PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Carrigan-Warner*, 2020 NSPC 21

Date: 2020/05/12
Docket: Case #8221432
Registry: Sydney

Between:

Her Majesty the Queen

v.

Tammy Carrigan-Warner

Judge: The Honourable Judge A. Peter Ross

Heard: December 4 and 11, 2019 and January 29, 2020 in Sydney, Nova Scotia

Decision May 12, 2020

Charge: s.368(1)(a) Criminal Code of Canada

Counsel: Mark Gouthro and Rochelle Palmer, for the Crown

Joel E. Pink, Q.C., for the Defendant

By the Court:

The charge

[1] In the early hours of February 23, 2018 an elderly, frail and confused inpatient on Unit 4C of the Cape Breton Regional Hospital got out of bed and tried to go home. He exited the Unit unseen via a fire door. The alarm did not go off. He left the building through an emergency exit on ground floor, made his way to a pedestrian walkway near an adjoining parking lot, and collapsed. He was discovered three hours later, by chance, by two nurses who had gone outside for a break. He died from hypothermia. He was Colin Francis MacDonald.

[2] The defendant, Tammy Carrigan-Warner, has been charged under s.368(1)(a) of the Criminal Code with knowingly using a forged document, namely "check sheets / nursing flow sheets" belonging to the Nova Scotia District Health Authority. She was working as a nurse on Unit 4C at the time. The offence was allegedly committed after the discovery of Mr. Macdonald's body. Further particulars of the charge emerged at trial and are detailed below.

Overview

[3] At approximately 3:30 a.m. Mary Saltzman and Amy Susin, who were, with the defendant, working the overnight shift on Unit 4C, went to Ms. Susin's car for a smoke break. They noticed a suspicious shape on the bridge. They were nervous about approaching the area so they went back inside to the Unit and looked down upon it from there. They were joined by other nursing staff. Someone called security. Within minutes of the body being discovered EHS staff were attending to Mr. MacDonald on the walkway. He was unresponsive. He was taken to the Emergency department but could not be revived.

[4] Security footage, examined in subsequent days, revealed that Mr. MacDonald left the building at 12:35 a.m.. He was discovered shortly before 4:00 a.m..

[5] It was a very busy night on the Unit 4C. It was filled to capacity, all thirty beds. One witness described the workload as "8 out of 10".

[6] Immediately after alerting security the staff of Unit 4C did a sweep of the ward to determine whether any patients were missing. They soon discovered that bed number one in room #4147 was empty – Mr. MacDonald's. He could not be located on the Unit. They suspected that the person found outside was their missing patient.

[7] Many of the staff were highly anxious and unsure what to do. Although not the "charge nurse", it appears Ms. Carrigan-Warner, along with nurse Simon MacDonald, assumed control of a rather chaotic situation. The defendant retrieved Colin MacDonald's medical history (chart) from behind the nursing station and took it down to Emergency (ER) in case it was needed. There she confirmed two salient facts – that the person was indeed Colin MacDonald, and that he was dead.

[8] TCW returned to the Unit. She attended to the needs of her patients, as others did. There was lingering anxiety over the events. Valerie MacGillivary was said to be "in shock". Others seemed unable to collect their wits. Simon MacDonald said that he and Ms. Carrigan-Warner "sat everyone down" at the nursing station. He pointed out that the matter would be "investigated to the full" and that "everyone had to have their ducks in a row". Given the evidence heard at trial it is fair to assume that all staff would understand the importance of ensuring full and proper documentation of the care given to Colin MacDonald in the preceding hours. The defendant said that she "saw someone in there around 3:30", referring to bed 4147(1). At this point no one knew the actual time Mr. MacDonald had left the unit.

[9] During the group meeting at the nursing station Valerie MacGillivary said she "did not know what to do." She had been assigned to Mr. MacDonald for that overnight shift. Mr. MacDonald was "her patient"; primary responsibility for his care rested with her. She was an LPN. She had never dealt with anything like this before. Simon MacDonald said she "looked scared" and couldn't seem to answer questions about the deceased. She and the defendant were seen sitting side by side, making notations. As the responsible nurse for that patient she would normally do the charting but it appeared to Simon MacDonald that she "was in no condition to

do it" and hence the defendant "took charge of this". At this time Ms. Carrigan-Warner entered a note on Colin MacDonald's chart indicating that she had seen him in his bed at 3:15 a.m. Other relevant observations had already been entered by Ms. MacGillivary but it is not clear on the evidence just when, in the sequence of events, hers were done. Authorship of the notes has been acknowledged by each of them.

[10] Despite the turmoil and worry, it appears the staff were able to attend to their patients until the end of shift. Just after 7:00 a.m. they met as a group with their supervisor, Stephanie O'Neil. The defendant passed her a sheet of paper containing the notes she'd made about Mr. MacDonald – the 3:15 bedside visit, details of the subsequent search, etc. As noted, other portions of Mr. MacDonald's records for the critical early-morning period were written by Valerie MacGillivary, but it is not clear just how or when they were collected.

[11] In subsequent days hospital administration and Human Resources officials met separately with Ms. MacGillivary and with the defendant. They were confronted with the notes which appeared to indicate various checks and observations of Mr. MacDonald in bed 4147(1) subsequent to 12:30 a.m. The officials knew such entries could not possibly be correct. It appears they also concluded that the entries were not truthful. Both Ms. MacGillivary and the defendant were terminated from their employment. It was only at these meetings that they became aware of the surveillance video and themselves realized that Mr. MacDonald could not possibly have been in bed 4147(1). At trial each has testified that there was indeed a patient in bed 4147(1) whom they believed to be CMD.

[12] The most obvious cause of this terrible event is the failure of the alarm to sound when Mr. MacDonald opened the fire door on Unit 4C. This has been investigated but to my knowledge not explained.

[13] It may never be known whether Mr. MacDonald's death could have been averted if his absence from Unit 4C had been noticed earlier and a search begun sooner. One might expect that routine checks, which are required hourly according to standard nursing practice, would have alerted staff to his absence. Failure to do these hourly checks would reflect badly on any whose responsibility it was to conduct them.

[14] In addition to performing the foregoing checks, staff are required to make a record of them, to document any such observations or interactions with their patients. Falsifying notes would presumably be motivated by a desire to cover up any such omission. While nursing care involves such things as taking blood pressure, changing an IV drip, administering a medication, or actively assisting a patient with some task, the bed checks which are in issue in this trial are far more passive. They are observations made at night when a patient is typically asleep, done so as not to wake the patient up, and thus somewhat cursory in nature. On the evidence at trial it appears a nurse would do only the minimum required to ascertain that a patient was comfortable, was breathing, was not in distress or in need.

[15] Alarms at bedside are available for patients to use at any time. Occasionally the alarm bell is attached to a patient's clothing so that it sounds automatically if the patient moves. It seems there was no perceived need to do this for Mr. MacDonald.

[16] I will return later to the interaction between Valerie MacGillivary and the defendant and how that might bear on the guilt of the defendant. Only Ms. Carrigan-Warner is charged in this proceeding. The decision was made to charge Ms. MacGillivary separately and hence her possible guilt will be adjudicated in a different forum. While one would expect the evidence and witnesses to be broadly similar, I have no knowledge of the testimony heard in Ms. MacGillivary's trial. That trial may have involved different forms of questioning, certain details may have emerged with are missing here, and vice versa. Witnesses may have presented differently in terms of demeanour. The trier of fact may take a different view of the evidence, find some facts differently, or make different inferences, than I do. The outcome of one does not inform the outcome of the other. I know that Ms. MacGillivary's trial has been conducted and that a decision is pending, but I am not aware of what transpired in that courtroom or what the result will be.

[17] I should also note that the decision to terminate TCW does not assist or inform my deliberations. What constitutes just cause for dismissal, what evidence supports such a step, what procedures ought to be followed – these are not applicable here and have no bearing on this

proceeding. In a criminal trial each element of a specific offence must be proven beyond a reasonable doubt in accordance with established rules of criminal evidence and procedure.

The competing theories

[18] In brief, the case for Crown and Defence may be set out as follows:

Crown submits

- that @ 4:00 a.m. staff working on the unit realized Colin MacDonald was missing from Unit 4C,
- Mr. MacDonald's bed was Room 4147, bed 1
- that unbeknownst to staff he had exited 3.5 hours earlier through the fire doors, without sounding the alarm
- that at @ 4:30 TCW made a false entry in Mr. MacDonald's chart in which she claims to have seen him in his bed at 3:15
- that at 3:15 Mr. MacDonald's bed – Unit 4C, Room 4147, bed 1 - was in fact empty
- that this was a deliberate attempt to make it appear that Mr. MacDonald's bed had been checked in timely fashion

Defence submits

- Ms. Carrigan-Warner did in fact perform a cursory check on 4147(1) at 3:15
- She noted an elderly looking man sleeping in that bed
- She assumed, at the time, that this person was Colin MacDonald, and subsequently, at 4:30, made a note to this effect on his chart

The law

[19] Both parties agree that the offence requires (1) that the document be a forgery, i.e. a document which is falsely made with the intent that it be acted upon as genuine, to somebody's prejudice and (2) that the defendant, knowing this, "used" it. The allegedly false document was passed along to administration for use in the investigation of Mr. MacDonald's death. In this sense there is no question that the defendant "used" the document. The issue is whether she did

so knowing it to be false. Crown must prove this essential element of the offence beyond a reasonable doubt. (This second aspect of the offence seems superfluous where the document in question was authored by the defendant herself, in which case a charge of simple forgery might have sufficed.)

[20] Defence argues that the making and use of the impugned records occurred by mistake, with no intent to deceive. The doctrine of mistake was discussed by the Supreme Court in R. v. Pappajohn (1980) 14 C.R. (3d) 243, and recently referred to in R. v. Morrison [2019] S.C.J. No. 15. At par.209 the court noted that the "defence" of mistake of fact is not a true defence but rather the proposition that there is reasonable doubt as to the *mens rea* of an offence. Professor Stuart in Canadian Criminal Law, A Treatise, at 119, says that "It avails an accused who acts innocently, pursuant to a flawed perception of the facts."

[21] It may thus be said that the subjective belief which must accompany the s.368 offence, i.e. the element of knowing that the medical record was false, may be negated by honest mistake. A trier of fact may consider the objective likelihood that the mistake would occur when it decides whether the person is being honest about it. That said, the reasonableness of the person's belief is not the focus *per se*. The mistake might arise from negligence or carelessness, but so long as the mistake is made honestly the resulting action is not criminal. It may be worth noting that the application of this defence in a fraud case is very different from its use in a sexual assault case. There, Parliament has legislated reasonableness requirements severely restricting the defence of honest, mistaken belief in consent.

Material portions of the medical record

[22] The various patient-care measures described in the flow-charts, nursing notes, etc. are expected to be done *and* to be documented. Such charting must be truthful and accurate in order to convey correct information to subsequent health providers, to permit auditing of nursing practices, to ensure proper performance of duties, to preserve professional standards, and to maintain the records required for a review of the hospital's procedures and the granting of accreditation. Nursing supervisors, certifying bodies, professional associations, those who inquire into incidents of concern – all rely on the accuracy of such information.

[23] While further discussion of charting procedures will follow, I will indicate here which portions of Mr. MacDonald's medical record are most important to this case. I will use the 24-hour clock to indicate times, in accordance with the records themselves.

[24] Occasionally counsel referred to Ex#2 and #7 as though each sheet of paper was one "page". I have myself put page numbers on these exhibits - the front and back of each sheet has been given its own page number. If there is a discrepancy between this decision and the trial record, this serves to explain why.

[25] Exhibit #2 is the nursing record for Colin MacDonald for the 0700 to 1900 shift of February 22, 2018 (4 pages of notes) and the 1900 to 0700 shift of February 22-23 (6 pages of notes). If one takes 0030 on the 23rd as the approximate time Colin MacDonald left Unit 4C, any entry for the interval between then and 0400, the approximate time staff learned he was missing, is suspect. Such entries are the basis for the charge against the defendant (and, I assume, Ms. MacGillivary). They are as follows:

- Flow chart entries for 0100 bed check (VMG)
- Flow chart entries for 0200 bed check (VMG)
- Flow chart entries for 0300 bed check (VMG)
- Narrative nursing note for 0045 - "Patient in bed, eyes closed. Resting comfortably as noted on hourly rounds" (VMG)
- Narrative nursing note for 0115 (as appears on page 8) – "Patient in bed eyes closed respiration nonlabored" (VMG)
- Narrative nursing note for 0115 (as appears on page 9) – "Patient in bed, eyes closed, respiration nonlabored, resting comfortably" (VMG)
- Narrative nursing note for 0315 – "Patient resting quietly in bed with eyes closed. Will monitor" (TCW)

[26] As I have indicated at the end of each entry, only the last of these, the 0315 entry, was made by the defendant. All the rest were made by Ms. MacGillivary.

[27] The evidence makes clear that the defendant wrote her single entry on Colin MacDonald's chart at approximately 0430, at roughly the same time that staff congregated at the nurses' station. However, it was common for a nurse to do "charting" some time after the fact, as and when time permitted.

[28] It is not clear from the testimony elicited from Ms. MacGillivary in this trial just when she made her entries. Crown says at par. 67 of its brief that she testified to making her notations after the defendant had confirmed the identity of Mr. MacDonald at the ER – at approximately 0430. But as I heard the evidence, this was the point at which she "handed over" such notations. While it is possible she wrote up these notes after the defendant returned from the ER, it seems possible she made them somewhat earlier. What is clear is that she made them before handing Mr. MacDonald's chart over to the defendant, after which Ms. MacGillivary had nothing more to do with it.

[29] Each of the flow chart entries at 0100, 0200 and 0300 consist of ticking a sequence of boxes which correspond to the patient's medical status. These include pain, body position, etc. (so-called '4P rounding'), medication requirements, bed position, and other aspects of routine care.

[30] The note for the 0115 observation seems to have been entered twice – it is the last entry on page 8 and the first on page 9. Immediately below it, on page 9, is the defendant's 0315 entry.

[31] It does not matter whether the various entries denote adequate care; nor does it matter whether they are wrong. What matters is whether they are untruthful. We know that Mr. MacDonald left the Unit at approximately 0030. The issue whether, at the material times noted above, there was any patient in bed 4147(1) at all, or whether there was indeed someone in the bed mistakenly believed to be Colin MacDonald. The evidence at trial points in both directions.

Unit 4C

[32] Some patient rooms on Unit 4C are private (one person), some semi-private (two people), and some accommodate four patients.

[33] As of February 23, 2018, staffing levels for Unit 4C were higher during waking hours. There were nurses working both 8-hour and 12-hour overlapping shifts. The 8-hour cohorts worked 0700 to 1500 and 1500 to 2300; the 12-hour cohorts worked 0700 to 1700 and 1700 to 0700 the next day. Accordingly, there were 6 staff working on Unit 4C in the overnight hours

(early morning) of February 23rd. Three were registered nurses (RNs). Two were Licenced Practical Nurses (LPNs). One was a nursing student.

[34] Supervisors assign RNs to the sicker, more demanding patients. LPNs are given more stable and predictable patients. During the overnight hours of Feb.22-23 it seems each RN and each LPN on Unit 4C was assigned six patients.

[35] Unit 4C was filled to capacity – 30 beds, all occupied. The student nurse was attached to one of the RNs. She did not have primary responsibility for any patients; she was there to observe, assist and learn. Each LPN is "paired" with an RN such that if something arises which is beyond their scope of practice, a problem they are not comfortable handling, they turn to the RN for assistance. On the night in question the staff roster was as follows:

Amy Susin, RN, also "charge nurse" for the shift
Rachael Buick (student nurse) - assigned to Ms. Susin
Simon Daniel MacDonald, RN
Tammy Carrigan-Warner, RN
Valery MacGillivary, LPN, responsible for Colin MacDonald in Room 4147 Bed 1
Mary Salzman, LPN

All the above have testified in this trial.

[36] Hereafter, where I use the present tense, it is worth noting that some of the described practices may have changed since.

[37] Staff maintain flexibility and share responsibility for patients on the Unit. Sometimes they trade patients if one proves especially challenging and time-consuming. Any might respond to a call, or an alarm, regardless whether they are assigned to that patient. This might or might not be noted in the patient's records, depending on what the call entailed.

[38] Unit 4C is U-shaped. The nursing station is in the middle. Entrance doors are regulated by a keypad behind the nursing station. Patients or visitors must be "buzzed" in and people leaving must have the door unlocked by a nurse. It is thus termed a secure unit. There are two fire exits, one of which is just a few feet from Room 4147. Room 4147 and Room 4150 (discussed below) are in the same corridor, a short distance apart. The doors to some patient

rooms are visible from the nursing station, but it does not follow that if a patient moved in or out of a room they would be noticed. Staff at the station do not monitor these doors constantly; they have other tasks. They are often in patient rooms. It is unsurprising that Colin MacDonald might leave his room and exit through the fire door unseen. It is surprising and troubling to learn that this went undetected because the alarm failed to sound.

[39] Patients, one assumes, are expected to sleep at night. However it is obvious that many will be active from time to time. In general, mobility is encouraged for patients who are capable of it and it appears movement was tolerated to a degree even at night. At the same time, haphazard movements are problematic. The patient might not stick to the corridor. If confused, they might venture into supply rooms, other patient rooms and other areas where they should not be. The likelihood that any such meanderings would be detected, and the ability to redirect such patients, will depend on how preoccupied staff are with other concerns.

Exhibits and charting procedures

[40] Crown and Defence helpfully prepared an Agreed Statement of Facts settling a number of key issues. Exhibits include sketches of the configuration of Unit 4C showing the location of rooms and beds, photographs of room 4147, photos of the corridor, entrance/exit doors, etc. Exhibit #2 is a copy of the nursing notes, flow charts and assessments for Colin MacDonald for the overnight shift of Feb 22-23, and also for the preceding dayshift. Exhibit #7 is a copy of similar documentation for one Roy Garland who was a patient in Room 4150, bed 4. There is evidence that Mr. Garland was confused, difficult to manage and prone to wandering around the unit. This is relevant to the case for the Defence, as I will discuss below. Mr. Garland was a patient of Ms. Carrigan-Warner.

[41] Witnesses made extensive reference to charts, notes, etc. but the terms were not always used consistently. Nurses kept records differently. Some used blank sheets of paper on which they wrote important information gleaned at bedside, later transcribed on standard approved forms. I do not have a complete picture of how hospital records from inpatient units are made, transferred and stored but it is possible to draw certain conclusions of fact in regard to Exhibit #2 and #7.

[42] The clearest evidence of charting procedures came from the defendant. At the beginning of each shift a standard 4-page file is created for each in-patient and put on a clipboard at the nursing station. Each nurse has his or her own clipboard. At the end of each shift this 4-page file is left for the nurse assigned to the patient on the following shift. This file is comprised of pre-printed forms. Relevant information is inputted (written, recorded) according to format. The information recorded here, or some of it, finds its way into a patient's permanent medical record.

[43] Some used the term "chart" to refer to a large binder, also kept behind the nursing station, containing a "Kardex", medication sheets and other information fundamental to understanding a patient's medical condition and treatment. It is this binder which the defendant took down to the ER at same time she identified the deceased. His 4-page file remained on the clipboard at the nurses' station. However, the term "chart" was sometimes used more generally, to mean any form to which patient information was transcribed. Some used the term "charting" to mean entering or transcribing information to the forms in the clipboard file.

[44] Pages 1 and 2 of Exhibits #2 and #7 are a "medical/surgical 12 hour flow chart". The attending nurse here records oxygen levels, temperature, etc. at the beginning of the shift. Thereafter, periodic checks and observations are recorded – such things as "rounding" (basic observations of the patient's situation), diet, bed position, toilet care, breathing, medication needs, etc. Practice is not consistent on how often these observations are recorded, or for what times. Mr. MacDonald's nurse for his 0700 to 1900 shift of Feb.22 recorded "4P rounding" each hour, and other "routine care" every two hours. Reference to Ex#7 indicates that the defendant made such a record every two hours, at 1900, 2100, 2300, 0100, etc. Valerie MacGillivary, who completed these documents for Colin MacDonald on the 1900 – 0700 overnight shift, recorded such checks every two hours at the beginning of the shift and then, for some reason, every hour beginning at 0100.

[45] Page 3 of Exhibits #2 and #7 is a "medical/surgical physical assessment" for the patient. This more extensive analysis of the patient's condition is done once, at the beginning of the shift. It includes cardiovascular function, respiratory condition, neurological features, etc.

[46] Page 4 is titled “nursing notes”. It is where miscellaneous observations and comments relevant to the continuing care of the patient are noted, particularly things which are not captured on the flow charts. Unlike the previous pages there are no prescribed criteria – it is in the nurse’s discretion what to record here.

[47] Pages 5 to 8 of Exhibits #2 and #7 are a repeat of the above, a second 4-page folio for each patient, for the following shift.

[48] Exhibit #2 also contains an additional sheet, pages 9 and 10. Evidently this is used when there is insufficient room on the single page of nursing notes to record all the relevant information. It is titled “nurse’s notes”. It is an older form which is utilized as needed.

[49] These sheets are stamped at top with the name of the patient and various pieces of identifying information (date of birth, address, health number, family doctor, etc.)

[50] While policy requires that “charting” be done as close as possible to the actual checks, it is often not possible to make the foregoing entries immediately afterwards. Often they are not done in “real time”. Frequently a nurse will record the relevant information on a blank sheet of paper kept in a pocket and later transfer it to the 4-page folio kept on the clipboard. It is often done when they get a break from hands-on care, which could be hours later.

[51] Not all bed checks are recorded. While hourly checks are required - every witness including the defendant and Ms. MacGillivary testified that they were in fact done - they may only be “charted” at two-hour intervals. In other words, a nurse may only record the results for every second one. Presumably anything critical to patient care would be noted in a flow-sheet or nursing note no matter when it occurred, regardless of the hour or interval. Because the transcription to the file on the clipboard was done after-the-fact, and because the clocks on the unit were not entirely consistent, some of the times showing on these records are not precise. More precision is observed when a patient is given a procedure of some sort, such as a dose of medication.

[52] Herein, I may use the word “chart” as a verb, to mean entering information on the 4-page file. I may use the word “chart” or “record” as a noun to mean all or some part of a patient’s

medical record, wherever kept. “Record” used as a verb refers to the act of writing on any part of a patient’s “chart”

The charge nurse

[53] Much was made at trial about the responsibilities of the “charge nurse”, particularly by the Defence. I have considered this evidence but as much as it may provoke some sympathy for the defendant, this must not influence the outcome of the case.

Character evidence

[54] I have also heard evidence of the defendant’s good character from two witnesses. While relevant, this factors little in the outcome. Slightly more important, though far from determinative, is evidence from co-workers who spoke about the defendant’s competence. She was termed “a fantastic nurse”, “conscientious”, and “reliable” by those who worked with her.

Credibility of Crown witness Valerie MacGillivary

[55] Counsel have argued at length about I ought to assess the credibility of Valerie MacGillivary. The Crown, having chosen to try her separately from the defendant, called Ms. MacGillivary as its own witness here in Ms. Carrigan-Warner’s trial. Crown said it had an obligation to present all potentially relevant evidence. In final argument it suggests its own witness was disingenuous. It suggests Ms. MacGillivary’s entries – noted above – are fabrications in the same sense as the defendant’s 0315 entry. There is strong suggestion throughout the Crown’s questioning and final argument that they connived.

[56] In final briefs the parties dealt extensively with the obligation of the Crown to call witnesses. Defence urges that I accept Ms. MacGillivary’s evidence, saying that the Crown “tendered her evidence as being truthful”. I have evaluated her as I would any other witness, irrespective of who put her on the stand. Whatever position a party may take on the credibility of a witness, it is not binding on the trier of fact. I am entitled to accept all, some or none of her evidence. Her evidence has the potential to support or to weaken the Crown’s case against the defendant, or to do neither. Tactical decisions of counsel may have an impact on what evidence it

is able to bring out, or restrict its ability to impeach the credibility of a witness. This may influence how the evidence unfolds, but does not influence the evaluation of whatever testimony is ultimately received.

Prior statements

[57] When staff were gathered together at the nursing station around 0430, the defendant is said to have made two statements to the group. According to nurse Simon MacDonald, she offered that she *"saw someone in there around 3:30"* (the first statement). Simon MacDonald testified that he then "asked if it was Colin" to which the defendant replied *"I don't know"* (the second statement). Of these two utterances, the defendant acknowledges only the first. She testified that she did not remember making the second, that it "didn't sound right". Simon MacDonald himself did not remember the second until his memory was refreshed with his police statement.

[58] In regard to the first utterance, Crown adduced it in the examination of Simon MacDonald. In cross-examination the defendant acknowledged making it. Crown attempts to impugn the credibility of the defendant by suggesting that it was inconsistent with her later statement (chart entry) in which the defendant used the word "patient" (see par. 25, above). While there is a difference in her use of words, I do not see this inconsistency as harmful to the defendant's credibility.

[59] The utterance "I saw someone in there around 3:30" could also be viewed as a prior consistent statement – consistent in a general sense with both with the impugned 0315 chart entry and with Ms. Carrigan-Warner's testimony at trial. As such it is *prime facie* inadmissible, with exceptions.

[60] The usual rationale for admitting a prior consistent statement is to rebut a suggestion of recent fabrication, but here the statement was made after, not before, a possible reason to fabricate arose.

[61] It seems, however, that the first utterance is receivable as "context" evidence, to give the trier of fact a full appreciation of the general circumstances. It relates to the state of mind of the defendant, and indeed is difficult to separate from the written statement (0315 chart entry) made so soon thereafter. But in the final analysis this statement, consistent or inconsistent as the case may be, has no effect on the defendant's credibility and ultimately no bearing on the outcome of the trial.

[62] As to the second statement, Simon MacDonald seemed to be a very credible witness, but the defendant's evidence also carries some weight. Taking the stand in her own defence, she did not admit to making the utterance, and there was no further procedure conducted by which to determine whether the statement in fact was made. The contradiction between Simon MacDonald's earlier testimony and the defendant's disavowal remains unresolved and cannot be resolved on the evidence before me. For this reason alone it does not serve to diminish the defendant's credibility.

[63] But, even if one considers why the defendant would say, in her note, that the 4147(1) "patient" was in his bed and yet in her response to Mr. MacDonald's question say she did "not know" who was in this bed, I do not see this as a stain on her credibility. The evidence allows for the possibility that her chart entry of 0315 was done to reflect what she believed at that time, not as informed by subsequent events. This is similar to the discussion above about her use of the word "someone", and to which I return at par. 116 , below.

[64] Tom MacNeil testified that during the HR interview with the defendant a week or so later, the defendant said she had "gone to bedside". The defendant, testifying subsequently at trial, denied saying this. While the voluntariness of her prior statements was admitted in general terms, the court lacks proof that this utterance was made in the first place. Mr. MacNeil, it seems, kept notes, but these were not elicited, nor any further inquiry requested into this alleged prior statement. However, even if proven, the defendant may have considered going to the foot of the bed to be "bedside" and so I do not view this as damaging to her credibility.

<u>Silence as implied admission</u>

[65] During her interviews with hospital administration and HR, the defendant did not mention Roy Garland nor elaborate on her position as she has done at trial (and as I will do below). She was asked in cross-examination why she hadn't done so. The Crown's apparent purpose was to suggest that her failure to say then what she later put forward at trial reflects poorly on her credibility and is indicative of a guilty mind. This would be so only if I view her silence as an implied admission. These arise from circumstances where one would expect a person to give an explanation in the face of an accusation.

[66] I do not think that it is reasonable to interpret the defendant's reticence as any sort of admission. She herself described the meeting as an "ambush", saying that five people were "staring down at her". She said she was not in a good frame of mind. There are reasons why she might not offer a detailed account in such circumstances. I do not think her reticence at this meeting diminishes her credibility at trial. It would be dangerous to regard it as evidence of a guilty mind, and so I do not.

The burden of proof – doubt vs. speculation

[67] Defence acknowledged from the very beginning of the case that the defendant authored the 0315 entry on Colin MacDonald's chart (Ex#2/p.9). It advances the defence of mistake. It claims that when this entry was made, it was made in good faith, in the belief that Mr. MacDonald was indeed sleeping in his bed at that time. This proposition is incredible unless somebody was in fact in the bed. Defence argues a case of mistaken identification. It argues that honest mistake is plausible, given that the observation was made at night, in a semi-darkened room, and done in such a way (i.e. from the foot of the bed, solely by visual observation of a person sleeping under a blanket) as to not disturb the patient.

[68] An accused bears no burden to prove innocence. Ms. Carrigan-Warner has testified by choice. She has asserted her honest belief. Her evidence stands to be evaluated with and against all the other evidence in the case.

[69] Reasonable doubt must emerge from the evidence at trial; it must not be the product of speculation. The obvious question arises – who was in bed 4147(1) at 0315, if not Colin

MacDonald? It would be pure speculation to think that it was an evening visitor who decided to stay the night. To say only that patients sometimes wander into the wrong room would give a very flimsy basis for a defence of mistake. However Defence has put a more specific possibility in play – that there was a particular patient, one Roy Garland, who was in bed 4 in Room 4150, who was confused and disoriented, who had a propensity to wander, who had in fact been seen wandering aimlessly on the unit, and who on one other occasion had entered the room of another patient (not Colin MacDonald). Mr. Garland's chart for the previous overnight shift of February 21-22 shows that he was "awake and wandering around unit all night". His assigned nurse was Ms. Carrigan-Warner. Her chart entries for Roy Garland for that earlier shift, and for the shift in question, are found in Ex.#7.

[70] To convict the defendant it is not enough to conclude that she *probably* falsified the entry. This must be proven beyond a reasonable doubt. If there is a reasonable possibility, based on the evidence, that she made an honest mistake, she must be acquitted.

[71] Needless to say, Ms. Carrigan-Warner is not required to explain or account for chart entries made by Valerie MacGillivary.

Possible modes of culpability

[72] The charging document is not very specific. It alleges that the "forged document" used by the defendant was "check sheets/nursing flow sheets". With the evidence now before me, this most obviously refers to her own chart entry of 0315. The guilt or innocence of Valerie MacGillivary is not here for decision, but if the evidence showed that the defendant encouraged or assisted Ms. MacGillivary to make false entries in Colin MacDonald's chart, the charge could theoretically extend to those documents. Crown did not focus its arguments on that theory – indeed at par.132 of its brief it says that what is "at issue" is p.9 of Ex#2 which contains the defendant's single 0315 note. None the less, I have considered Ms. Carrigan-Warner's possible culpability for any falsehoods entered by Valerie MacGillivary.

[73] As s.21 of the Criminal Code declares, a person may be guilty not only as a principal offender but as a party. If someone aids or abets another person to commit an offence, they too

become implicated in the crime. Aiding or abetting means active assistance or encouragement. If, speaking hypothetically, the defendant coached Ms. MacGillivary to make false entries, she would become a party to Ms. MacGillivary's offence. Additionally, if they formed a plan to deceive others about Colin MacDonald's bed checks, and if the defendant ought to have known that Ms. MacGillivary would then forge Mr. MacDonald's records, they would both be liable.

[74] If the defendant knew that Ms. MacGillivary's entries (as set out in par 25) were false, and then passed p.9 of Ex#2 to Stephanie O'Neil, holding it out to be genuine, this would constitute a s.368 offence, completely aside from the veracity of her own 0315 chart entry,

[75] I have also considered the possible effect of Ms. MacGillivary's actions on the defendant in a more general sense. Hypothetically, if the defendant knew or suspected that Ms. MacGillivary's entries were false, might this have prompted the defendant to make a false note of her own? Might it simply have given her the idea, absent any actual collusion?

[76] As I consider these points, the evidence gives rise to different, sometimes conflicting interpretations.

[77] Evidence of possible collusion between the defendant and Ms. MacGillivary arises circumstantially. They sat side by side near the nursing station at 0430. Rachael Buick said that she saw Ms. MacGillivary with notes, writing. Simon MacDonald saw the defendant writing on Colin MacDonald's chart, on a single sheet of paper. I infer this was page 9 of Ex#2. At this time Valerie MacGillivary was said to be in shock, unsure what to do. This would make her vulnerable to suggestion. Ms. MacGillivary was "paired" with the defendant that evening and so the defendant was the RN she would turn to in any situation where she needed assistance. The defendant may consequently have felt responsibility for Ms. MacGillivary, sympathy for her situation, and a desire to protect her.

[78] The fact that Roy Garland was a patient of the defendant's and Colin MacDonald a patient of Ms. MacGillivary's cannot be overlooked. This makes more likely the possibility that they discussed the idea of Roy Garland mistakenly wandering into Colin MacDonald's room. The evidence at trial is that both Ms. Carrigan-Warner and Ms. MacGillivary made the same

mistaken identification. This is inherently less likely than only one of them doing so and suggests the possibility that they concocted this whole idea.

[79] It is curious that Ms. MacGillivary's nursing note of 0115 is found in two places – on page 8 and again on page 9 of Ex#2 where the words "resting comfortably" are added. There was still room on page 8 of the form to write further notes, begging the question why she would see the need to begin a fresh page. The defendant filled out the date at the top of page 9, which suggests that it was not a simple continuation of notes Ms. MacGillivary would have made had nothing unusual happened, for in that case one would expect Ms. MacGillivary to have inserted the date. This suggests p.9 may have been done at the defendant's direction, causing one to ask whether earlier notes were also.

[80] On the other hand, the defendant said that when she "took over" the charting for Colin MacDonald's case she "entered a note . . . for the last time I'd been in that room", this being 0315. Ms. MacGillivary's entry for 0115 appears first, the defendant's 0315 entry immediately below. The proximity of these entries may raise suspicion, but is also consistent with a scenario where the defendant recognized the need to begin an extra page of nursing notes, realizing she had much to enter about her visit to the ER, etc. Indeed, such notations occupy the rest of page 9 and some of page 10. Ms. MacGillivary's 0115 entry on p.9 may have been done simply to show a carry-over of the nursing notes from p.8.

[81] Calling Ms. MacGillivary as its own witness may have deprived Crown of the opportunity to explore some of these areas by challenging her more rigorously. As a general rule, a party cannot cross-examine its own witness. Left unclear in my view of the evidence is just when Ms. MacGillivary's notes were made. The testimony of Rachael Buick suggests they may have been made when the defendant and Ms. MacGillivary were sitting side by side at 0430. However, each had other patients whose charts required completion. Indeed, the defendant testified that she was doing charging for her other patients before confronted by Ms. MacGillivary's profession that she "did not know what to do". It thus seems possible on the evidence that p.9 of Ex#2 was created because the defendant knew that further notation would be needed – more than could be written on the remainder of p.8 – and the 0115 note was replicated

on p.9 for continuity of the record. However, this alone would not suggest that the defendant coached Ms. MacGillivary to make a false entry there.

[82] Ms. MacGillivary had the opportunity to make entries on Ex#2 (above) during the time that the defendant was in the ER. There is no direct evidence from anyone that she did, but it is clear that the defendant took the binder to the ER, leaving Colin MacDonald's 4-page file (pages 5 to 8 of Ex#2) on the clipboard at the nursing station. At this point, all staff had a strong fear that the person found unresponsive outside on the walkway was Colin MacDonald, their missing patient. Ms. MacGillivary testified that she "just gave her (the defendant) my last written statements that were on the chart and she took over." It is distinctly possible on the evidence that the defendant took the 0115 and other entries on Mr. MacDonald's chart at face value and had no role in creating them. The defendant did say to staff just after they finished their search of the unit that she had seen someone in there around 0330. Even if this planted a seed of deceit in Ms. MacGillivary's mind, it is not shown that this was TCW's intention.

[83] It would be perfectly proper for the defendant to encourage Ms. MacGillivary to complete her charting for Colin MacDonald, and indeed for all her patients. Providing advice or emotional support is not criminal. Similarly, Simon MacDonald did nothing wrong to say that all staff had to "get their ducks in a row" when they realized one of their patients had slipped away. An exhortation to make full and complete notes is not a suggestion to lie.

[84] Various witnesses spoke of Ms. MacGillivary's state of shock, her inability to speak. She herself testified that she did not know what to do. Yet she was able to finish her shift, to function. She was not incapacitated. No other patient records were adduced into evidence, but she had five other patients whose charts would have to be completed and updated by the end of the shift. I cannot conclude that she was incapable of making the entries noted in par.25 , even after the bad news arrived around 0400.

[85] In the questioning of the defendant there was some attention to her charting of Roy Garland's whereabouts in and around 0100. She said Mr. Garland went to the washroom at about 0015 but when she checked his bed around 0115 he was not there. She searched for him around the unit, did not find him, returned to his room and found him lying in his bed. Her chart shows

Mr. Garland resting in bed at 0030 but the rest of these details are not noted. This raises a suspicion that she is attempting to provide cover for Ms. MacGillivary's 0115 entry concerning Colin MacDonald, i.e. to support the theory that Mr. Garland could have been in 4147(1) at that time. Similarly, her note of 0415 has Roy Garland "in and out of patients rooms". This also begs consideration of a planned attempt to bolster Ms. MacGillivary's evidence. That said, the evidence is not sufficiently compelling to conclude that this was the defendant's intent.

[86] As I will discuss later, Valerie MacGillivary's entries, taken as a whole, appear very suspect. However, even if one assumes these entries are fabricated, they do not serve to incriminate the defendant unless there is also proof that she actively assisted or encouraged in making these falsehoods, formed a plan in advance with Valerie MacGillivary to falsify the records, or was somehow influenced by Ms. MacGillivary's entries to add her own small piece to an existing pattern of deceit. The evidence, taken as a whole, does not demonstrate that the defendant knowingly participated in any false record-keeping by Ms. MacGillivary, nor that they planned to deceive administrators about bed checks performed on Colin MacDonald, nor that Valerie MacGillivary's entries had any influence on the defendant's.

The possibility of misidentification – the 'wandering patient'

[87] Defence argues that the Crown has not proven the requisite *mens rea*. It posits that the evidence at trial fails to prove fraudulent intent, an essential element of the crime of which the defendant is charged. It says that the evidence adduced at trial from both Crown and Defence witnesses gives rise to a real possibility that the defendant made an honest mistake. It suggests that the circumstances of another patient on Unit 4C, Roy Garland, make plausible a scenario in which he, not Colin MacDonald, was in bed 4147(1) at 0315.

[88] This theory – a term which I use only to encapsulate the idea, not to suggest an onus of proof – requires the occurrence of two rather unusual things: (1) that a patient who has left his own 4-bed room returns to a 2-bed room by mistake, finds an empty bed, crawls in and draws the blanket and (2) a nurse familiar with this patient, doing a cursory nighttime check, does not realize that this has occurred.

[89] There is evidence from a number of witnesses that they have known "wandering patients" to attempt, successfully or unsuccessfully, to get into the wrong bed. If the theory was only this general proposition it would have little bearing on the court's deliberation, but the theory does find some purchase in the evidence. It focuses on Roy Garland, whose behavior on the unit and proximity to bed 4147(1) make him a candidate for the person mistakenly identified as Colin MacDonald.

[90] I have discussed above how guilt via "party" might operate, and I have concluded that there is insufficient evidence to find the defendant culpable in this sense. That discussion took the Crown's perspective. However, both parties propose that I should look at all the suspicious entries, both those of Valerie MacGillivary and the one made by the defendant, when I evaluate the case from the Defence perspective.

[91] Defence argued forcefully for the credibility of Valerie MacGillivary, who claimed that there was a patient in bed 4147(1) when she did her various checks. Defence seems to suggest that she should be believed, thus supporting the idea that Ms. Carrigan-Warner made an honest mistake.

[92] One party's 'mistake' is the other party's 'falsehood'. Crown points to the extreme unlikelihood that all the foregoing entries, taken as a set, could be true. It seeks to rebut the Defence theory by reference to these very same observations of Ms. MacGillivary's. Crown seems to argue that that apparent falsehoods of Ms. MacGillivary should impact on the credibility of the defendant.

[93] The significance both parties attribute to Valerie MacGillivary's notes requires that I examine them, even though she is not on trial here. I will do this from the perspective of Roy Garland. He was a patient of the defendant's and so I will utilize (1) Ms. Carrigan-Warner's charting of Mr. Garland for the midnight to 04:00 period, as found in Ex#7, (2) Valerie MacGillivary's charting of bed 4147(1) as found on Colin MacDonald's records in Ex#2, and (3) testimony received at trial from both of them.

[94] I should explain that Roy Garland was not called as a witness at trial. While no longer in hospital his physical state made a personal court appearance problematic, and counsel understood that he would have no memory of the events of that night. Ex#7 was shown to be his complete record for that shift and was received in evidence by agreement of the parties. Little more would be gained from having him testify in person.

[95] Viewed through the lens of the Defence theory, and taking the notes of Valerie MacGillivary and Ms. Carrigan-Warner at face value for the purpose of analysis, it would thus seem that Roy Garland moved between his room, 4150, and CMD's empty bed, 4147(1), as follows:

- 00:15 – in his room - went to washroom – per defendant's testimony
- 0030 – in his bed, "resting quietly" - per Ex#7 p.8
- 0045 – in 4147(1), "resting comfortably" – per Ex#2 p.8
- 0100 – in his room – per Ex#7 p.5 and 6 *(p.6 of flow chart notes "C" for chair)*
- 0115 – in 4147(1) "resting comfortably" per Ex#2 p.8 and 9
- 0115 – Roy Garland wandering on ward – per defendant's testimony
- 0125 – (0115 plus 10 minutes) – in his room – per defendant's testimony
- 0200 – in his room - per defendant's testimony that hourly checks done even if not noted
- 0200 – in 4147(1) per Ex#2 p.5 and 6
- 0300 – in his bed - Ex#7 p.5 and 6
- 0300 - in 4147(1) – Ex#2 p.5 and 6
- 0315 – in Rm.4147(1) – Ex#2 p.9
- 0400 – either wandering or back in his own bed, because defendant's bed determined to be empty @ this time
- 0415 – wandering around unit, settled back in bed (per Ex#7 p.8)

[96] Before discussing what this suggests about Mr. Garland's movements, some preliminary observations are in order. There is evidence that "C" for "chair" does not necessarily mean the patient was sitting, however it is reasonable to conclude that the notation reflects the fact the patient was at least in the room, because "rounding" was also done.

[97] The defendant testified that Mr. Garland "was wandering on the unit" at 0115. This may indicate only that he was not in his bed; it is not inconsistent with Ms. MacGillivary's note that someone, presumably Mr. Garland, was in bed 4147(1) at about the same time.

[98] I am also mindful of the fact that the times in such notes are often approximate, given that clocks are not synchronized and charting is usually done later. Thus, theoretically, the observations of 0300 – one putting Roy Garland in bed 4150(4) and another in 4147(1) – do not necessarily suggest that he was in two places at once; he may have moved between beds at or about that time.

[99] Adopting this view of the evidence, as applied to the theory of the Defence, it appears Roy Garland must have moved from his own bed to Colin MacDonald's bed and back again once between 0015 and 0100, once again between 0100 and 0125, once again around 0200, and once again around 0300 (presumably having vacated bed 4147(1) before the search for Colin MacDonald was undertaken). On this view, Roy Garland changed beds four times in less than four hours and was never once seen doing so. I say this on the assumption that none of the staff would have knowingly allowed a patient to occupy the wrong bed. The possibility of Roy Garland going back and forth like this between 4150(4) and 4147(1) seems extremely remote, which in turn creates serious misgivings about Valerie MacGillivary's testimony. Crown has described this elaborate choreography as "playing musical beds".

[100] The more times something so unusual is supposed to have occurred, the less likely it actually did. It is more plausible to suggest that a strange occurrence happened once than to suggest it happened four times (or three, or two).

[101] Viewed in this way, Ms. MacGillivary's evidence does not support the veracity of the defendant's 0315 entry and the theory of the Defence. On the other hand, neither does Ms. MacGillivary's evidence diminish the likelihood that on one occasion, at or about 0315, RG wandered out of his room and returned to the wrong bed. The entries of Ms. MacGillivary, however suspicious they may seem, do not undermine the Defence theory, either.

<u>The 0315 bed check</u>

[102] I am left to consider the possibility that Roy Garland on one occasion wandered into the wrong bed and pulled up the covers, that a short time later, at 0315, the defendant made a casual observation of bed 4147(1), and that the defendant honestly assumed that the person she

observed from the foot of the bed was the person who was supposed to be there, Colin MacDonald.

[103] As with the "wandering patient" idea discussed above, evidence supports the Defence in some senses, the Crown in others.

[104] The accused testified that at approximately 0315 she responded to a patient in room 4147 bed 2 who rang his buzzer, requesting a drink. She delivered this to the patient and then walked to bed number 1 on that room "to see if he needed anything". She spent only a few seconds there. She said the room was dark, but that she could see somebody in the bed, lying on his right side, eyes closed, blanket pulled up to eye level. Some light was coming from the "crack" in the bathroom door.

[105] She was cross-examined quite rigorously by the Crown. She maintained that she could see the person's chest going up and down. She could not tell whether the person was lying underneath more than the one blanket. She picked out from photographs taken the next day which of the blankets in the room she saw. She described her vantage point as "the foot of the bed" and did so by reference to photos of the room, bed curtain and adjoining bathroom. She told the Crown that she did this cursory check because she "wanted to make sure everyone was where they were supposed to be."

[106] I have the benefit of photographic and verbal depictions of Room 4147, of the position of the two beds in that room, the curtain between them, and the location of the bathroom door. The defendant said she viewed the patient in such a way as to not disturb his sleep. She said nurses would only "directly id" a patient if they were going to do a procedure.

[107] It is important to note that I have nothing but the testimony of the various witnesses by which to assess the likelihood of hospital patients getting into the wrong bed – Mary Saltzman, Amy Susin, and Simon MacDonald all acknowledged that this has happened. There is no statistical or expert evidence about the frequency of such occurrence, nor about the possibility of mistaking one patient for another. In other words, there is no statistical or expert evidence about the frequency of observational errors in hospitals. Courts must apply common sense to the

evidence they hear, but I have no special insights nor actual experience in this setting. I have no photographs or comparison of the facial appearances of Colin MacDonald and Roy Garland, although both were elderly gentlemen and some similarities may be assumed. The defendant said the hair on the person she saw in 4147(1) at 0315 was short and grey. Simon MacDonald gave a brief comparison of the stature of each, but this is not particularly helpful.

[108] With respect to the defendant's purported bed-check of 4147(1) at 0315, some other comments are in order. Just after staff learned that Mr. MacDonald was missing, while questions were going around about who may have seen him, Rachael Buick offered the fact that she had gone to that room - though not to Mr. MacDonald's bed which was behind the curtain - to deliver a blanket to the patient in bed 4147(2). One wonders whether this may have given the defendant the idea to use something similar as a pretext for faking a check on bed 4147(1).

[109] Ms. MacGillivary testified that a nurse would "automatically" check on the status of other patients, whatever reason the nurse had for entering the room. On the other hand, Ms. Buick saw no need to do this, and Ms. MacGillivary may be harbouring bias in favour of the defendant. It seems to me that the likelihood the defendant performed this 0315 bed-check is diminished by the fact that the person in bed 4147(1) was not a patient of hers. She could assume that the patient in that bed had been checked within the hour by the responsible nurse. The person did not ring an alarm or call out for any assistance when and if the defendant was bringing a glass of water to the patient in bed 4147(2). As Crown rightly suggests, the bed-check seems gratuitous and, amid concern of a cover-up, looks suspiciously convenient.

[110] The bed rails were up on at least one if not both beds – 4150(4) and 4147(1). This makes it somewhat less likely that the occupant would get out of bed, although the evidence indicates that this would not prevent patients as mobile as Colin MacDonald and Mr. Garland from doing so.

[111] As the unit was full, the Defence theory requires that Roy Garland mistakenly found the one and only empty bed on the unit. On the other hand, rooms 4150 and 4147 are just 5 to 7 meters apart.

[112] Mr. Garland was a patient of the defendant's; she was familiar with his appearance and had seen him lying in his own bed. This makes it less likely that she would mistake him for someone else.

[113] As noted above, the defendant responded to a question about why she would bother to make a check of bed 4147(1) with this rationale: "I wanted to make sure everyone was where they were supposed to be." This is odd wording, given subsequent events, given the allegations, given the concern that someone was insufficiently concerned about ensuring that patients were where they were supposed to be. It raises concerns about her veracity.

[114] The Crown's theory supposes that this check didn't occur at all. However, one wonders why, if the defendant decided to make a false entry about a fictitious visit, she would choose 0315 as the time, not knowing when Mr. MacDonald had actually left the unit. She'd have known then that Ms. Saltzman and Ms. Susin had seen Colin MacDonald on the ground outside before 0400. Why would she claim to have seen him in 4147(1) such a short time before that? Would it not have occurred to her that he might have been out there for a much longer period, as indeed the sad facts of the case now confirm? Might this not have been discoverable either through security cameras, or possibly by medical autopsy-like examination? Would she not think of this?

[115] The 0315 note concludes with the phrase "will monitor". Why would the defendant write this in when she was not the responsible nurse? On the other hand, she seemed to use the phrase liberally, perhaps even as a matter of habit, as evidenced from other notes she made on Roy Garland's chart.

[116] In one part of its cross-examination of the defendant, Crown queried her on her statement that she had seen "someone" in the bed when, shortly afterwards when she made 0315 entry she chose to write "patient". *If* this was meant to suggest that the defendant *did* see Roy Garland in 4147(1), *recognized* him as Roy Garland, but later tried to make it appear that the person was Colin MacDonald, the idea holds little water. On the evidence I do not think any of the staff would knowingly have left a patient in the wrong bed.

[117] As of 0430, the defendant may well have harboured uncertainty about her earlier observation, because by this time all staff knew that Mr. MacDonald had left the Unit at some earlier time. This may have shaken her assumption that it was Mr. MacDonald she'd seen in the bed. She may thus have said "someone" in conversation, yet in charting her observation, reverted to her earlier-held assumption that it was Mr. MacDonald. On the evidence it seems possible she may have charted the check in the way that she understood it at the time, at 0315, rather than as she viewed it later, at 0430, and considered that this was the proper and more accurate way to do it.

[118] The use of "patient" at the time she entered the 0315 note does not clearly suggest a deliberate attempt to deceive. Crown asked: why she did not use an indefinite preposition and write "*a* patient"? Would she not be questioning in her own mind whether her earlier observation was correct? Would she not write a note that was consistent with her earlier use of the word "someone"? After careful consideration, I do not attribute the significance to this that Crown argues for. Her choice of word could be a matter of ingrained habit, or be intended to reflect, in her notes, what she believed at the time (0315) rather than the uncertainties that had crept in by 0430.

[119] Crown also cross-examined the defendant as to why she would make the 0315 entry on Mr. MacDonald's chart, yet not make any note of bringing the glass of water on the chart for the person in 4147(2). The defendant said the latter was too insignificant to mention. If so, why chart such the casual observation she made of bed 4147(1)? A reasonable explanation lies in the fact that the defendant "took over" charting for Mr. MacDonald but not for Ms. MacGillivary's other patient in 4147(2) nor her other patients elsewhere. The defendant testified that if Colin MacDonald had not died she "would not have charted there at all." This accords with the defendant's version of events: something trivial had just assumed much greater importance, and had to be recorded.

<u>Ms. Carrigan-Warner's testimony generally</u>

[120] While not obliged to testify, the defendant took the stand in her own defence. She answered questions directly and succinctly. Crown argues that she seemed evasive in one or two

key places, but I did not perceive her answers or demeanour in such a damaging way. By and large she gave credible responses to difficult questions. She presented as being very knowledgeable of nursing practice and procedure. She articulated her thoughts very well. She exhibited good recall of the events and testified in a very matter-of-fact manner without obvious evasion or exaggeration. She firmly asserted that she saw someone lying in 4147(1) at 0315 and believed it to be Colin MacDonald.

[121] At par.111 of its brief, in discussing the defendant's credibility, Crown says it has "the same concerns", i.e. misgivings, regarding the "wandering patient theory". It says this theory defies logic. It suggests that concerns with Ms. MacGillivary's credibility spill over onto the defendant. Whatever the merits of this argument as it relates to Ms. MacGillivary, this does not impact on the credibility of the defendant. Absent a clear indication of collusion, the improbability of a series of unlikely events does not inform the improbability of one such event.

Conclusion

[122] It seems odd that one patient would crawl into another patient's bed, in a room not his own. It seems unlikely that a nurse familiar with this patient would mistake him for a different patient on the same Unit. It seems unusual that Ms. Carrigan-Warner would make a bed-check for a patient she was not assigned to, and for no particular reason. At the same time the possibility of an honest mistake has a foothold in the evidence. Proof beyond a reasonable doubt is a high bar to meet. In this case, I am left with some reasonable doubt about the defendant's guilt.

[123] The entry on the court's record will be "not guilty".

Dated at Sydney, N.S. this 12th day of May, 2020.

_____

A. Peter Ross, PCJ