

CANADA / JUDGMENT

C.L.C. v. Lions Gate Hospital

2001 BCSC 1505

COURT

Supreme Court of British Columbia

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Registry: Prince George

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

CLAUDETTE LORNE COLLIN
PLAINTIFF

AND:

LIONS GATE HOSPITAL
DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE W. G. PARRETT

Counsel for the plaintiff: P. Shawana

Counsel for defendant: D. Goult

Date and Place of Trial: December 4, 5 & 6, 2000

Prince George, BC

INTRODUCTION

- [1] The plaintiff in this action seeks general and punitive damages from the defendant hospital arising from an incident which occurred on October 30, 1996, while she was a patient at that hospital.

- [2] The statement of claim is brief and does little to frame this matter in terms of causes of action but the trial was presented and the claim advanced on the basis that it was an action in negligence.
- [3] At the heart of the matter is the plaintiff's allegation that while she was a patient in the care of the defendant hospital she was sexually assaulted by another patient.
- [4] The material portions of the statement of claim are found in paras. 7 to 10 of the document, which read:
7. The Plaintiff . . . states that the Defendant was aware and knew that the said Gordon Hutchins was a sexual predator and in the alternative a danger to other patients, and that there was a high probability he would offend other patients if measures were not taken to protect patients from him.
8. The Plaintiff states that the Defendant did not take measures to protect patients from other violent patients, like Gordon Hutchins, despite knowing the potential for the other patients to be violent.
9. The Plaintiff states that the Defendant owes to the Plaintiff a duty of care to ensure:
- (a) patient privacy while in the care of the Defendant;
 - (b) patient physical safety while in the care of the Defendant;
 - (c) patients are protected from sexual predators;
 - (d) patients are provided with the medical care and attention they needed free from harm of sexual predators; and
 - (e) such other measures necessary for patients to convalesce free from the harm of other patients.
10. The Plaintiff states that the Defendant breached their duty to the Plaintiff thereby causing the Plaintiff damage, including, but not limited to, damage from physical and sexual assault, emotional trauma, embarrassment, stress and such other damages, the particulars which will be provided on demand.
- [5] The defendants deny that they were negligent in any way or in breach of any duty owed to the plaintiff.

BACKGROUND

- [6] On October 27, 1996, Gordon Hutchins, an 85 year old man, was admitted to Lions Gate Hospital after collapsing at home. A cerebral vascular accident was suspected although no diagnosis could be made at the time of his admission. Mr. Hutchins arrived on the neurological ward of Lions Gate Hospital at 10:22 hours on October 27, 1996, and was assigned to room 720.

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- [7] Over the course of the next 36 hours, Mr. Hutchins was moved twice; at 1:20 hours on October 28, 1996, he was moved to room 724, and at 19:30 hours he was moved back to room 720.
- [8] The plaintiff is a 38 year old mother of three children. In 1994 she had fallen and injured her lower back. After continued difficulties, she was referred by her family physician to Dr. Padilla for surgical repair of a ruptured disc.
- [9] The plaintiff was admitted to Lions Gate Hospital on October 29, 1996, to undergo the surgery and, after admission to the neurology ward at 13:00 hours, she was assigned room 718, the room next door to that occupied by Mr. Hutchins.
- [10] During the course of the afternoon of October 29, 1996, Mr. Hutchins wandered into the plaintiff's room on at least two occasions. On those occasions he left either on his own or when directed to do so by a nurse. On none of these occasions did he appear agitated or act either aggressively or violently.
- [11] The next morning, Mr. Hutchins again entered the plaintiff's room and stood between the end of her bed and the bathroom door approximately one foot from the door and began to tug at his pajama buttons. The plaintiff called for a nurse who took Mr. Hutchins away.
- [12] Mr. Hutchins did not in fact expose himself but when the plaintiff asked the nurse "Why would he try to expose himself?" she replied that "he probably thought he was in the bathroom."
- [13] At approximately 14:00 hours the same day, October 30, 1996, the plaintiff was awakened with Mr. Hutchins standing beside her bed with his hands under the sheets on her body in the area of her buttocks. At trial the plaintiff testified that his finger had penetrated her anus. This particular detail is absent from her description of events given at the time and frequently thereafter up until her evidence at trial. Her previous descriptions were that she awoke to find Mr. Hutchins "fondling her" or with his hands "inside my buttocks ah . . . caressing my . . . my bum and my back . . ."
- [14] While this apparent discrepancy, at first blush, may seem significant, I have little doubt that Ms. Collin was traumatized by this incident; her reaction at the time and over the balance of that day makes that abundantly clear.
- [15] Her screams immediately brought nurses to the scene where Mr. Hutchins was restrained and removed.
- [16] Ms. Collin had undergone surgery and was recuperating in a hospital bed when she was awakened in this manner. I have little doubt that the incident traumatized her and that her recollection of the event has been affected by those emotions and the additional stress of this litigation.
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- [17] The evidence as a whole supports the conclusion that, if penetration did in fact take place, it was not communicated by her to the nurses at the time; her sister who she telephoned the same day; her husband when she returned home; her family doctor when she spoke to him or the hospital itself when she telephoned to complain about the incident on November 4th, 1996.
- [18] It is true that she characterized the incident as a sexual assault and that on at least some occasions described Mr. Hutchins hand as being "inside" her buttocks. But, on the whole of the evidence, I am unable to find that penetration as she described at trial took place.
- [19] It is clear, in my view, that no such allegation was communicated by the plaintiff to the nursing staff or the hospital at the time. No such entry is recorded in the hospital records and any such allegation would almost certainly have initiated a very different response and, in all likelihood, an investigation.
- [20] The letter authored by the plaintiff's specialist, Dr. Padilla, on November 4, 1996, is also revealing, if somewhat confused. Dr. Padilla writes, in part:

What prompted me to write this was an assault that one of my patients suffered while on 7 East. Mrs. Claudette Collin had just had a removal of a ruptured left L4/5 disc on October 29th, 1996 and one of our so-called "wandering demented patients" who are semi permanently living on 7 East, assaulted her in her room. To add insult to injury this happened with a different gentleman the following day. She and I found this extremely disturbing especially because she interpreted this as a sexual assault.

It took me quite some time to calm her down, hopefully enough to avoid further repercussions but she was so afraid she went home a day or two earlier than she should have.

- [21] While Dr. Padilla may have gotten some details wrong, it is difficult to conceive of his characterizing the event in this manner if he had been made aware of the allegation of penetration.
- [22] The allegation of negligence and breach of duty against the defendant hospital gives rise to three specific issues:
- 1) Was the incident involving Mr. Hutchins and the plaintiff foreseeable and, as a result, within the scope of the duty of care owed by the hospital to the plaintiff?
 - 2) If the incident was foreseeable and therefore within the scope of the duty of care owed by the hospital to the plaintiff, did the hospital meet the requisite standard of care?
 - 3) If the hospital did not meet the requisite standard of care, what is the appropriate measure of damages in the circumstances of this case?

[23] It is important to recognize from the outset in approaching these issues that there is no claim advanced against the defendant hospital that they are directly liable for the actions of Hutchins. The claim advanced against the hospital is founded in negligence. The acts of negligence alleged in the statement of claim are that:

- a) the defendant was aware and knew that Gordon Hutchins was a sexual predator and, in the alternative, a danger to other patients, and that there was a high probability he would offend other patients if protective measures were not taken.
- b) the defendant owed to the plaintiff a duty of care to ensure:
 - i) patient privacy
 - ii) patient physical safety
 - iii) patients are protected from sexual predators
 - iv) patients are free from harm from sexual predators
 - v) patients are kept free from harm at the hands of other patients.
- c) the defendant breached these various duties

[24] Any analysis of principles of negligence must begin with the landmark formulation of the principle pronounced by Lord Atkin in *Donoghue v. Stevenson* [1932] A.C. 562 at 580:

. . . You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

[25] The test for foreseeability was canvassed at some length by Macaulay, J., in *Robertson v. Adigbite et al*, 2000 B.C.S.C. 1189, where he concluded, at para. 58, that the test of reasonable foreseeability was that set out by Lord Reid in *Home Office v. Dorset Yacht Co. Ltd.* [1970] 1 All. E.R. 294 (H.L.). Lord Reid, at p. 297, writes that:

The three officers knew or ought to have known that these trainees would probably try to escape during the night, would take some vessel to make good their escape and would probably cause damage to it or some other vessel. There were numerous vessels moored in the harbour, and the trainees could readily board one of them. So it was a likely consequence of their neglect of duty that the respondents' yacht would suffer damage.

He then concluded at p. 300 that:

... where human action forms one of the links between the original wrongdoing of the defendant and the loss suffered by the plaintiff, that action must at least have been something very likely to happen if it is not to be as novus actus interveniens breaking the chain of causation. I do not think that a mere foreseeable possibility is or should be sufficient, for then the intervening human action can more properly be regarded as new cause than as a consequence of the original.

[26] In *Wenden v. Trikha* (1991) 8 C.C.L.T. (2d) 138 at p. 155, Murray, J., discussed the duty owed and foreseeability:

52 Hospitals and psychiatrists owe a duty to their patients to take such steps as are necessary to prevent their patients suffering loss or damage which they as reasonably prudent people operating a hospital or practising their profession ought to anticipate might result if they do something or omit to do something which is the cause of such loss or damage to the patient; see: *Villemure v. Turcot* (1972), [1973] S.C.R. 716, 31 D.L.R. (3d) 454, affirming *Recueils de jurisprudence* [1970] C.A. 538, and *Jinks v. Cardwell* (1987), 39 C.C.L.T. 168 (Ont. H.C.). A hospital also owes a duty to other patients in the hospital to exercise such control and supervision over mental ill patients that because of his or her conduct or behaviour, fellow patients do not come to harm; see: *Stewart v. Extendicare Ltd.*, 38 C.C.L.T. 67, [1986] 4 W.W.R. 559, 48 Sask. R. 86 (Q.B.). It should follow that a psychiatrist owes a like duty to other out-patients he is treating while they are upon his office premises. These relationships also have a contractual component. It must be remembered that such a duty is confined to reasonable and foreseeable dangers. As stated by Hall J. speaking for the Supreme Court of Canada in the case of *University Hospital Bd. V. Lepine*, [1966] S.C.R. 561, 57 W.W.R. 5, (sub nom. *Moncton v. Lepine*) 57 D.L.R. (2d) 701, at pp. 579-580 [S.C.R.]:

The question of whether there was or was not negligence in a given situation has been dealt with in many judgments and by writers at great length. One principle emerges upon which there is universal agreement, namely, that whether or not an act or omission is negligent must be judged not by its consequences alone but also by considering whether a reasonable person should have anticipated that what happened might be a natural result of that act or omission. As was said by Lord Thankerton in *Glasgow Corporation v. Muir*

The court must be careful to place itself in the position of the person charged with the duty to consider what he or she should have reasonably anticipated as a natural and probable consequence of neglect, and not to give undue weight to the fact that a distressing accident has happened . . .

[27] In *Hill v. Chief Constable of West Yorkshire*, [1988] 2 All E.R. 238 (H.L.) at p. 241, Lord Keith said:

It has been said almost too frequently to require repetition that foreseeability of likely harm is not in itself a sufficient test of liability in negligence. Some further ingredient is invariably needed to establish the requisite proximity of relationship between the plaintiff and defendant, and all the circumstances of the case must be carefully considered and analysed in order to ascertain whether such an ingredient is present. The nature of the ingredient will be found to vary in a number of different categories of decided cases.

[28] With this background it is necessary to turn to an examination of what the hospital knew concerning Mr. Hutchins prior to the incident in question, and, whether that knowledge made the defendant aware that Mr. Hutchins' represented a serious danger to the well-being of other patients such as the plaintiff.

[29] It is of some importance that a clear distinction be drawn between information the defendant had available to it prior to the incident and that of which it was aware after the incident.

[30] In beginning this analysis it is necessary to say at the outset that not only was it not proven that Mr. Hutchins was a sexual predator, no evidence whatsoever was led in any attempt to suggest that he was. In the circumstances that pleading is regrettable to put it mildly.

[31] Mr. Hutchins was an 85 year old man who was admitted to the hospital after collapsing and becoming unconscious. He was admitted at 2:24 hours on October 27, 1996.

[32] Portions of the initial recorded history note the following:

HISTORY OF PRESENT ILLNESS This man was brought in by EHS. He was found prone on the floor. We do not have any history. His wife is a poor historian, probably Alzheimer's as she is not oriented to date. We are not sure who phoned EHS, but it was probably the wife. We can get no history from the man and no history from the wife. The wife stated to the ambulance drivers that she gave amitriptyline to her husband but this is not clear. Initially with ambulance blood sugar was 9 and oximetry was 94%. The patient was moving all four limbs, had constricted pupils and good air entry and normal vitals.

...

COURSE IN EMERGENCY: He settled down with some reassurance. ECG did not show any arrhythmia. He appears to have a left bundle branch block pattern, borderline QRS duration in his ECG. His blood gases showed a PCO₂ of 46, pH of 7.43 and a PO₂ of 287. CBC, electrolytes, enzymes showed some minor changes. Hemoglobin was down at 101, AST up at 66, CK was normal, ethanol was negative, creatinine slightly up at 120, glucose 5.6, potassium 4.2, sodium 138 and urea 6.0.

[33] On October 27, 1996, the progress notes record the following background:

This elderly married man has been living with his 2nd wife in W. Van for 4 years. They function only marginally given her Alzheimer's and his dementia (mild). He only takes zopiclone to sleep as he is often up & around disturbing the neighbours at night.

...

Surprisingly <Hutchins> has been quite well except for a psychiatric adjustment reaction to his 1st wife's death where he became quite paranoid and depressed. Since then he's been the strength of the family.

[34] In the progress notes for October 29, 1996, are found the following entries:

... had 3 x 2mg ativan in 8 h for agitation and restlessness. I'm not sure about the amount that <Hutchins> drinks but I think it is a fair amount.

...

Agitation last night consistent with possible ETOH withdrawal. I spoke with daughter yesterday and step daughter today (in S. Carolina) everyone feels social situation is extremely tenuous and I promised we would not discharge until social worker & Dr. Conley have had a chance to assess.

[35] The nurses' notes portion of the clinical records gives a slightly more expanded picture of Mr. Hutchins. It includes the following entries leading up to the incident in question.

28 OCT 96 01:20

Pt. Quite confused, mumbling non-sensical conversation. Climbing out of bed & attempting to walk to BR, completely ignoring IV line & pump. Urinal provided. Voided. Returned to bed. Restraint jacket applied. Bed transferred to 724-4.

06:30

... Pt has been restless all night and seems not to have slept at all. ...

19:00

... Attempting to get out of bed at times. Taken to B.R. & voided when restless & resettled to bed. Safety vest on while in bed. Very unsteady on feet when up.

19:30

Pt. Remains restless & unsettled. Transferred to 720-1 for purposes of care. Care Aide remains in room with pts. Wife encouraged to go home and has done so. ... Pt appears to be settling.

23:00

Pt. Chatting to care aide. Not attempting to leave the bed.

Oct. 29 19:00

Drowsy but responsive to verbal stimuli. ... Up wandering in hall ...

22:00

Alert & oriented to person place & time but vague & inappropriate at times.

23:00

Pt. Sitting up in bed with light on talking to self. Writer settled pt & informed pt it was 23:00. Pt. Was surprised & stated he thought it was morning. Settled easily.

Oct 30 01:00

Pt. Talking to self not sure if its day or night.

04:00

Pt.. fussing about in bed. Talking out loud. Stated he's hungry why didn't he get dinner! Banana given.

04:00

Pt. Seeing his sister on the wall wanting to get her down with a ladder. Pt. Shown that it is a fan on the wall & not his sister. Pt unable to settle.

[36] This latter entry was the last entry in the nursing notes prior to the incident in question. The next two entries are:

OCT 30/96 15:30

Oriented to person, place and year @ this time. Pt seems to fluctuate on level of confusion. Up wandering hall independently. Entered female pt. Room and seemed to attempt to enter fellow pt's occupied bed. Pt moved to locked room. Loxapine administered appears to have settled in room

14:00 see incident report Pt. Entered 718-1 room lifted up her sheets, gown, Touched pt's buttocks. Confused.

[37] The clinical records also contain notes from interviews by the social worker assigned to the case. These notes include more detailed summaries of the circumstances of Mr. Hutchins. Within the notes are the following entries:

OCT. 28/96

. . . Recent HX of episode of confusion/hallucination/yelling in the yard @ 2 am 2 mos ago, which resulted in WVPD being called. Pts. Daughter says he was out of his Rx for Imovane @ the time . . .

. . . wife's son . . . indicates that pt. And wife drink "at least" a bottle/wine/day. Pt is presently (evening 10-29-96) disoriented x 2 and mildly hallucinating that he went home last nite . . . From family sheet and hx in chart, it would seem that he has some degree of underlying dementia, but functions better than wife. I wonder if he is presently undergoing not only ETOH W/D but also Imovane W/D as well.

OCT 30/96

. . . Family members indicate <their> time clocks are "off" they stay up until 2 or 3 am then sleep until early afternoon. . . . Considerable ETOH is said to be consumed . . .

[38] The incident report prepared and signed by the nurses involved records the following description of the incident:

Confused wandering pt. In a female room touching pt. In 7128-1. Heard pt. yelling "nurse". 2 nurses began approaching room where shout came from. Then heard pt screaming "Get out of here!" Found Mr. Hutchins standing @ foot of bed. Pt. in 178-1 crying uncontrollably stating Hutchins was touching her back, her buttocks, had also wandered in early am and undid his pants. Pt in 718-2 witness to all of above.

- wandering pt. (Mr. Hutchings) (sic) removed from room by 2-3 nurses. Pt. aggressive @ first.
- physically none - pt (718-1) very upset, crying, shaking ++, scared.

[39] I have carefully reviewed the whole of the evidence placed before the court at this trial. There is, quite literally, no evidence to support the allegations that the patient Hutchins was "a sexual predator" or that he was a "violent patient".

[40] There is no evidence before the court from which one could possibly conclude that the defendant hospital knew, or even suspected, that Hutchins was dangerous in any way.

[41] To be specific, at no time prior to the incident in question did the patient Hutchins appear to be dangerous to anyone, including himself. The overall picture of this patient was that of a confused elderly man with disrupted sleep patterns who found it difficult to settle down and wandered. There is no evidence to support the allegation that he was becoming increasingly agitated or violent or aggressive prior to this incident.

FORESEEABILITY

[42] In Robertson v. Adigibite et al, supra, Macaulay J. had before him a case in which the plaintiff was attacked and injured by a mentally disabled patient on an outing to a retail store with two careworkers and another resident of a group home.

[43] Macaulay J., after reviewing the authorities, found, at para. 57, that:

A mere foreseeable possibility of risk is insufficient to render a person liable to a third person for the acts of another person. Instead, the courts have adopted a test of reasonable foreseeability of a likely risk of harm . . .

[44] The decision went on to cite, with approval, a passage from *Wenden v. Trikha* (1991), 8 C.C.L.T. (2d) 138, affirmed (1993) 14 C.C.L.T. (2d) 255 at p. 156:

[A] hospital treating mentally ill patients does owe a duty of care to a person or a class of person other than its staff or patients if it can be said that it is foreseeable that harm will likely occur to such a person or persons as a result of the behaviour of a mentally ill patient . . .

(emphasis added)

[45] On the issue of foreseeability, Macaulay J. concluded, at para. 64:

Based on all that was known about Adigbite before December 11, 1994 there was no reason to foresee a likely risk that Adigbite would assault other shoppers at the Costco store.

[46] These words, with the appropriate changes, are equally applicable in the present case. The evidence in this case discloses no basis for foreseeing a likely risk that Hutchins would assault the plaintiff.

[47] In reaching this conclusion I am mindful of the passage in *Stadel v. Albertson et al*, [1954] 2 D.L.R. 328 at p. 335, where the court stated:

Whether or not an action is negligent must be judged not by its consequences alone, but also by considering whether a reasonable person should have anticipated that what happened might be a natural result of that act or omission.

[48] The reasoning in *Wenden v. Trikha*, supra, is equally applicable. In that case, a psychiatric patient left a psychiatric ward of a hospital and, under the influence of delusions, drove at high speed through a red light striking the plaintiff's vehicle.

[49] At p. 161, the court set out the test to be applied:

To my mind, it is a logical application of the reasoning in the *Dorset Yacht* decision that it is only fair and reasonable that both a hospital and a psychiatrist who became aware that a patient presents a serious danger to the well-being of a third party or parties owe a duty to take reasonable steps to protect such a person or persons if the requisite proximity of relationship exists between them.

[50] The court goes on to note at p. 165 that:

To succeed, the plaintiffs must satisfy the court that Trikha, because of his mental condition, posed a danger to third parties of which the hospital staff or Dr. Yaltho knew or ought to have reasonably foreseen could result in harm to others.

[51] On the evidence before the court there is simply no basis for finding that such a risk was foreseeable in the present case.

[52] In concluding on the first issue it is necessary to comment on the decision of the Ontario Court of Justice (General Division) in *H. (M.) v. Bederman* (1995), 27 C.C.L.T. (2d) 152, on which the plaintiff relies. At p. 155, Eberhard J. writes that:

Neither Dr. Bederman nor the medical witnesses expert in both clinic and hospital standards of care for plastic surgery had ever heard of a sexual assault by patients in a clinic setting. However, I am persuaded that the incident was foreseeable. Dr. Carlsen spoke with frustration of being unable to prevent patient intrusions on the privacy of other patients in the hospital setting. Another witness mentioned she had read of patient assaults in the newspapers. This testimony was nothing more than an expression of a general awareness in modern society of the potential for unpredictable and unwanted human misbehaviour in a variety of settings. No one, certainly not a physician, could claim ignorance of the prevalence of acts of sexual misconduct in modern society. In a way, the whole of society is on the alert because it is foreseeable that such acts will occur in the most unexpected circumstances. Therefore, irrespective of the particular individuals who are placed together, it cannot be said that some incident of misconduct is not foreseeable.

[53] This passage and the approach taken in it to foreseeability has, to the best of my knowledge, never been applied either in Ontario or British Columbia in the six years since it was decided.

[54] I am wholly unable to accept this approach as being one that fits within the parameters of the principles and authorities referred to above. Instead, this approach elevates the principle of foreseeability to that of a guarantee against "unpredictable" and "unexpected" intrusions.

[55] Absent compelling authority, I am unable to accept this as the appropriate approach.

[56] I find that this unfortunate incident was not foreseeable and that, as a result, it falls outside the scope of the duty owed by the hospital to the plaintiff.

STANDARD OF CARE

[57] In the event I am in error in concluding that the events on which this action is based were not foreseeable, it is necessary to consider whether or not the defendant hospital departed from the standard of care expected of nurses and hospitals in the circumstances.

[58] The plaintiff concedes that in order to succeed she must adduce evidence that the standard of care expected of the hospital and its nurses in the treatment and management of wandering and/or aggressive patients and patients with cognitive impairment was breached.

- [59] The authorities for this proposition are legion, including *ter Neuzen v. Korn* (1995), 127 D.L.R. (4th) 577 at p. 590; *Tekand v. Lions Gate Hospital et al* (unreported) 26 July 1999, Vancouver Registry No. C973422 at para. 109; *Postnikoff v. White et al* (unreported) 27 April 1998, Kelowna Registry No. 32506 at para. 34; and, *Cankovic v. Stockdill* (unreported) 9 January 1998, New Westminster Registry No. S026054 at paras. 85-86.
- [60] The plaintiff, at this trial, called three witnesses. Besides the plaintiff herself, her husband and her family doctor, Dr. Hugh Patterson, testified.
- [61] The defence in turn called four witnesses. These included Jeanne Marie Foley, a nurse with over 40 years experience, who was tendered and qualified as an expert in the standard of care expected of hospitals and nurses in the circumstances; two registered nurses on duty at the time, Desiree Bonner and Lucy Johnson; and, Lynette Best, who was the Chief Operating Officer of the defendant hospital at the time of the incident.
- [62] The evidence as to the standard of care in this case came almost entirely from the evidence of the defence witnesses and, in particular, that of Ms. Foley.
- [63] Ms. Foley expressed the opinion that the defendant hospital and its nursing staff met the requisite standard of care in all aspects of treatment and management of both Ms. Collin and Mr. Hutchins.
- [64] Ms. Foley, for the purpose of formulating her opinion, was provided with a statement of assumed facts which is attached to and forms a part of her report. In my view, each of the material facts set out in that statement was supported and established by the evidence at this trial.
- [65] In contrast, during the course of a lengthy cross-examination, Ms. Foley was asked by plaintiff's counsel to assume certain additional facts -
- 1) that an elderly male patient had been moved three times in 24 hours;
 - 2) that this patient was progressively losing orientation and becoming agitated, confused and demanding;
 - 3) that prior to his admission to hospital, the elderly male patient had taken all of his Imovone and drank alcohol heavily (1 bottle of wine per day plus a 26 ounce bottle of whiskey).
- [66] The first difficulty with these additional assumptions is that none of them were established on the evidence. In particular, the evidence establishes the patient was moved twice - not three times. Secondly, the evidence does not support a finding that Mr. Hutchins was progressively losing orientation or that he was becoming more agitated, confused or demanding. Finally, the evidence is far less clear on Mr. Hutchins' alcohol consumption than that posed to Ms. Foley by plaintiff's counsel.
- [67] In the end, the plaintiff has failed to meet the burden on her to establish a breach of the requisite standard of care.

- [68] It is unnecessary, in the circumstances, to go on to the assessment of damages.
- [69] In this case this regrettable incident was not foreseeable and, even if it was, there was no breach of the applicable standard of care.
- [70] The plaintiff's action is dismissed. If counsel are unable to agree on costs, they may be spoken to.

"W.G. Parrett, J."

The Honourable Mr. Justice W.G. Parrett

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