LEGAL EAGLE EYE NEWSLETTER

For the Nursing Profession

April 2006 Volume 14 Number 4

Hospital Bed Entrapment: New Guidance From FDA.

On August 30, 2004 the FDA issued a guidance document in draft form entitled "Hospital Bed System Dimensional Guidance to Reduce Entrapment."

See *Entrapment: New Draft Guidance From FDA Re Hospital Bed Systems*, Legal Eagle Eye Newsletter for the Nursing Profession (12)10 p.8 (Oct., 2004).

On March 10, 2006 the FDA replaced the draft document with a finalized version entitled "Hospital Bed System Dimensional and Assessment Guidance to Reduce Entrapment."

The guidance document conveys the FDA's recommendations to manufacturers and to healthcare facilities which use hospital beds how to reduce life-threatening entrapments associated with hospital bed systems.

The guidance document characterizes the body parts at risk for entrapment, identifies the locations of hospital bed openings that are potential entrapment areas, recommends dimensional criteria for bed systems, provides information about so-called "legacy" beds (beds already manufactured and currently in use) and specifies information to include when reporting entrapment adverse events to the FDA.

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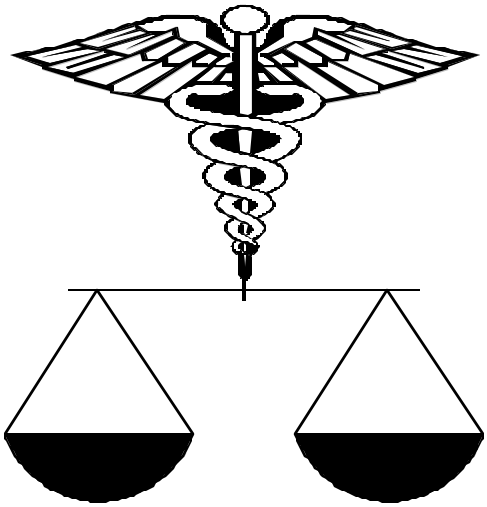

FDA guidance documents do not establish legally enforceable responsibilities.

Instead, guidance documents merely describe the FDA's current thinking on a certain topic and should be viewed only as recommendations unless the document makes reference to specific regulatory or statutory requirements.

FEDERAL REGISTER March 10, 2006
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Hospital Bed Strangulation, Positional Asphyxia: Case Raises Complex Legal Issues.

A nursing assistant discovered the nursing home resident at 2:00 a.m. in bed with his head trapped between the mattress and the side rail of his bed. His lower limbs were touching the floor next to the bed.

An LPN responded to the aide's call for help. She and a second aide were able to free the resident from his entrapment and reposition him on his bed, but he had died.

The director of nursing and the administrator were called to the facility. They made arrangements to contact the family and notified the coroner.

According to the Court of Appeals of Ohio, the director of nursing jotted down notes when she first spoke with the LPN, then crumpled up her notes and threw them in her desk drawer.

When first interviewed by the coroner the LPN stated the patient's airway was not blocked, then changed her story while talking to the coroner a week later.

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Hospital Bed Entrapment: FDA's Draft Recommendations Have Now Been Finalized.

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Visual Depiction of Entrapment

The older and newer guidances both contain a disturbing one-page graphic which dramatically conveys the patient entrapment risk associated with seven identified entrapment zones commonly associated with hospital beds:

1. Within the rail;
2. Under the rail, between the rail supports or next to a single rail support;
3. Between the rail and the mattress;
4 Under the rail, at the ends of the rail;
5. Between split bed rails;
6. Between the end of the rail and the side edge of the head or foot board;
7. Between the head or foot board and the mattress end.

Vulnerable Population Defined

According to the FDA, not all patients are at risk for entrapment and not all hospital beds pose a risk of entrapment.

The population most vulnerable to entrapment, according to the FDA, are elderly hospital patients and nursing home residents, especially those who are frail, confused, restless or have uncontrolled body movements.

Long-term care facilities have reported the majority of entrapment incidents reported to the FDA.

From 1985 through 2005, 691 such reports included 413 deaths, 120 injuries and 158 incidents described as "near-miss events" with no serious injuries.

The FDA suggests that facilities as well as manufacturers determine the level of risk for entrapment and take steps to mitigate the risk.

Evaluating the dimensional limits of the gaps in hospital beds is one component of an overall assessment and mitigation strategy to reduce entrapment.

Healthcare facilities may use the FDA's latest guidance document as part of a bed-safety program to identify entrapment risks that may exist with current hospital bed systems.

We have the FDA's newest guidance document on hospital bed entrapment on our newsletter website at http://www.nursinglaw.com/entrapment.pdf.

The FDA's March 10, 2006 announcement in the Federal Register is available on our website at http://www.nursinglaw.com/fda031006.pdf. This 2-page notice contains information how to obtain copies of the guidance document directly from the FDA as a hard copy or on computer diskette.

According to the FDA, unlike FDA regulations, FDA guidance documents do not establish legally enforceable responsibilities.

Instead, guidance documents merely describe the FDA's current thinking on a certain topic and should be viewed only as recommendations unless the document makes reference to specific regulatory or statutory requirements.

That is, the FDA stresses that the word "should" in its guidance documents means that something is suggested or recommended, but not required by the FDA.

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The FDA has an extensive bibliography of references at the end of the latest guidance document to assist healthcare facilities in making decisions toward the goal of achieving a safe and comfortable sleeping environment for patients.

Exclusions

The FDA asks healthcare facilities to look carefully at the list of bed products which are excluded from the latest recommendations. For example, when mattresses are deflated on specialized therapy beds there is an entrapment risk, but for patients with skin-integrity issues the therapeutic benefit from addressing skin-integrity issues probably outweighs other risk considerations, the FDA says.

Pediatric beds and infant cribs are also excluded.

HBSW Test Methods for Assessing Entrapment Risk

According to the FDA, the newer guidance document differs from the older draft in that the newer document includes the Hospital Bed Safety Workgroup's (HBSW) July 2005 Dimensional Test Methods for Bed Systems.

The HBSW test methods include instructions for using a cone-and-cylinder tool to measure and assay the multiple potential entrapment zones which have been identified for existing bed systems, test procedures and sample data sheets.

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Hospital Bed Strangulation, Positional Asphyxia: Case Raises Complex Legal Issues.

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No Ruling Yet On Liability

No court has ruled whether the nursing facility is liable for the patient's death.

Quality Review / Peer Review Confidentiality

The Court of Appeals of Ohio has been wrestling with pre-trial evidentiary questions. It ruled the LPN must testify what she first told the administrator, even though it was written down for purposes of internal quality review.

A healthcare facility must keep a log of its internal quality review or peer review committee's deliberations. Without recording what was said, the facility must note who met, when, and what in general was discussed. Without revealing the contents of documents, the facility must catalog by general description the documents that were considered by the committee during its deliberations. A healthcare facility cannot later claim in court the right to invoke the privilege of confidentiality without having done its homework. **Smith v. Manor Care of Canton, Inc., 2006 WL 636975 (Ohio App., March 13, 2006).**

All information, data, reports and records made available to a quality assurance committee or utilization committee of a hospital or long-term care facility are confidential.

An incident report or risk management report is a report of an incident involving injury or potential injury to a patient as a result of patient care prepared by or for the use of a peer review committee of a health care facility and within the scope of the functions of that committee.

Proceedings and records of internal review committees cannot be obtained in pretrial discovery or introduced into evidence at trial.

An individual cannot be compelled to testify what he or she told a quality review committee within the scope of its investigation.

COURT OF APPEALS OF OHIO
March 13, 2006

PCA, Morphine Overdose: Court Puts Fault On Nurses.

After cystoscopic kidney-stone surgery, the patient received IM injections of morphine and was also placed on a patient controlled analgesia (PCA) morphine pump which allowed the patient to self-medicate for pain.

In the early morning hours of her second day post-op a nurse found the patient unresponsive with no pulse. She could not be resuscitated and was pronounced dead.

A higher than lethal level of morphine was found in her blood *post mortem.*

The hospital's investigation established that the PCA pump was not defective and had to have been functioning normally during the time in question.

Res Ipsa Loquitur

The Court of Appeals of Tennessee ruled that the family's civil liability lawsuit for damages should be submitted to the jury with instructions to the jury to take into consideration the legal rule of *res ipsa loquitur*. A principle sometimes applied in medical negligence cases, it is Latin for, "The thing speaks for itself."

Under the circumstances of this case, the patient dying from a morphine overdose is an event, the court ruled, which could not have happened in the absence of negligence on the part of the patient's caregivers. The patient's family does not have to explain any further how the deceased's caregivers were negligent. **Flowers v. HCA Health Services of Tenn., 2006 WL 627183 (Tenn. App., March 14, 2006).**

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Skin Care: Court Refuses To Blame Nurses, Sees Care As Adequate In All Respects.

The family of a deceased nursing home resident sued the nursing home for negligence leading to skin breakdown leading to amputation of the patient's leg.

Statute of Limitations Had Expired Court Discussed Standard of Care

The Court of Appeal of Louisiana ruled against the family because Louisiana's one-year statute of limitations had expired before the lawsuit was filed.

Nevertheless, the court went on to say there was no violation of the standard of care by the nursing staff. That would have meant dismissal of the family's lawsuit even if it had been filed on time.

Nursing / Medical Documentation Are the Legal Evidence

The evidence showed that the patient was ambulatory when she entered the nursing home and was assessed as able to turn herself in bed.

Her physicians diagnosed and documented renal failure, hypertension and peripheral vascular disease. These are conditions which can predispose a patient to lower extremity skin breakdown.

The court found documentation that the wound-care nurses were seeing to the patient's needs on a regular basis per the physician's orders. The family's attorney's own nursing experts testified they could not fault the wound-care nurses.

A separate sacral skin lesion which started at the nursing home actually healed completely due to the nurses' efforts.

The medical evidence tended to prove the skin lesion on the leg began and progressed because of the patient's peripheral vascular disease and not because of substandard nursing care, the court stated.

There were no physician's orders to turn the patient, so there could be no issue of nursing staff failing to carry out such orders. In skin-care cases, the court noted in passing, failure to document frequent turning is an all too common legal liability issue. **Alexander v. Amelia Manor Nursing Home, Inc., __ So. 2d __, 2006 WL 472289 (La. App., March 1, 2006).**

The family's lawsuit was filed one day less than one year after the patient died in the nursing home.

However, the family's lawsuit directly takes issue with the amputation of the patient's leg, which occurred fourteen months before the patient died.

The lawsuit claimed that substandard care for the patient's skin-integrity issues led to bedsores which progressed to serious lesions which necessitated the amputation.

The negligence alleged in the lawsuit had to have occurred before the leg was amputated, which was outside the time limit for the statute of limitations by the time the lawsuit was filed.

The court must dismiss any lawsuit if the statute of limitations has expired, even if the statute of limitations imposes a harsh penalty on persons who have waited too long to file an otherwise valid suit.

However, there was no negligence by the nursing staff at this nursing home, though technically that is not the basis for the court's ruling.

COURT OF APPEAL OF LOUISIANA
March 1, 2006

Urine Sample: Misdiagnosis Of Renal Bleeding Tied To Nurses' Negligence.

The patient came to the emergency room with flank pain and other complaints pointing to a problem with her kidneys. The physician ordered a CT scan without contrast and urinalysis.

The nurses were supposed to obtain the urine sample by use of a catheter. Instead, the urine sample was obtained by clean catch.

The urine sample contained blood. The physician realized the sample had been obtained by clean catch rather than by catheter and assumed for that reason that the blood was not from the kidneys.

The physician released the patient. Two days later she returned to the emergency room. The blood clot in the kidney had progressed. Surgery was too late to save the kidney and it was removed.

Many people do well with only one kidney. However, the lawyers convinced the jury that her second admission and her unsuccessful surgery could be blamed on her caregivers' negligence.

SUPERIOR COURT OF DELAWARE
NEW CASTLE COUNTY
February 28, 2006

The Superior Court of Delaware, New Castle County, upheld a jury verdict in the patient's favor for $570,000.

The jury apportioned the damages 40% against the hospital for the nurses' negligence and 60% against the physician for misdiagnosing the patient's condition based on the urine sample improperly obtained by the nurses. **Quesenberry v. Beebe Medical Center, Inc., 2006 WL 515455 (Del. Super., February 28, 2006).**

Kidney Misdirected: Appeals Court Says Recipient May Have The Right To Sue.

A recent ruling of the US Court of Appeals for the Second Circuit sharply criticized a ruling of the US District Court for the Eastern District of New York which we reported in May, 2005.

The District Court had ruled that a person claiming to be the intended beneficiary of a deceased patient's gift of a kidney had no right to sue over the organ being harvested and given to another patient.

See *Organ Donation: Court Says Beneficiary Cannot Sue For Kidney Given To Another*, Legal Eagle Eye Newsletter for the Nursing Profession (13)5, p.8 (May, 2005).

The Uniform Anatomical Gift Act grants immunity from civil lawsuits to healthcare providers who harvest and distribute organs in good faith.

Implicitly, such lawsuits must be permitted if and when good faith is lacking.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
February 23, 2006

The US Court of Appeals sent the case to the New York State Supreme Court for a ruling whether or not a 95-year-old New York case is still a valid precedent in light of newer cases in other states setting a trend toward allowing lawsuits over misdirected human organs, and told the US District Court to re-consider the case under the Uniform Anatomical Gift Act. **Colavito v. New York Organ Donor Network, 438 F. 3d 214 (2nd Cir., February 23, 2006).**

Stillborn Fetus: $2,000,000 Jury Verdict Upheld, Parents Were Denied Right To Proper Burial.

This case can be decided for the parents based on the common-law right of sepulcher even if state statute laws do not expressly mention a right to sue.

The common law clearly says that living persons have a right to burial and the surviving next of kin have the right to the preservation of the remains for the purpose of burial.

The attending physician testified that this fetus, stillborn at 21 1/2 weeks and weighing only 400 grams, never showed signs of life.

However, the parents, as next of kin, should have a right of sepulcher whether or not the fetus was ever alive after delivery.

The cultural imperative to bury one's dead is rooted in thousands of years of civilization.

The next of kin have the absolute right to possession of a deceased's body for preservation and burial.

The next of kin have the right to file suit for damages against any person who unlawfully interfered with their rights or who improperly dealt with the deceased's body.

NEW YORK SUPREME COURT
KINGS COUNTY
February 22, 2006

The mother was admitted to the hospital twenty-one weeks pregnant.

She experienced complications of her pregnancy throughout her stay. However, according to the New York Supreme Court, Kings County, no malpractice allegations for mismanaging her pregnancy were raised in the lawsuit.

Three days after admission she delivered a stillborn fetus weighing 400 grams. The attending physician would later testify the fetus never lived.

The next day the remains were sent to the hospital's pathology department for disposal. The reason given for sending the remains to the pathology department, and for not offering them to the parents, was the age and size of the remains.

The hospital never disclosed to the parents or to the court what became of the remains after they were sent to the pathology department.

The parents sued the hospital for denying them their common-law right to bury the stillborn fetus, known as the right of sepulcher, and for mishandling the fetus, that is, for never obtaining informed consent from the parents to dispose of the remains.

The jury awarded the parents $2 million. The court upheld the verdict over objections to the legal basis for the lawsuit and the size of the award

Fetus Was Non-Living
Issue Ruled Irrelevant

The court agreed with the parents' attorney's argument that once the fetus was delivered the fetus had a physical existence separate from the mother. Even if not a living existence it was a symbolic existence which had a profound importance to the parents which the hospital had a legal obligation to recognize.

The fact this fetus never lived, unlike the short-lived fetuses in the legal case precedents, should not bar these parents from suing for damages, the court ruled. **Emeagwali v. Brooklyn Hosp. Center, 2006 WL 435813 (N.Y. Sup., February 22, 2006).**

Sexual Harassment: Hospital Fulfilled Its Obligations, Nurse Can Still Sue For Retaliation.

A female nurse, who was a hospital employee, and a male respiratory therapist, who worked at the hospital through an employment agency, worked together for a time in the hospital's ICU.

The court record in the US District Court for the District of Nevada pointed to sexually suggestive comments, sexual gestures, use of the Internet to cause pornographic materials to be sent to the nurse and use of abusive language by the respiratory therapist.

The harassment started in March. The nurse reported it to her supervisor in August through a formal written complaint for sexual harassment.

Supervisors Took Prompt, Effective Action

The very next day, after an expedited investigation, the respiratory therapist was issued a disciplinary notice of corrective action, told to cease the harassment, told to stay away from the nurse altogether and told if he was even seen in her work area he would be terminated on the spot.

The nurse testified the harassment stopped at this point. She actually did see him once or twice in her work area but never reported it to her supervisors.

Several months later the nurse resigned, claiming retaliation in the form of verbal abuse and unreasonably close scrutiny by her supervisors because she had filed a complaint.

Sexual Harassment Claim Dismissed Retaliation Claim Allowed to Stand

The court ruled the nurse had no right to sue for sexual harassment.

As to the retaliation claim, the court described the evidence as weak, but not implausible. The nurse would still be given her day in court to present her evidence of retaliation.

Retaliation over a good-faith complaint of harassment or discrimination can be a basis for a lawsuit even if the harassment or discrimination claim is ruled invalid. **Moss v. Washoe Medical Center, Inc., 2006 WL 508088 (D. Nev., March 1, 2006).**

Notification that sexual harassment is occurring triggers an employer's duty to take prompt corrective action, including:

Temporary steps to deal with the situation while it is determined whether the complaints are justified;

Permanent remedial steps taken by the employer once the investigation has been completed.

An employer violates Title VII of the US Civil Rights Act if the employer knowingly tolerates sexual harassment.

Tolerating sexual harassment creates a sexually hostile work environment. The law considers that a form of gender discrimination for which the victim has the right to sue.

If an employer fails to take corrective action after learning of a co-worker's harassing conduct or takes inadequate action that emboldens the harasser, the employer is considered to have adopted the offensive conduct and its results as if the offensive conduct had been expressly authorized by the employer's policies.

UNITED STATES DISTRICT COURT
NEVADA
March 1, 2006

Whistleblower: Nursing Director's Suit Upheld.

The director of nursing in a brain-injury rehab facility began to hear concerns from her subordinates that patients were not being released upon attainment of their treatment goals or upon patients' requests for discharge notwithstanding treatment goals not being met.

After she spoke with management a directive came from the director of marketing and admissions to keep the patients for the entire four-year period for which Medicare funding existed.

The director of nursing was concerned that keeping such patients at the facility could be a violation of the law and could even be considered Medicare fraud.

While attending a conference she spoke privately with the state director of the traumatic brain injury program. He confirmed her understanding that such patients should be released. She went back to her superiors with this information and one month later was informed her position had been eliminated.

An employer cannot terminate an employee for reporting a co-worker or supervisor in good faith to a governmental authority for violations of the law pertaining to public health and welfare.

UNITED STATES DISTRICT COURT
KANSAS
March 2, 2006

The US District Court for the District of Kansas ruled that the director's whistleblower lawsuit would get its day in court, to sort out her former supervisor's assertions she was fired for breach of patient confidentiality rather than for going to the state authorities with her concerns. **Yonker v. Centers for Long Term Care, 2006 WL 516851 (D. Kan., March 2, 2006).**

Child Abuse: Court Places Some Blame On Health Care Providers.

The child's father sued state child protective services on his daughter's behalf for negligence in failing to do follow-up investigations of suspicions of sexual abuse of his daughter in the home of the child's mother and live-in boyfriend.

The state agency responded to the lawsuit, in part, by asking the court to rule that some portion of the blame should be allocated to the doctors and nurses at two different medical facilities who treated the child for vaginal injuries strongly indicative of sexual abuse. They apparently dismissed the injuries as accidental without reporting the injuries to law enforcement or child protective services.

Doctors, nurses and other healthcare providers have a mandatory legal duty to report to law enforcement or child protective services when they have reason to believe a minor has been the victim of abuse.

UNITED STATES DISTRICT COURT
ARIZONA
March 8, 2006

The US District Court for the District of Arizona validated the agency's legal position. The agency can ask the jury to place some percentage of fault, the amount not as yet determined, on the doctors and nurses and their employers in the civil damages suit filed on the victim's behalf.

Doctors, nurses, physician's assistants, behavioral health professionals, etc., are by law mandatory reporters of child abuse *vis a vis* patients they see. **Torrez v. Child Protective Services, 2006 WL 616647 (D. Ariz., March 8, 2006).**

Internal Bleeding: Nurse Faulted For Not Taking, Recording Vital Signs.

The patient was brought to the emergency department with severe injuries from a motor vehicle accident.

Paramedics had been unable to get a blood pressure at the scene, but then got a pressure of 146/50 after they started IV fluids during transport.

At the hospital attempts were made to arrange for a suitable blood transfusion while CT scans were ordered and read. He was treated for almost two hours before he expired.

Where Were The Nurse's Vital Signs?

The medical records did not indicate that the emergency department nurse was taking vital signs.

In the family's lawsuit against the hospital, the family's medical expert testified the patient died from internal bleeding. That could not be confirmed or ruled out definitively because the family declined an autopsy on religious grounds.

The family's medical expert went on to say that the nurse's failure to take vital signs contributed to the physicians' failure to appreciate the true nature and gravity of the patient's medical condition, that is, that he was bleeding internally.

In court the nurse was allowed to testify she did in fact take vital signs q 5 – 10 minutes and scribbled them on pieces of paper which she put in her pockets and was not able to copy into the chart.

The Superior Court of New Jersey, Appellate Division, threw out the verdict that came out in the hospital's favor. The court ruled it was unfair to the family for this version of the events first to surface in trial and ordered a new trial after the nurse's assertions could be investigated. **Gorcey v. Jersey Shore Medical Center, 2006 WL 533379 (N.J. Super., March 6, 2006).**

Confidentiality: Disclosure Of Roommate's Name Does Not Violate HIPAA.

The family of a deceased patient filed a lawsuit for negligence against the hospital where she died.

She came to the emergency room with severe abdominal pain. The lawsuit alleged that the emergency department nurse took vital signs but failed to report significant drops in her blood pressure to the physician. A radiologist, it was alleged, got a CT scan, but likewise failed to report the results.

The issue at this stage in the litigation is whether the hospital can and must divulge the names of the two patients in the adjoining beds in the E.R. holding area on the night in question.

The US Health Insurance Portability and Accountability Act (HIPAA) provides Federal standards for protection of patients' confidential medical information.

The Act does not prevent disclosure of a patient's name per se, as long as no individually identifiable health information is disclosed in the process.

NEW YORK SUPREME COURT
RENSSELAER COUNTY
February 3, 2006

The New York Supreme Court, Rensselaer County, ruled that the names of such potential witnesses are relevant points of information for the family's lawsuit. As long as no information about other patients' health status and treatment are revealed, their names can be divulged. **Foley v. Samaritan Hosp., 2006 WL 431368 (N.Y. Supp., February 3, 2006).**

LEGAL EAGLE EYE NEWSLETTER
For the Nursing Profession

Falls: Court Finds Substandard Precautions.

The New York Supreme Court, Appellate Division, made note that the elderly patient had right-sided weakness, dementia, psychosis and aphasia and was on multiple medications.

Verbal Reminders / Substandard Care

After such a patient has fallen ten times during unassisted ambulation, repeated verbal reminders to ring the call bell and wait for assistance are of little value and more affirmative precautions are necessary, the court ruled.

A non-restraining measure such as a bed alarm should have been tried with this patient, the court believed.

The nursing home was ruled not liable for injuries from an assault by another resident. There was no solid evidence the nursing home staff had any reason to know that the other resident had a tendency to act out violently toward this resident, the court ruled. **Hranek v. United Methodist Homes, __ N.Y.S.2d __, 2006 WL 560208 (N.Y. App., March 9, 2006).**

Serum Mix-Up: Court Sees No Harm, No Foul.

According to the US District Court for the Central District of Illinois, it was discovered that a nurse in a Federal correctional facility used tetanus/diphtheria vaccine for the intradermal injection, rather than the tuberculin serum, during routine tuberculin screening of a group of inmates. The two products are made by the same manufacturer, are packaged in similar vials and happened to be stored in the same area of the prison dispensary.

When the error was discovered all of the affected inmates were notified. One inmate had some redness and itching at the injection site.

Two weeks later another inmate complained of headaches, abdominal pain, diarrhea, weight loss, swollen arms and dizziness starting 30 minutes after the injection. The court dismissed these complaints, and his lawsuit, based on medical testimony that such symptoms could not have come from the injection. **Brumsfield v. Dintelman, 2006 WL 452508 (C.D. Ill, February 23, 2006).**

Civil Rights: Circulating Nurse Violated Sponge-Count Rules, Discrimination Lawsuit Dismissed.

A registered nurse of Asian Indian descent was fired after a laparotomy sponge was left inside a patient on whose case she circulated and had to be removed with a second surgery.

The scrub nurse on the same case, a Caucasian, was reprimanded but was not fired.

Unlike the circulating nurse, the scrub nurse was willing to take responsibility. She admitted she and the circulating nurse did not follow the hospital's protocol for the scrub nurse and the circulating nurse to do their sponge counts. Both the scrub and the circulating nurse were to direct their attention and watch as the circulating nurse handled each sponge individually that was removed from the sterile field and counted each sponge aloud.

The Asian Indian circulating nurse refused to take responsibility for the incident and had three prior OR episodes which threatened patient safety.

The Caucasian scrub nurse was willing to take responsibility for the incident and had no prior infractions.

The two nurses were indeed treated differently, but not because of race.

UNITED STATES DISTRICT COURT
NEW YORK
March 6, 2006

The court pointed out that neither the scrub nurse or the circulating nurse were in the room at the start of the case, a fact the court thought made it all the more essential to follow sponge-count protocols rigorously for the second and last counts on the case which they performed.

With valid grounds to fire the nurse notwithstanding her minority status, her discrimination lawsuit had to be dismissed. A perioperative nurse cannot claim to be doing the job satisfactorily, a prerequisite to filing a discrimination lawsuit, if a sponge is left inside a patient and it can be traced to the nurse's failure to follow the hospital's protocols for sponge counts, the court said. **D'Cunha v. New York Hosp. Med. Center of Queens, 2006 WL 544470 (E.D.N.Y., March 6, 2006).**