Whatever Happened To . . . The Prosecution of Susan Nelles

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Introduction

In the 1980s, Canadians were riveted by the news of a succession of babies mysteriously dying at Toronto's world-renowned Hospital for Sick Children. Between June 1980 and March 1981, a troubling increase in baby deaths in cardiac Wards 4A and 4B was observed. Early meetings among hospital staff concluded the problem was not serious. It was thought most of the children had simply died of their conditions and that, if anything, there may have been a need for another Intensive Care Unit at the hospital.

However, in January 1981, the autopsy of 4-month-old Janice Estrella revealed a high level of digoxin in her blood. Digoxin was commonly used in cardiac wards to increase circulation and slow heart rates. Then in March, Kevin Pacsai, only 23 days old, died unexpectedly. His condition was not life threatening upon hospital admission. His autopsy also pointed toward digoxin toxicity.[1] Nurse Susan Nelles had failed to convince doctors to attend to him and was the one to find the baby struggling on the morning of his death. The coroner called in police to investigate the deaths of these two babies.

When another baby, Allana Miller, died soon after with a high concentration of digoxin in her blood, the hospital designated digoxin a "controlled drug" – it was to be locked away and could only

be administered by following strict procedures. Still, the next day twelve-week-old Justin Cook died with elevated levels of digoxin in his blood and tissues despite never being prescribed the drug. The entire Ward 4A nursing team was temporarily relieved of duty. Elective admissions to Wards 4A and B were halted, patients were transferred to other wards, and a full police investigation was launched.

More than 30 years later, we have not obtained answers to what happened during that period that threatened to bring down one of the foremost pediatric hospitals in the world. What did follow was a parade through the criminal and civil courts. In the end, this litigation – much like the medical mysteries that gave rise to it – would produce more drama than meaningful resolution.

Were these babies murdered? If so, who would be held legally responsible for them? In a further twist, should individuals charged with crimes like murder be able to sue the Crown (government), the Attorney General and its prosecutors if they are acquitted? The litigation that ensued from these baby deaths would ultimately serve only to define the liability of prosecutors and the Crown in such matters.

Susan Nelles Charged

On the night he died, baby Justin Cook was under the exclusive care of Susan Nelles – he was her only patient for her entire shift. From a respected family of physicians, Nelles was a nurse who had graduated less than three years earlier from Queen's University in Kingston. Nelles had also cared for babies Miller and Pacsai when they died and she had worked the shift prior to baby Estrella's death. The police, seeing Nelles as the common denominator, focused on her.

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The police interviewed all members of the Ward 4A nursing team. They spoke with Nelles last, with the intent of arresting her if she could not explain the deaths. Forewarned she would be questioned by police, Nelles consulted her law-student roommate about what to do. Her roommate advised her to "lawyer up" and not to speak to the police without a lawyer present. Three days after baby Cook's death, she was arrested and charged with the murder of the four babies. The suspicious baby deaths then stopped. Nelles volunteered little information in the police interview which further convinced the police of her guilt.

The murder case against Nelles was circumstantial, and the proof required to be shown by the Crown is beyond a reasonable doubt. Either Nelles was a horrible baby killer or she was unjustly and falsely accused.

Nelles had cared for the four infants at the time of their deaths, but she was not the only nurse to do so. Other nurses had access to digoxin. While providing care for Cook, Nelles was relieved by her supervisor for breaks. Exhumed remains of another infant showed digoxin toxicity when Nelles had been off work for several days. While the deaths seemed to end after Nelles' arrest, that could also be explained by the hospital's new restrictions on access to digoxin and other infant care protocols.

The preliminary inquiry in Ontario's Provincial Court addressed the threshold determination of whether all the Crown evidence, if believed, could result in at least one murder conviction against Nelles. If so, she would stand trial before a jury in Superior Court. If not, there would be no further prosecution.

In the end, the judge threw out all four murder charges against Nelles, citing the lack of sufficient Crown evidence. The medical and legal communities were rocked by the news that Nelles would not face trial. And why did these babies die?

The Grange Inquiry

Judge Samuel Grange was appointed to head the Royal Commission of Inquiry into the deaths of the 36 babies between June 1980 and March 1981 at the Hospital for Sick Children.[2] He concluded 8 babies were killed by digoxin toxicity. He called another 15 cases suspicious or highly suspicious.

He also concluded that the police were in a difficult position because they believed that they had found the killer of baby Cook, and because Nelles refused to speak without a lawyer. She stood out among the nurses because she was the only one to act in that way – to the police it further incriminated her. The prosecution pressed on when they believed Nelles was guilty.

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Civil Lawsuit for Malicious Prosecution

Nelles herself did want a trial, but not the kind the prosecutors had in mind. After the preliminary inquiry, and especially after the inconclusiveness of the Grange Inquiry, attention turned to the way the police investigation and prosecution were carried out. The police were criticized for arresting Nelles without fully questioning her, and charging her with the three earlier murders without clear evidence of contact with those babies.

Nelles hired former professional football player, then prominent Toronto civil lawyer, John Sopinka, who would later be appointed to the Supreme Court of Canada. He argued that the Crown of Ontario, the Ontario Attorney General (through his prosecutors who were not personally named in the lawsuit) and police were malicious in their pursuit of Nelles. He commenced a civil suit against all three parties.

Malicious prosecution has long been an infrequently used and controversial tort, largely because many fear it would open the floodgates to lawsuits against individual prosecutors who, in turn, may become so chilled by this litigation that they would be unable to properly do their jobs.

To win a civil lawsuit for malicious prosecution, one must meet a four-part test. One must prove that the prosecution, more likely than not, was:

1. initiated by the (prosecuting) defendant;
2. terminated in favour of the plaintiff;
3. undertaken without reasonable and probable cause; and
4. motivated by malice or a primary purpose other than that of carrying the law into effect.[3]

These requirements give no opportunity to convicted criminals to pursue legal action against their prosecutors. Accused who are later acquitted will not succeed unless they can show bad faith or malice on the part of the prosecutors.

When Nelles' case came to the Ontario courts, the issue of prosecutorial immunity arose. In 1985, she settled with the police for $190,000, paid by the Province of Ontario. She continued on, however, against the Ontario government and the Attorney General. The immunity defence rose to the Supreme Court of Canada.

In August 1989, a divided Supreme Court of Canada ruled that Nelles could continue her action against the Attorney General for malicious prosecution but not the Crown of Ontario itself, which enjoyed immunity under provincial legislation.[4] The distinction between the Crown and a Minister and agents of that Crown was a technical one.

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Nelles' lawyer Sopinka later wrote "a person wrongfully accused or convicted may have suffered the same social stigma, loss of liberty, loss of earnings, costs of defence, and possibly loss of family life that is suffered by the rightfully convicted accused who is responsible for his or her crime."[5] The procedural victory that allowed her case to proceed brought applause from the media for her courage to fight the system that wronged her and a chance to recover damages for the ordeal she suffered.

Two years later, Nelles settled with the Ontario government for what amounted to her accumulated legal costs of $60,000, of which $20,000 endowed a Queen's University scholarship in her name and $10,000 added to the Nelles Family Endowment Fund at Belleville General Hospital. This Fund had been created in honour of her brother and father, both doctors, who passed away during her legal ordeal.

Nelles married James Robert Pine in 1985 and the couple had three children. Her nursing licence was unaffected by the criminal charges and she continued to live near her hometown of Belleville and work as a nurse in Kingston, Ontario. She has also spoken to nursing groups about her experience. In 1999, she was awarded an honorary doctorate in law from Queen's University, her *alma mater*, for her work in promoting integrity in nursing.

The Nelles Legacy

The high profile but short-run *R. v. Nelles* criminal prosecution gave rise to *Nelles v. Ontario*, a civil case that clarified for the first time that cabinet ministers and prosecutors are not shielded from having to defend lawsuits for malicious prosecution. Young nurse Nelles symbolized the human ordeal that can occur at the hand of overwhelming state investigatory and prosecutorial power. There is a civil legal remedy for damages when that power is mis-directed.

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Recently the Supreme Court of Canada, in *Miazga v. Kvello Estate*,[6] had occasion to further refine this tort of malicious prosecution. Crown Attorney Miazga prosecuted parents falsely accused of sexual assault by their foster children. The sexual abuse claims against the parents were grotesque and outrageous, and included alleged ritual killings of babies and animals. The prosecution was continued against the families, even though the allegations were unbelievably preposterous. The children later recanted all allegations.

The Supreme Court of Canada found no liability on the part of the prosecutor in this case, on the grounds that malice was not established. The plaintiff bringing a malicious prosecution lawsuit must prove a negative – an absence of reasonable and probable cause for prosecuting. The prosecutor must actually believe in the guilt of the accused according to one's professional assessment of the legal strength of the case, and that belief must be reasonable in the circumstances.

The Court said malice is a question of fact, requiring evidence that the prosecutor was motivated by an improper purpose. It will be difficult for such evidence to be found. In what appears to be a considerable narrowing of this tort where Crown prosecutors enjoy major leeway, one who brings a malicious prosecution lawsuit today must prove the prosecutor deliberately intended to subvert or abuse prosecutorial powers. Courts will not second-guess decisions made by the prosecutor during criminal proceedings. By requiring proof of an improper purpose, the malice requirement protects prosecutors from incompetence, inexperience, honest mistake, and even gross negligence. In the end, only the most egregious case of bad faith prosecution will be punished by civil damages. Under this new standard, it is unlikely that Nelles would have won her case against the Attorney General of Ontario. The *Nelles v. Ontario* principle that the Attorney General and prosecutors can be sued for malicious prosecution has now been narrowed so much that such a case is now almost impossible to win.[7]

Justice Sopinka might have respectfully dissented from the *Miazga* decision, but he had no vote in it. He died suddenly on November 24, 1997 of complications from a rare blood disease at the age of 64, after serving almost a decade on the Court. Nelles remained one of his highest profile

clients from his lawyer days – that case rocketed his reputation and may have been a factor in his appointment directly from private practice to the Supreme Court of Canada.

Epilogue

Whatever came out of all those Toronto hospital baby deaths between June 1980 and March 1981? Not much.

The hospital's investigation of the digoxin poisoning was later criticized as experimental testing and the number of deaths from digoxin may have been greatly exaggerated. In 1993, a physician released a report blaming the chemical MBT, used to toughen syringes and medical tubing, for the deaths of these babies. He claimed MBT causes severe reactions, especially in children, and can mimic digoxin in autopsies. This report concluded that testing for digoxin used in the early 1980s has since been found to indicate falsely high readings.

After Nelles was exonerated, another nurse was publicly named and fell under suspicion for a time. Given the lessons learned from the Nelles preliminary inquiry, and the very high requirement of proof for crimes, no one else has been charged in the deaths of the babies.

Today, no one can even say with certainty whether any crimes were ever committed on the pediatric cardiac ward.

Notes

1. Samuel G.M. Grange. *Report of the Royal Commission into Certain Deaths at the Hospital for Sick Children and Related Matters* (Toronto: Ontario Ministry of the Attorney General), 133-39.2.
   Some reports put the number of babies poisoned by the heart medication as high as 43.
3. *Miazga v. Kvello Estate*, [2009] 3 S.C.R. 339, 2009 SCC 51
4. *Nelles v. Ontario*, [1989] 2 S.C.R. 170, 1989 CanLII 77 (SCC), 69 OR (2d) 448, 60 DLR (4th) 609, 71 CR (3d) 358, 42 CRR 1, 41 Admin LR 1, 35 OAC 161
5. John Sopinka, "Malicious Prosecution: Invasion of Charter Interests: *Nelles v. Ontario: J v. Jedynack: R v. Simpson*" (1995) *Canadian Bar Review* 74:366.
6. [2009] 3 SCR 339, 2009 SCC 51
7. Rather, the tort of negligent investigation, where one does not have to prove malice, may be a better option for those seeking civil justice from law enforcement: *Hill v. Hamilton-Wentworth Regional Police Services Board*, [2007] 3 SCR 129, 2007 SCC 41 (CanLII), 87 OR (3d) 397, 285 DLR (4th) 620, 50 CR (6th) 279, 64 Admin LR (4th) 163, 230 OAC 260.

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