of procedural fairness

Khan v. University of Ottawa (1997, ONCA)

- Court says university should've:
- 1) Had an oral hearing, giving the student the chance to appear in person to make oral representations, in particular since credibility was in issue in this case. She was saying a 4th book existed, and the two committees doubted that assertion.
- 2) Considered the procedures followed in the specific exam, which it didn't. The University assumed that since it was usually careful with exam procedures, it must've been careful this time
- 3) University should've shared with the student the factors and evidence it was relying on to doubt the existence of a fourth book, to give her a chance to challenge or contradict that evidence and the conclusions it led to
- Remedy – court didn't order the university to retest her, but instead simply ordered the university committees to consider the student's appeal in line with the rules of procedural fairness – in other words, give her an oral hearing to make her case that a 4th book existed and make the process more transparent

Dunne v. Memorial University (Nfld., 2012)

- A student was accused of unethical academic conduct and expelled
- Appealed his expulsion to the senate
- Senate employed a subcommittee that conducted a thorough investigation
 - Interviewed the student and others
 - Took lengthy submissions through the student's lawyer
- Produced a lengthy report taking into account all of the evidence it had gathered and concluded that it disagreed with the decision to expel, finding the student hadn't committed an unethical act as some of the university's guidelines were not clear
- But this subcommittee wasn't the decision-maker; they just submitted the report to the senate along with its recommendation not to expel the student, with the senate making the final decision

Dunne v. Memorial University (Nfld., 2012)

- Notwithstanding the report from its own subcommittee, the Senate rejected the appeal and upheld the decision to expel the student
- The Senate provided *no* written reasons for its decision to uphold his expulsion – just advised him that his appeal was denied
 - Gave NO reasons or analysis as to why it had at least implicitly rejected or ignore the recommendation and investigation of its own committee

Dunne v. Memorial University (Nfld., 2012)

- Student appeals this to the courts through judicial review, making a number of arguments, including that the committee's failure to provide written reasons constituted a breach of procedural fairness
- Court agrees, allows his appeal

Dunne v. Memorial University (Nfld., 2012)

- Court notes in particular that it was unreasonable and unfair for the Senate, without ANY reasons to reject the investigation from its subcommittee
- Notes in particular that the investigation was characterized by a substantive degree of procedural fairness
- Remedy – court doesn't remit matter to senate for reconsideration. Substitutes decision of the subcommittee; overturns the expulsion

Judicial Reviews

- Application to Nurse Educators

Lawsuits

- Before a court will hear a lawsuit, it has to be satisfied that it has the authority, the jurisdiction to hear a case and provide remedies
- Courts' jurisdiction covers things like:
 - Breach of contract
 - Torts – personal injury, negligent misrepresentations
- This has been the case for hundreds of years – goes back to longstanding roots of the legal system

Lawsuits

- Some had thought that academic matters were in the sole discretion of the academic institution, and that the courts had no jurisdiction to deal with such issues, except by way of judicial review of grades and enforcing procedural fairness
- However, the ONCA recently clarified that it is **possible** for a student to sue an academic institution, and conceivably a prof or instructor in civil court, in relation to academic matters: ***Jaffer v. York University*** (ONCA, 2010)

Jaffer v. York University

- A disabled student at York University was removed from his program for failing to maintain a requisite grade point average
- He filed a lawsuit against York and made several claims:
 - That they failed to accommodate his disabilities
 - Negligent misrepresentation – a prof had apparently said to the student that he would be permitted to resubmit a paper for a course that he had failed, and that his status in the program would be “deferred” and he wouldn’t be removed from the program
 - Negligent misrepresentation: “but for” your negligent representation to me, things would’ve been different, I wouldn’t have suffered losses or damage

Jaffer v. York University

- York argued, in part, that the student's lawsuit was really an indirect attempt for him to judicially review his grades – that he was trying to attack the University's academic function, an issue over which the Court had no primary jurisdiction except through a judicial review
- Court rejects this, to an extent
- The court made clear that it *can* take jurisdiction over “academic” matters in lawsuits
- However – it made clear that the academic matters must still raise an issue in relation to torts or breach of contract – areas where the court clearly and traditionally has jurisdiction

Jaffer v. York University

- The court dismissed the student's case for a few reasons
- Regarding breach of contract - Court agreed that his enrolment with the university *could have* constituted a “contract”
- However, to the extent it was a “contract”, it made no specific mention of a duty to accommodate
 - If you're going to allege a breach of a contract, you need to be able to establish that a contract exists, and that a specific provision in the contract has been breached, and outline how it's been breached.
- His “enrolment” didn't contain a provision providing that the University would accommodate him per the Human Rights Code
- The claim had to go to the Human Rights Tribunal, not the courts

Jaffer v. York University

- Regarding his claim for negligent misrepresentation (the professor's promise to rewrite a paper), the court said:
- It's not clear how the student thought from this one professor's statement that his status would be deferred and he'd be permitted to continue in the program
 - In legal terms: it's not clear that "but for" the prof's statement, the student would've been able to continue in the program
- In other words – more than a statement by one prof would've been required.
- Situation might've been different if there had been something more official from the university, on letterhead, etc.

Turner v. York University

- York had a strike in 2008 and classes were suspended.
- When classes resumed, the school year was shortened and exams had to be rescheduled.
- A group of students sued York making a number of claims, including that they had a contract with York and York breached that contract
- Case is dismissed without hearing evidence as court holds, in part, that there was no reasonable prospect of success in the case

Turner v. York University

- Court's reasons based on plaintiff-students' pleadings
- Plaintiffs pleaded a breach of contract, pointing to their enrolment and course calendar as a "contract" that had been breached by the strike
- Court rejects this for two reasons

Turner v. York University

- First: “While it is possible for a student to enter into a contract with a university, that is not to be confused with the academic relationship between a student and his or her university.”

Turner v. York University

- Second: Even if the course calendar and other documents were a “contract” it had disclaimers:
 - York reserved the right to make changes to classes and information in the course calendar
 - Disclaimed all liability for losses or damages resulting from delays or termination of services by reason of, among other things, strikes.

Turner v. York University

- The case was dismissed with costs awarded against the plaintiffs in the amount of \$7500

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Student complaints and legal actions

- Application to Nurse Educators

Duty to Accommodate

- Duty to Accommodate - Clinical and Classroom settings

Duty to Accommodate

- Duty to Accommodate refers both to an *obligation* (a duty) *and* a *process*
- The duty becomes engaged when a regulation, policy, benchmark or some other rule interferes with someone's access to a service, a job, or some other benefit ("**Discrimination**")
- Questions to be addressed: is the rule a "bona fide and justified requirement" (**BFJR**, or **BFOR**)
- If so, can changes be made to the way the service is delivered or the way the work is performed ("**accommodation**") without incurring "**undue hardship**"
- What constitutes "discrimination", a "BFJR" or "undue hardship" are complex, multi-faceted questions that have to be addressed on a case-by-case basis

Duty to Accommodate

- To be a “Bona fide and justified requirement” OR “bona fide occupational requirement”, a rule or benchmark must be:
 - Rationally connected to the performance of the job
 - Adopted in honest and good faith belief it was required
- If a rule is a “BFJR” or “BFOR”, question arises as to whether the person can be accommodated without imposing undue hardship

Duty to Accommodate

- What constitutes undue hardship?
- Major “factors” that would almost certainly be considered in any analysis of undue hardship:
 - Patient Safety
 - Cost (e.g. for assistive equipment, changes to workplace)
 - Disruption to service delivery or staff
- Always a case-by-case question

Duty to Accommodate

- There are obligations on *both* parties in the accommodation process
- For the individual (non-exhaustive list):
 - Advise there is a disability interfering with their performance on the job or in school
 - Seek accommodation
 - Continue to actively participate in the accommodation process
 - Individual is entitled to a “*reasonable*” accommodation, not the perfect, ideal, or chosen one
 - If a reasonable accommodation is offered, even if not preferred or ideal, there will be an obligation on individual to accept it

Duty to Accommodate

- For the institution (non-exhaustive list):
 - Consider available options
 - Cannot simply assume, out of hand or on a “hunch” that the person “clearly” can’t perform task x, y, or z, or the practice of nursing generally
 - Is the rule in question rationally connected to the work to be performed?
 - Can any changes be made without incurring undue hardship?

Duty to Accommodate

- Examples of *workplace* accommodations:
 - Relieving nurses of heavy lifting or other physical tasks that are not within their medical restrictions
 - Modified working hours
 - Assistive devices or equipment
 - Modified break times (e.g. for stretching)

Duty to Accommodate

- 3 primary areas where the “duty to accommodate” is relevant for Nurse Educators:
 - a) Accommodating student learners – written and practical tests, and in placements
 - b) Accommodating people on the job as a nurse educator
 - c) A nurse’s registration with the CNO
 - *Trozzi v. College of Nurses of Ontario*

CNO's RSAs

- The CNO's "Requisite Skills and Abilities for Nursing Practice in Ontario" sets out SEVEN categories which the CNO sees as necessary components of practicing nursing:
 - Cognitive
 - Communication
 - Interpersonal
 - Behavioural
 - Psycho-motor
 - Sensory
 - Environmental

Duty to Accommodate

- *Grismer* case (SCC, 1999): “... This decision stands for the proposition that those who provide services subject to the *Human Rights Code* must adopt standards that accommodate people with disabilities where this can be done without sacrificing their legitimate objectives and without incurring undue hardship. It does not suggest that agencies...must lower their safety standards or engage in accommodation efforts that amount to undue hardship” (at para. 44).

Duty to Accommodate – Clinical Setting

- Example: Student has hearing issues.
- Determine whether and to what extent her hearing problems actually interfere with the job she has to do – don't assume that it does
- If she has a hearing aid, can she hear a Code?
- If she has problems hearing the Code, can the volume be made louder without causing undue disruption and inconvenience to other staff or patients?

Duty to Accommodate – Clinical Setting

- Assistive devices: is it feasible or possible to provide some type of signal or alternative system that alerts her to cues or signals that are otherwise auditory for the rest of us
 - E.g. a buzzer/pager with a Code?
- Can the nurse be given tasks or assignments that don't require her to be able to hear Codes?

Duty to Accommodate – Clinical Setting

- Overlaying ALL of this would be interrelated questions of undue hardship
- Would it be prohibitively costly to obtain some type of assistive devices or equipment
- Would it be unduly disruptive to shift schedules or work arrangements
- MOST IMPORTANT FACTOR → patient safety

Duty to Accommodate - Academic Setting

- Education/Academia considered a “service” under the *Human Rights Code*
- Typical accommodations in educational settings:
 - Longer to write tests
 - Stretching breaks during tests
 - Permission to audio-record certain lectures

Fisher v. York University

- Languages student with a learning disability
- Her physicians and experts recommended several accommodations:
 - Quiet testing environment
 - More time to write tests
- These were granted by York

Fisher v. York University

- Her specialist doctors also recommended that York provide (fund) a “subject matter” tutor for the student
- “Subject matter tutor”
 - Essentially a private teacher for outside the class for this student to receive 1-on-1 instruction

Fisher v. York University

- However, York had a policy to not fund subject-matter tutoring for students and denies her requested accommodation
- Student applies to the HRTO, claiming that she was being discriminated against
- And she *was*: As a result of her disability, she needed accommodation
- Put another way – to be on equal footing with other students, she required a change to the way in which pursued her degree
 - Without that change, she may have been hampered in her academic pursuits as a result of her disability
- So to be clear – it *is* discriminatory

Fisher v. York University

- So the real question becomes – did York’s failure to offer her the required accommodation, tutoring, fall afoul of the *Code*, or could they defend the discriminatory action of not giving her a tutor
- Plug the “BFOR” / “BFJR” factors in:

Fisher v. York University

- The rule must be:
 - Rationally connected to the object of the employer, or in this case the university
 - Adopted in honest and good faith belief it was required

Fisher v. York University

- Tribunal found that the first two factors were easily satisfied
- The no-tutoring policy was adopted because York saw this form of tutoring as incompatible with the maintenance of academic standards
 - The *student* must learn the material through their own efforts outside of the classroom
 - The need for accommodation doesn't trump academic standards

Fisher v. York University

- So the rule is a bona fide one, however, the Tribunal does not get to issue of undue hardship because...
- The student/complainant “withdrew” from the accommodation process
- Faced with her request for subject matter tutoring, York asked the student to undergo evaluative tests to explore whether accommodations short of tutoring would assist her
- The student refused; filed her human rights complaint
- Her failure to participate in the process was fatal to her case, and her ultimate goal of seeking accommodation

Fisher v. York University

- Application to nurse educators in academe and clinical settings

CNO Registration & Human Rights

- *College of Nurses v. Trozzi*
- A nurse with fibromyalgia and depression was granted several accommodations by her educational institution for writing her RN and RPN examinations
- When she registers with the CNO, they attach 13 conditions to her certificate
- She appeals this to HPARB – the Health Professions Appeal and Review Board
- While she's waiting for HPARB to hear her appeal, she files a complaint against the CNO with the HRTO

College of Nurses v. Trozzi

- Before the HRTTO gets to hear her case, HPARB renders its decision, dismissing her appeal
- HPARB determines that the conditions the CNO attached to her registration were reasonable and within the proper mandate and responsibility of the College
- HPARB also determines that the CNO had accommodated the Nurse's disabilities in accordance with the *Human Rights Code*
- However, HPARB is not an expert Board on human rights law, does not conduct a thorough human rights analysis

College of Nurses v. Trozzi R. v. Trozzi

- But the HRTTO complaint is still “out there” – HPARB’s case doesn’t dispose of the complaint
 - HPARB has no jurisdiction to dismiss a complaint before the Human Rights Tribunal, and vice versa
- So the nurse, having lost at HPARB, asks the Human Rights Tribunal to continue hearing her case against the conditions imposed on her registration
- The College, on the other hand, takes the position before the Tribunal that the case has been dealt with by HPARB and shouldn’t be “relitigated” before a separate adjudicative body

College of Nurses v. Trozzi

- The HRTTO reviews HPARB's decision and concludes that HPARB did not conduct a full human rights, duty to accommodate, undue hardship analysis, and therefore did not deal with the human rights issues "appropriately"
- Tribunal determines that it will "take jurisdiction" - essentially to hear the case - arguments, evidence, witnesses etc.
- To be clear - the Tribunal did NOT decide if the conditions on her registration were in violation of the Human Rights Code
 - It only decided that it would hear that case and decide that issue

College of Nurses v. Trozzi

- The College of Nurses appeals the HRTTO's decision to take jurisdiction and hear the case
- Appeal goes to Divisional Court, which concludes that the Tribunal was wrong to assume jurisdiction and that HPARB's decision was conclusive on the question of the registration conditions
- The court reached this conclusion notwithstanding the fact that HPARB's analysis of the human rights issues in the case was arguably lacking

College of Nurses v. Trozzi

- Court stresses that both the CNO and the HPARB are specialized in their own rights – in relation to public and patient safety and the regulation of medical professionals
- SO the court concludes that the specialized HPARB had plugged in factors in an area where *it* was a specialist – public safety
- And once they'd made a decision that engaged that aspect of its mandate – the legal case as it concerned the conditions on her registration, was over, even though the human rights elements received somewhat short shrift from HPARB
- Suggests the importance of public safety and patient care in the regulation of nursing

Conclusions, Q&A

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