NURSING AND MIDWIFERY – A LEGAL PERSPECTIVE

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Personally, I believe that nursing is an art and a science, and its focus is on health. The essence of nursing lies in the unique interplay of intuition, logical thought, knowledge and compassion for others. Nowadays nurses are required to be competent in a variety of areas ranging from patient physical care to organisation, planning and interpersonal relations. Nurses now have to adapt quickly to changing circumstances for the benefit of the patient and for the benefit of the profession itself. Failing to adapt not only exposes the patient to unnecessary risks but also stultifies professional development. The role of nurses has expanded over the last two decades and is undergoing continuous development in order for it to meet the ever-demanding increasing demands of society. Though a very demanding profession, nursing provides an excellent opportunity for continual professional development or a career path in a wide-ranging variety of areas.

Yet due to this diversity and continuous change and evolution in knowledge and development, it is inevitable that legal provisions reflecting these rapid changes are absent. Logically, the most common query is about the nurses’ and midwives’ position at law. During my talk I shall be tackling this legal perspective from two angles namely: those provisions which provide for the regulation of the profession in so far as qualifications are concerned and secondly other more general provisions which deal with the regulation of the professional’s actions.

Under Maltese Law, precisely under the Medical and Kindred Professions Ordinance one comes across Part VII, Sections 72 to 80. These sections set up the Nursing and Midwifery Board and regulate the registration of nurses. Section 78 makes it an offence for a person to practice the profession of nurse for the sick or to take or use the name or title of registered nurse or of enrolled nurse unless he is so
registered. Hence registration is a *sine qua non* for the practice of the profession. It is worthwhile noting that although here the legislator has attempted a definition of nurse—"nurse of the sick"—this is very vague and does not provide clearly the parameters of the nurse's role.

Midwives are also catered for under the Medical and Kindred Professions Ordinance, precisely Part V. The Midwife still has to be registered to practice as such. In her case however the legislator was more specific in that the provisions of the law provide specifically for certain circumstances that might arise during labour and lay down what should be done by the midwife under those circumstances. Whereas, as far as the midwife is concerned, the law provides for the regulation of the role as well as the profession, in the case of nurses the law regulates the profession rather than the role. It is important to note that the profession has evolved, and these provisions do not reflect the progress made.

The second tier of regulation affects the nurse or midwife in her day to day chores. Here I am referring to the provisions of the law under the Civil Code and the Criminal Code. Under these two one will not come across a definition of the nurses' role. The law in these two codes simply refers to actions which give rise to damage. These codes do not single out the profession. On the other hand they are applicable to every person carrying out a task, irrespective of what this might be. The obvious question then is, where can one find a definition, if the law does not provide one? My answer to this is that I prefer the law as it is. Definitions are by their very nature restrictive, and in the sphere of nursing and midwifery it is not practical and workable to have a defined written-down role. Personally, I opt for the definition given by the profession itself. In other words, I believe that it is the profession which should determine the role of its members. How this is done is very simple. A procedure followed by the profession becomes standard by use across time. It then acquires the force of law without there being the need to write down that procedure in some legal instrument.

Even courts of law have followed this position. For example in *Hunter v Hanley (1955 SC 200)* Lord Clyde held that to establish whether
there are grounds for damages due to breach of normal practice the following test has to be carried out:

a) There is a usual and normal practice
b) The nurse has not followed that practice
c) The action taken by the nurse is one that no other nurse would have taken if she had been acting with ordinary care.

The problem in these cases is very often one of actual proof. What is usual and normal practice? Protocols and guidelines play an important role in this sphere of material proof. Though these are not prescribed by law, yet they acquire the force of law once followed by that particular profession. It is important therefore not to depart from a particular standard set by the profession unless sure of the outcome. This is not to mean that if healthcare professional deviates from the norm of one or more accepted modes of practice he runs the risk of being found guilty of negligence. In fact Lord Diplock in Sidaway v Bethlem Royal Hospital Governors [1985] held that:

"Those members of the public who seek medical or surgical aid would be badly served by the adoption of any legal principle that will confine the doctor to some long established, well tried method of treatment only, although its past record of success might be small, if he wanted to be confident that he would not run the risk of being held liable in negligence simply because he tried some modern treatment, and by some unavoidable mis-chance it failed to heal but did some harm to the patient. This would encourage "defensive medicine" with a vengeance."

It must be remembered that first and foremost the patient should not be exposed to unnecessary risks and that, secondly, nothing should be undertaken which goes beyond one's capacity. In the absence of guidelines and protocols we would have to rely quite heavily on the evidence of other professionals working in the same field. The problem with this is that not every one would be ready to take the witness stand,
not everyone can express himself clearly, very often evidence is required after a considerable number of years have elapsed and so memory sometimes fails us as well. This makes our position quite crumbly and definitely not satisfactory. Apart from their use as evidence, guidelines provide a more stable work environment as they can easily be accessed. But in my opinion their unsurpassable importance stems from the fact that they can easily be changed as the profession evolves without any need to undergo cumbersome parliamentary procedures.

One of the recurrent questions posed by healthcare professionals is whether or not they are competent in carrying out a particular task. Competence is a quality which courts look into. Registration with the Nursing and Midwifery Board, or a degree obtained from recognised institutions do not per se prove competence. They are pointers, but the onus rests heavily on the nurse or midwife to prove that he/she could carry out a particular task. It is his/her duty to keep up to date with all the developments. Refusing to carry out a particular task claiming incompetence smacks of gross negligence unless that nurse takes the initiative to update his/her knowledge. It is imperative to keep in mind that patients and relatives sue both when they feel aggrieved by a commission as well as by an omission. In other words, if a nurse fails in her duty of care through an omission she can still be found guilty of negligence. On the other hand if a nurse or midwife is aware that she cannot for example give a particular treatment regime she should refrain from giving it. Obeying higher orders is not an excuse. Patients should not be exposed to unnecessary risks.

Another problem I personally encounter when defending a healthcare professional in a court of law is one regarding the medical records and their upkeep. Medical records are the only document, which ideally gives a clear picture of an individual state of health. Hence any information in that file should be accurate. Very often minute details are left out, as they are deemed unimportant. This unfortunately is a far cry from the truth. In court, every detail counts, and minute details may turn out to be very strategic pointers in the future. Nothing should be taken for granted.
Another important aspect of the medical records is that these records pertain to the institution as well as to the patient – not his relatives. There records are official documents and should not leave the ward or hospital unless with the proper authorisation of whoever is in charge. Furthermore they should be sent back and forth in sealed bags. This would narrow down the possibility of having third parties researching the contents. It is becoming quite common to have patients claiming breach of their right to privacy because someone used their medical history outside a hospital setting without their consent. Healthcare professionals may only use information about a patient within a hospital setting, and in the interest of that patient, unless of course there is a court order ordering the release of the records. It may not be used for research purposes without the express consent of the patient. Furthermore, the relatives and spouse of the patient do not have an automatic right to any information regarding the patient unless that patient consents to it. It is important to register that consent in writing in the medical history of the patient.

On this issue of consent I feel I should take this opportunity to once again stress the fact that the ability to consent to treatment or care is not directly linked with age. If a patient is 16 years old and capable of understanding the nature of the treatment or care to be given to him, then he should not be turned out or asked to wait till his parents come along. It is also legitimate for him to ask for confidentiality to be respected. The nurse or midwife should not, if precluded by the patient, divulge any information to third parties even if the patient is under the 18-year threshold they commonly apply to date. One can have a patient who though under 18 is still mature enough to understand the information given to him. It is wrong to apply the 18-year-old threshold in the medico-legal sphere. What happens if the patient is unconscious? Do relatives have a say? The answer is no. If the patient cannot give his consent then it is the doctor’s duty to act in the best interest of that patient. The only relatives who can consent instead of the patient are the parents in the case where the patient is a minor who cannot give valid consent due to immaturity. However, this is not to say that the
relatives should be pushed aside and disregarded. It is good practice to consult relatives about what to do. Their comments have no legal effect except insofar as they may evidence the attitude that the patient would have had towards the giving of consent for the relative treatment. Yet the final decision rests with the healthcare professional.

I would like to take this opportunity to end my talk with the following observation: Whilst it is true to say that nursing provides an excellent opportunity for continual professional development or a career path in a wide-ranging variety of areas, it is also true that the role of nurses has expended over the last two decades and is undergoing continuous development in order for it to meet the needs of a demanding and complex society. It is the responsibility of each individual therefore to ensure that the environment (in its widest meaning), he/she is working in is conducive towards the best patient care available. Team work, effective handing over, proper communication, record keeping, complaint tackling from the very start, are all factors which provide the safety net for the professional when faced with formal demands for damages. We should not be afraid of these demands. We are equipped to tackle them. The Department stands behind its employees and you should definitely not feel alone, as long as you obviously follow the rules and principles enunciated by the Department.