LEGAL EAGLE EYE NEWSLETTER

April 2004 *For the Nursing Profession* Volume 12 Number 4

Patient Wanders To Roof, Falls To Death: Court Holds Medical Facility Responsible.

The eighty-two year-old patient was in the hospital for pneumonia. He had been in the hospital more than a week.

His nurses knew he was short of breath and needed supplemental oxygen. However, he was able to walk without assistance and was for the most part alert and oriented.

The last morning of his life a staff nurse assisted him to the bathroom. While doing so she observed that he was able to walk on his own and bear his full weight on his own legs.

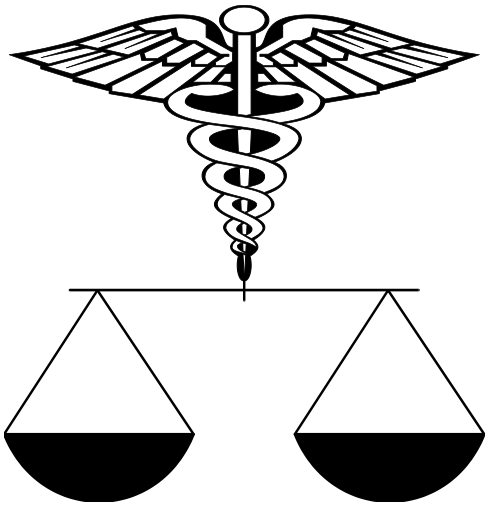
He was not depressed and had verbalized no expression of suicidal intent. At the same time he was concerned he might have leukemia despite medical testing that was negative.

Starting at 8:00 a.m. a nurse gave him a breathing treatment, cough medicine and IV antibiotics. His IV was completed at 10:30.

Twenty-five minutes later a radiology tech told his nurse he was not in his room and could not be located.

Patient Dressed Himself Wandered From His Room

The patient dressed himself apparently believing it was time for him to go home. As he was leaving he got lost in the maze of hospital corridors, went through a door on to the roof and could not figure out how to get back into the building.



A medical facility caring for the elderly must anticipate they will wander unattended from their rooms.

While wandering to places unintended for them to go they can become confused, even panicked, and make ill-advised, unsafe decisions.

Signs and warning alarms are a must wherever an elderly patient might go.

COURT OF APPEAL OF LOUISIANA
March 19, 2004

He sat on the roof ledge and waited for help. He turned around when he believed someone had come out to help him, but lost his balance and fell four stories to his death.

Medical Facility Faulted

According to the Court of Appeal of Louisiana, a medical facility caring for elderly persons must anticipate just this sort of tragic event.

The hallways to the main exit doors several floors below had no signs marking them as access to the outside.

The door to the roof was not signed as a restricted area. There was no alarm to alert staff that someone, probably a patient, had wandered through the door onto the roof. The door, once allowed to close, locked and could not be re-opened from the roof.

The point of the court's ruling was that a medical facility has a legal duty to anticipate that any location in its maze of hallways where an elderly person can become lost, trapped, confused and panicked can be a deadly trap. Even an alert, oriented elderly person can become disoriented and wander into dangerous territory with no mental defense against serious injury. **Thomas v. Sisters of Charity, __ So. 2d __, 2004 WL 541111 (La. App., March 19, 2004).**

Inside this month's issue ...

April 2004

Child Abuse: Nurse Upheld For Reporting Physician Who Treated His Own Child.

An emergency room nurse was sued by a physician (podiatrist) for reporting the physician to child protective services after the physician elected to treat his own six year-old child for a finger laceration instead of taking the child immediately to a hospital emergency room.

The nurse believed the one-day delay in seeking emergency medical care for the child fit the definition of child abuse. In general terms a parent or other custodian who denies or delays proper medical care for a child is by law considered to have committed child abuse.

After consulting with her nursing supervisor and the emergency room physician on duty, the nurse reported the parent/physician to child protective services.

Child protective services determined the allegations of abuse were unfounded and dropped the investigation. The parent/physician sued the nurse for defamation. The New York Supreme Court, Appellate Division, dismissed the suit, finding no bad faith on the part of the nurse.

Mandatory Reporting

The court pointed out that healthcare providers such as emergency room nurses have no discretion whether or not to file a report when they believe child abuse has occurred. They face sanctions and possible civil liability for failing to report.

Legal Immunity From Civil Liability

The other side of the coin is that healthcare professionals with a mandatory duty to report child abuse cannot be sued successfully in civil court unless they are guilty of willful misconduct or gross negligence in making a report.

The nurse in this case had a good-faith belief that the child had been abused by being denied prompt and proper medical care, even under the unusual circumstance that it was a physician's child. The nurse could not be held to answer in a civil lawsuit. **Lentini v. Page, 2004 N.Y. Slip Op. 01649, 2004 WL 438973 (N.Y. App., March 11, 2004).**

Child protective services investigated and found "no credible evidence" to support the nurse's charges.

The parent/physician sued the nurse. The only relevant issue in his lawsuit is the nurse's good faith.

The adequacy of the parent/physician's treatment of his child is not the issue.

Other physicians' expert medical opinions are irrelevant. A plastic surgeon who later treated the child stated that the parent/physician's initial treatment was perfectly appropriate. Even if that is true it is beside the point.

The radiologist on call for the E.R. at the hospital stated the parent/physician had rendered proper care. That is likewise irrelevant.

The nurse was fulfilling her mandatory legal duty. Genuinely believing a parent had denied a child proper medical care, the nurse had a mandatory legal duty to file a report.

The nurse is entitled to legal immunity from this lawsuit. The parent/physician has shown no proof the nurse acted in bad faith.

NEW YORK SUPREME COURT
APPELLATE DIVISION
March 11, 2004

Fluid Intake: Nurses Must Monitor, Record Carefully Before Surgery.

The patient was admitted to the hospital for abdominal pain with exploratory abdominal surgery scheduled ahead two days later.

On the operating table, prior to administration of general anesthesia, the patient vomited into her oxygen mask. The mask and her airway were cleared and the surgery went ahead.

After surgery, however, the patient was unable to resume breathing on her own. She died two weeks later from aspiration pneumonia. The family sued.

The physicians elected not to order restriction of oral fluids prior to surgery.

The patient's nurses had a strict duty to record carefully the precise quantity of fluids the patient was consuming prior to surgery.

NEW YORK SUPREME COURT
APPELLATE DIVISION
March 11, 2004

The family's lawsuit faulted all the physicians involved in the patient's care as well as the hospital's staff nurses.

The New York Supreme Court, Appellate Division, agreed the hospital's staff nurses, knowing two days ahead of time that the patient would be having surgery under general anesthesia, should have carefully recorded the precise quantities of fluids the patient was drinking.

However, the physicians went ahead knowing the patient was not NPO. According to the court, any possible error or omission by the nurses prior to that point in time was not the legal cause of harm to the patient. **Postlethwaite v. United Health Services Hospitals, Inc., 2004 N.Y. Slip Op. 01637, 2004 WL 438724 (N.Y. App., March 11, 2004).**

Deceased's Remains: Nurse Tried To Contact Family, Then Called The Coroner. Court Rules Family Member Has No Right To Sue.

The daughter of the deceased had little contact with her mother.

While her mother was living in a nursing home the daughter provided the nursing home with information about her mother's burial insurance and gave instructions to send her body to a particular funeral home when she died.

Six months later the daughter contacted the nursing home with her new address.

Five months after that the daughter went to visit her mother in the hospital She gave a nurse at the hospital a new address and phone number which the nurse noted in the patient's chart.

There was no further contact between daughter and mother before the mother passed away in the hospital nine months later from congestive heart failure.

A nurse tried to contact the daughter at the address and phone number in the chart, but it turned out it was actually an old address and phone number.

The nurse called the nursing home and obtained another number, which turned out to be disconnected. The hospital notified the coroner's office, as required by law when the next of kin cannot be located.

The patient was admitted to the hospital at the request of the nursing home where she resided.

The hospital had no relationship with the daughter of the deceased and had no obligation to the daughter with regard to the remains.

Without a direct relationship with the daughter the hospital could not be held liable to the daughter for emotional distress.

The family has a limited legal interest in the remains of the deceased, that is, the family has the right to take possession to see that the remains are taken care of in an appropriate manner.

However, when the next of kin cannot be found, by law the coroner must be notified and the coroner must take possession and dispose of the remains.

CALIFORNIA COURT OF APPEAL
December 11, 2003

The coroner took custody and had the body cremated.

When the daughter found out, she sued the hospital for infliction of emotional distress. The California Court of Appeal dismissed the lawsuit.

No Legal Relationship Between Daughter and Hospital

The court ruled there was no legal relationship between the daughter and the hospital, as the deceased had been admitted by the nursing home and was being cared for on behalf of the nursing home.

The hospital had no legal obligation to attempt to contact the daughter and no legal liability for not doing so.

Nurse Carried Out Legal Duties

Nevertheless, the court ruled the nurse did everything that would have been required even if the daughter had admitted the patient. A nurse tried to contact her using the information she provided.

According to the court, a healthcare provider with custody of a patient's remains has no legal obligation to conduct an exhaustive investigation to locate the whereabouts of a deceased patient's family members who have to all intents and purposes abandoned the patient in the provider's care.

The family at most only has the right to see that appropriate measures are made for a funeral, burial or cremation, and cannot sue for damages. **Spates v. Dameron Hosp., 7 Cal. Rptr. 3d 597, 2003 WL 2292454 (Cal. App., December 11, 2003).**

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Discrimination, Retaliation: Filipino Nurse's Case Upheld.

The Court of Appeals of Michigan ruled it was wrong for the county circuit court to dismiss a Filipino nurse's discrimination case against the hospital where she had worked.

However, each of the judges or the Court of Appeals expressed different legal rationales for the Court's decision and the opinion has been officially designated as unpublished.

Pattern of Differential Treatment Presumption of Discrimination

The starting point was to look at the history of staff nurse relations at the hospital. After a change in official policy the hospital gratuitously continued orienting Caucasian staff nurses to the duties expected of charge nurses but did not orient any Filipino staff nurses and expressly turned down requests from the nurse in question to participate in such orientation.

Any differential treatment of minority employees can be seen after the fact as discriminatory. The employer may be required to produce a legitimate, non-discriminatory explanation or such actions will be presumed discriminatory.

In this case all the judges agreed there was an underlying pattern of discrimination. The hospital said that high patient censuses meant it had to curtail excusing staff nurses from their staff-nurse duties for charge-nurse orientation. However, that did not in any way account for the fact that Caucasian nurses still were being oriented as staff nurses while Filipino nurses were not. Racial discrimination was the only plausible explanation.

Retaliation

An employer cannot retaliate against an employee who files a civil rights complaint. The issue was whether retaliation was the motive for scrutinizing the Filipino nurse's nursing skills more closely after she complained compared to before.

In a climate of discrimination, retaliation will be seen as the more likely explanation, giving further ammunition to a minority employee's discrimination case. **Navarro v. Hutzel Hosp., 2004 WL 345387 (Mich. App., February 24, 2004).**

The hospital had had a policy of routinely orienting qualified staff nurses to the charge nurse position, then officially dropped that policy on the grounds that high patient censuses made it impractical to excuse staff nurses from their staff-nursing duties.

But then the hospital continued to orient some staff nurses to the duties of the charge nurse position even after the hospital's official policy had changed.

The hospital oriented a number of Caucasian nurses to the staff nurse position, did not orient any Filipino nurses and turned down an express request from one Filipino nurse for charge-nurse orientation, citing patient censuses.

After the Filipino nurse complained to the Equal Employment Opportunity Commission her nursing skills were more closely scrutinized than any time during the previous eleven years.

With the pattern of racial discrimination and underlying climate of prejudice, there was probably retaliatory intent behind the way the nurse was treated.

COURT OF APPEALS OF MICHIGAN
UNPUBLISHED OPINION
February 24, 2004

Disability Discrimination: Restriction On Lifting Is Not A Disability.

A staff nurse filed suit for disability discrimination against the hospital where he was employed.

The Federal District Court in New York dismissed his case as invalid on its face. He stated in his lawsuit papers that he had a lifting restriction for which his employer refused to offer reasonable accommodation by finding him a staff nurse position which involved no patient lifting.

A disability is a physical or mental impairment that substantially limits one or more of the major life activities of the individual.

A lifting restriction is not a disability within the meaning of the Americans With Disabilities Act.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
February 12, 2004

The US Circuit Court of Appeals for the Second Circuit likewise did not have to look beyond the allegations contained in the nurse's lawsuit, to rule in favor of the hospital.

To be entitled to reasonable accommodation an employee or applicant must have a disability.

Inability to lift is not a disability under the Americans With Disabilities Act. There is no right to reasonable accommodation for an inability to lift.

The hospital also argued that lifting was an essential function of a staff nurse's position but that was not necessary to go into that for the court to reach a decision. **Taylor v. Lenox Hill Hosp., 87 Fed. Appx. 786, 2004 WL 287171 (2nd Cir., February 12, 2004).**

Gender Discrimination: Court Weighs Female Patients' Right To Privacy vs. Male Nurses' Right To Equal Employment Opportunity.

A male nurse sued a hospital which declined to offer him employment as a staff nurse in its obstetrical department.

For its ruling the Supreme Court of Appeals of West Virginia researched all the recent pertinent US state and Federal court decisions.

In a nutshell the courts are saying that a blanket prohibition against hiring males for jobs involving intimate personal care of female patients is discriminatory.

However, healthcare employers can hire female staff preferentially on the basis of gender to care for female patients who actually express a preference for female caregivers giving intimate personal care.

Gender Was the Only Issue

The court looked at the nurse's qualifications at the time he was turned down for the position in obstetrics:

He had been an RN more than nine years. He had held various staff nursing positions at a number of hospitals, some of which involved obstetrical duties. At one hospital he had worked in the delivery room with deliveries of infants he would then care for in the intensive care nursery. He had been trained on the job at another hospital to work in three distinct areas of the hospital's obstetrical service, labor and delivery, postpartum and nursery. He worked part-time for a home health agency that hired him to do post-partum mother/child visits, but actually focused on in-home care of geriatric patients.

The hospital flat-out stated it simply would not consider a male nurse for obstetrics, citing concerns for patient privacy, staffing and quality of care.

Courts Uphold Patients' Right To Personal Privacy

US court cases state uniformly that patients have the right to ask for and receive care from a same-gender caregiver, but only in intimate personal-care situations. A facility faces liability in a patient's lawsuit for denying such a request.

It is unlawful to discriminate on the basis of gender unless the employer can show that gender is a bona fide occupational qualification for the job in question.

The US Supreme Court has ruled it is indeed a rare instance where gender will be a bona fide occupational qualification for any form of employment.

However, one such rare instance is a healthcare facility's obligation to protect the personal privacy rights of patients. Gender can be a bona fide occupational qualification for caregivers, if three conditions are met:

1. Not hiring patient care workers of one sex exclusively would undermine the essence of the business operation;

2. All or substantially all the members of a particular sex would be unable to perform the job duties of the job in question;

3. It is not feasible to assign job responsibilities in a selective manner to satisfy patients' privacy interests and the legal principle of equal employment opportunity.

SUPREME COURT OF APPEALS OF WEST VIRGINIA
February 19, 2004

Patients cannot object to caregivers on the basis of gender when intimate personal privacy is not an issue, like when being given oral meds, having a bed made or being ambulated.

Blanket Prohibition Against Male Nurses Ruled Discriminatory

The hospital's obstetrics nurse manager gave an affidavit setting out the hospital's policy. She went over the obvious facts that all obstetric patients are females and that obstetric care necessarily involves viewing, touching and performing care to the patients' vaginal and perineal areas.

The obstetric nurse manager went on to say, *"In my personal experience with male student nurses in the obstetrics department, approximately 80% of patients objected to having a male nurse."*

The court found fault with that statement. It was not a valid a basis for an all-female policy for obstetrics staff nurses.

Hospital Must Try To Accommodate Patients' Privacy and Equal Employment Opportunity

A patient cannot be forced to accept an opposite-gender caregiver for care involving intimate personal-privacy.

However, it is also wrong for a healthcare facility to have a policy across the board that all female patients will object to a male caregiver.

Healthcare facilities can accommodate patients' expressed wishes for same-gender caregivers for intimate personal care. As needed to care for such patients a facility can preferentially hire one gender over the other on the basis of gender alone without committing discrimination.

However, a facility must offer non-discriminatory employment opportunities to opposite-gender caregivers for patients who do not object. To care for obstetric patients who do not object to a male nurse, male nurses must be considered for employment without regard to gender. **Slivka v. Camden-Clark Memorial Hosp., __ S.E. 2d __, 93 Fair Empl. Prac. Cas. (BNA) 471, 2004 WL 323199 (W. Va., February 19, 2004).**

Sexual Assault In Long Term Care: Court Discusses Nursing Home's Liability.

A woman was admitted to a nursing home with head injuries from a motor vehicle accident that left her in a persistent vegetative state. She is not able to talk or otherwise communicate, not able to feed herself, not able to breathe on her own, not able to perform any activities of daily living and is totally dependent upon the care given her by the nursing home.

The resident was sexually assaulted in her room by her brother-in-law. A nursing home employee caught him in the act and chased him away. The brother-in-law was later arrested and convicted and is now serving a lengthy prison sentence.

Resident To Get Her Day In Court

The Court of Appeals of Kentucky ruled the local county court judge was in error to dismiss the civil lawsuit filed against the nursing home by the family on the resident's behalf.

The common law rule does not apply in this situation that generally absolves every person from consequences of other parties' criminal acts.

A jury will be allowed to decide whether or not reasonable steps were taken for the resident's protection.

Duty to Screen Visitors
Duty to Monitor Visitation

The Court of Appeals ruled that nursing homes have a duty to screen visitors. Visitors must identify themselves. People cannot be allowed just to walk in.

Any visitor who the nursing home has reason to anticipate may harm a resident cannot be allowed in to see a resident.

Nursing homes also have the duty to monitor visitation to see that no harm occurs even after screening visitors to determine which visitors can be allowed in.

That being said, however, it is not at all clear that the nursing home would have had any reason to bar the brother-in-law or that his visit was not monitored closely enough by the staff. A jury will have to decide that. **Murphy v. EPI Corp., 2004 WL 405754 (Ky. App., March 5, 2004).**

Ordinarily no one is responsible for the consequences of another person's criminal acts.

That is, ordinarily no one has any legal duty to prevent another person from committing a crime.

Having no duty to prevent a criminal act, no one is ordinarily liable to pay civil damages to another party for the harm done in a criminal act committed by another person.

A major exception to the ordinary rule exists for institutions like hospitals, nursing homes, day care centers, etc., that exist for the sole purpose of caring for vulnerable persons who are unable to care for and protect themselves.

A nursing home is responsible for the safety of its residents.

A nursing home must exercise what the law refers to as ordinary care to protect residents from harm, if the harm can reasonably be expected from third parties.

A nursing home resident harmed by a visitor can, in some cases, sue the nursing home for damages.

COURT OF APPEALS OF KENTUCKY
UNPUBLISHED OPINION
March 5, 2004

Nursing Home Liability: Court Upholds Arbitration.

A long-term care resident was badly injured when his caregivers placed him in a bathtub of water that was too hot.

The issue for the District Court of Appeal of Florida was not whether the nursing home was negligent, but how the resident would go about seeking and obtaining legal compensation.

The nursing home admission contract clearly spelled out that any claim against the nursing home related to the care received by the resident would be decided in arbitration and not in a civil-court jury trial. The court upheld arbitration as the only avenue of recourse for this resident, even though there were allegations of violation of state law for which state law allows a nursing home resident to sue.

Arbitration can be a method for healthcare facilities to avoid potential liability for large non-economic damages. **Five Points Health Care, Ltd. v. Alberts, __ So. 2d __, 2004 WL 350741 (Fla. App., February 26, 2004).**

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Medicare/Medicaid: New Data Collection Requirement For Skilled Nursing And Extended Care Nursing Facilities.

A letter dated October 10, 2002 from the US Centers for Medicare & Medicaid Services (CMS) to all nursing-facility administrators announced the requirement, effective January 1, 2003, that all skilled nursing facilities and nursing facilities compile, record and display a daily report of the nursing staff working in direct patient care in the facility.

The letter included a rough outline of a makeshift form recommended for compiling and displaying the required data.

On February 27, 2004 CMS announced proposed new regulations that, if adopted, will require use of CMS's official Daily Nurse Staffing Form on a per-shift basis in every nursing facility.

To Be Required Every Shift

Although the word "Daily" appears in the title of the form, it will be required at the end of each shift.

CMS says the new form should not be completed until the end of the shift, so that the form can accurately reflected the nursing staff who actually worked the shift or part of the shift, not the number who were scheduled for the shift or who reported at the beginning of the shift.

To Be Completed By A Designated Person

CMS expects every nursing facility to designate a specific person to have the responsibility to complete the information on the form.

However, CMS has not specified who must or should have this responsibility.

Only Direct Patient-Care Workers Are To Be Counted

CMS cautions that only staff who provide direct patient care may be counted on the form. A charge nurse is a direct patient care worker but the director of nursing is not, unless the director also serves as a charge nurse or does other direct care tasks.

FEDERAL REGISTER February 27, 2004
Pages 9282 – 9288

The US Centers for Medicare & Medicaid Services (CMS) has proposed new regulations to require use of CMS's official Daily Nurse Staffing Form for all skilled nursing facilities and nursing facilities to compile, record and display patient census and nurse-staffing data.

The new regulations are only a proposal and are not mandatory at this time.

(Any US Federal agency enacting new regulations must post the proposed new regulations in the Federal Register at least thirty days ahead of time and invite public comments.)

CMS will accept public comments until April 27, 2004 before announcing its decision regarding final, mandatory regulations.

Collecting, recording and posting of nursing staffing and patient-census data on a per-shift basis is not a new requirement.

What will be new will be the requirement for all nursing facilities to use the official Daily Nurse Staffing Form.

FEDERAL REGISTER February 27, 2004
Pages 9282 – 9288

PART 483--REQUIREMENTS FOR STATES AND LONG TERM CARE FACILITIES (New – Proposed 2/27/04).

Sec. 483.30 Nursing services.

* * * * *

(e) Posting of nurse staffing information.

(1) Information requirements. The facility must--

(i) On a daily basis, at the end of each shift, calculate the number of FTE(s) for the following licensed and unlicensed nursing staff directly responsible for resident care:

(A) Registered nurses.

(B) Licensed practical nurses or licensed vocational nurses (as defined under State law); and

(C) Certified nurse aides.

(ii) On a daily basis, determine or verify the resident census.

(2) Form use and posting requirements. The facility must on a daily basis--

(i) **Use the CMS-specified form (Daily Nurse Staffing Form) to enter the information specified in paragraph (e)(1) of this section;** and

(ii) Post the completed Daily Nurse Staffing Form in a prominent place readily accessible to residents and visitors.

(3) Public access and data retention requirements. The facility must--

(i) Upon request, make the Daily Nurse Staffing Form(s) available to the public;

(ii) Maintain the Daily Nurse Staffing Form(s) for a minimum of 3 years, or as required by State law, whichever is greater.

An example of the new Daily Nurse Staffing Form is on our website at http://www.nursinglaw.com/dnsf.pdf. The form and instructions are pages 6 and 7 of the PDF file for the February 27, 2004 announcement in the US Federal Register (Federal Register pages 9287-9288).

We assume CMS will mail out examples of the form.

CMS says the new Daily Nurse Staffing Form can be downloaded and printed from the CMS website at http://www.cms.hhs.gov, but we have not been able to find it on the CMS website apart from CMS's own link to the 2/27/04 announcement in the Federal Register.

LEGAL EAGLE EYE NEWSLETTER
For the Nursing Profession

Inconsistent Accounts: Nurse's Liability Nixed.

The dementia patient's daughter found a bruise over her mother's eye and complained to the nursing home's director of nursing and to the police.

The patient said she had been beaten up. The patient also said she fell and hurt herself.

The nurse on duty assigned to her care told the administrator she checked on the patient when she heard her cry out and did not see any facial bruising. The nurse told the police she never actually went to the room.

The nurse's conflicting accounts of what happened, in and themselves, were not enough evidence for the police to file criminal charges.

The Court of Appeal of Louisiana sympathetically acknowledged it was a very unfortunate set of circumstances for both sides.

However, standing alone, the nurse's conflicting statements were insufficient evidence to hold the nursing home liable for damages in a civil lawsuit. **Wallace v. Red River Center Corp., __ So. 2d __, 2004 WL 385006 (La. App., March 3, 2004).**

Adverse Drug Reaction: No Nursing Liability.

A patient came to the hospital's emergency room with a skin rash. A physician started an IV line in her right hand.

When the patient complained of nausea an LPN gave an unspecified dose of Phenergan through the IV line.

The patient felt a burning sensation in her hand and later developed a superficial phlebitis which resulted in a sclerotic vein that had to be removed surgically.

The patient sued the hospital for nursing negligence. The patient's attorney filed the affidavit of a registered nurse stating that the manner in which the E.R. nurse gave the Phenergan fell below the standard of care and had to have been what caused the sclerotic vein.

However, the Court of Appeals of Michigan, in an unpublished opinion, ruled that an adverse reaction, standing alone, does not prove a nurse was negligent. The case was dismissed. **Parker v. Mercy General Health Partners, 2004 WL 243359 (Mich. App., February 10, 2004).**

Sexual Assault: Psych Nurse's Consensual Relations With Former Patient Ruled Criminal.

A patient with a history of psychiatric illness admitted herself to a psychiatric hospital on the advice of her therapist who feared she might try to harm herself.

A licensed vocational nurse on the unit was assigned to dispense medications and to chart each patient's status. He gave this patient her meds on twelve occasions.

On four such occasions he took the opportunity to conduct what the Court of Appeals of Texas described as "in depth" conversations in which the patient revealed intimate details about her personal life.

Four days after discharge the nurse approached her outside her workplace and she invited him to her home, where consensual sexual relations took place.

A criminal sexual assault occurs when a mental health service provider causes a patient or former patient to submit by exploiting the other person's emotional dependency.

Consensual sexual relations in this circumstance are legally considered non-consensual.

Mental health service provider includes a nurse on a mental health unit.

COURT OF APPEALS OF TEXAS
UNPUBLISHED OPINION
March 11, 2004

The nurse was prosecuted and found guilty of sexual assault. The Court of Appeals of Texas upheld his conviction in an opinion not released for publication.

The law sees consenting sexual relations as non-consensual between mental health service providers, including nurses, and their patients or former patients and grounds for criminal sexual assault charges.

The law fears the potential for a mental health service provider to exploit a psychiatric patient's vulnerability and/or to misuse a dependency relationship for inappropriate ends. Actual exploitation does not have to be proven, only that the victim is or was a patient under the defendant's care. **Jones v. State, 2004 WL 438676 (Tex. App., March 11, 2004).**