LEGAL EAGLE EYE NEWSLETTER

August 2002 *For the Nursing Profession* Volume 10 Number 8

Bed Rail Down: High-Risk Patient Got Out Of Bed And Fell, Court Finds Negligence.

The eighty-six year-old patient was admitted through the emergency room of an acute care hospital for respiratory problems.

She had been diagnosed with Alzheimer's and had full-time home attendants upon whom she relied for help to walk, go to the bathroom and feed herself. She also needed to be kept from wandering from her home as she would get lost if she went out alone.

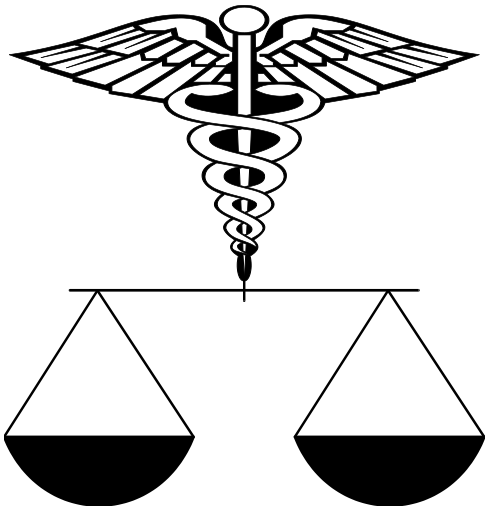
High-Risk Assessment In Hospital

Because of her Alzheimer's she was classified as high-risk for falling. For high-risk patients the hospital had a fall/injury prevention protocol.

The protocol required the nursing staff, throughout the patient's hospitalization, to assess and re-assess the patient's physical and mental condition, including medications that could dim the patient's thought processes.

A safety alert sign was to be posted above the bed, the patient was to be checked every two hours, the bed was to be kept in the lowest position and all bed rails were to be up at all times. Only a physician's order could override the protocol for high-fall-risk patients.

A nurse found the patient face down on the floor in the hallway at 7:00 a.m. One bed rail was down when the nurse put her back to bed.



As a general rule a hospital is not liable for negligence for failing to erect the bed rails absent a doctor's express medical order to raise the bed rails.

However, the general rule does not apply after the hospital establishes a rule that bed rails are to be raised at all times for a particular class of high-risk patients.

NEW YORK SUPREME COURT
June 4, 2002

The New York Supreme Court, Kings County, ruled there were grounds for a negligence lawsuit.

Violation of Internal Protocol Is Evidence of Negligence

When a healthcare provider disregards or intentionally violates the institution's own internal patient-care protocols, it is evidence of negligence.

There is still room for argument that there may have been a good reason for not following procedures.

The hospital argued that keeping all four bed rails raised would amount to a physical restraint, that restraints could not be applied without a doctor's order and there was no doctor's order to restrain this patient. The court was not persuaded by that argument.

Patient Found On Floor Bed Rail Down

The patient being found on the floor and the bed rail being down proved to the court's satisfaction a hospital employee lowered the bed rail and the patient was able to get out of bed because the bed rail was down. It was not likely, the court believed, that this patient herself lowered the bed rail or that she climbed over the rails that were raised. **Pedraza v. Wyckoff Heights Medical Center, __ N.Y.S.2d __, 2002 N.Y. Slip Op. 22094, 2002 WL 1364153 (N.Y. Sup., June 4, 2002).**

Inside this month's issue ...

August 2002

New Subscriptions Page 3

Narcotics Diversion: Court Sees A Pattern Of Misconduct, Throws Out Nurse's Wrongful Discharge Lawsuit.

The Supreme Court of Vermont found there was sufficient evidence to terminate a hospital staff nurse's employment for just cause.

The court stated that hospitals have the ultimate responsibility for patient care and thus have the right to set their own standards for medication administration.

The courts do not second-guess a hospital's standards for medication administration after a nurse sues for wrongful termination. Nurses must submit to supervision on this issue.

A Pattern of Errors With Narcotics Is A Patient Safety Issue

When one nurse's pattern of administering narcotics differs significantly from the nurse's coworkers caring for the same types of patients on the same unit, it is strong circumstantial evidence of diversion and abuse of narcotics.

However, diversion and abuse of narcotics does not have to be proven to discipline a nurse, the court pointed out, because faulty medication practice in and of itself is a patient safety issue.

While apparently over-administering prn narcotics the nurse actually often gave prn Tylenol instead of prn Percocet, according to verified complaints from patients. The nurse kept up the pattern after being warned she needed to obtain approval from the charge nurse whenever she medicated a patient for pain.

Employment at Will

The nurse had no employment contract and was not working under a collective bargaining agreement.

Still, the hospital's employee handbook and past practices set expectations that employees would not be terminated without going through progressive discipline. The court ruled this nurse was properly warned and was offered remedial supervision before she was fired. **Delude v. Fletcher Allen Healthcare, Inc.**, __ A. 2d __, 2002 WL 1396873 (Vt., June 28, 2002).

There was no direct eyewitness evidence that the nurse was diverting narcotics to her own use.

However, a medication and narcotic audit performed by the hospital's chief pharmacist, the vice president of nursing, the head of human resources and the unit nursing manager found the nurse's narcotics practices differed significantly from all the other nurses on her unit.

Letters of understanding were issued to her before she was terminated.

She was told her narcotics administration patterns were out of line with those of her coworkers. She was told to obtain approval from her supervisor whenever she administered narcotics. She was told that further complaints from patients could lead to termination.

Her deviant pattern continued with narcotics. She continued to give more Percocet than all the other unit nurses combined. She refused to seek approval from her supervisors before giving narcotics. Patient complaints continued.

SUPREME COURT OF VERMONT
June 28, 2002

Narcotics Diversion: Court Upholds Board Of Nursing.

In an unpublished opinion, the Court of Appeals of Iowa ruled the state board's strict rules on wastage of controlled substances were in accord with accepted nursing standards and violation of the rules was sufficient grounds to suspend or revoke a nurse's license.

Minimum standards of acceptable and prevailing nursing practice require competent documentation by a nurse of wastage of controlled substances.

When all or part of a dose is wasted the nurse must document the patient's name, amount wasted, the reason for the wastage and get the signature of the nurse who witnessed the wastage.

COURT OF APPEALS OF IOWA
UNPUBLISHED OPINION
July 3, 2002

The nurse was accused of failing to conform to minimum standards of practice and of diverting narcotic medications from patients to her own use.

The accusation of narcotics diversion could not be proved and it was dismissed.

However, although diversion and abuse were strongly suspected, it did not have to be proved to discipline the nurse.

Improper documentation of narcotics wastage, missing witness signatures, supposedly broken ampules and syringes not being turned in, counts not being done or documented or turning up wrong, etc., are serious violations of rules for patient care and legal grounds for disciplinary action, the court said, even if diversion and abuse of narcotics cannot be proved. **Matthias v. Iowa Board of Nursing, 2002 WL 1429951 (Iowa App., July 3, 2002).**

Home Health: CMS Will Consider Changes To OASIS.

In the July 17, 2002 Federal Register the Centers for Medicare and Medicaid Services (CMS) announced it is considering changing the Outcome Assessment Information Set (OASIS) that has been required since 1999 for home health agencies serving Medicare patients.

According to CMS, this is part of an overall effort to streamline unnecessarily burdensome or inefficient regulations that interfere with the quality of care and to streamline Medicare paperwork.

CMS has indicated that the development of this process can be followed by interested parties by logging on to CMS's OASIS website at http://www.cms.hhs./gov/oasis/hhnew.asp.

We have placed CMS's July 17, 2002 announcement on our website at http://www.nursinglaw.com/cms.pdf.

FEDERAL REGISTER, July 17, 2002
Pages 46949 – 46950

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Needlesticks: FDA Considering Petition To Ban Unsafe Sharps.

The US Food and Drug Administration has been asked to consider an outright ban on the use of unsafe sharps in healthcare.

The FDA is asking for concerned institutions and individuals to submit their comments before September 18, 2002.

Comments may be mailed to Dockets Management Branch (HFA-305), Food and Drug Administration, 5630 Fishers Lane Room 1061, Rockville MD 20852 or sent at http://www.fda.gov/dockets/ecomments.

The FDA asks that persons submitting comments identify as specifically as possible the device they are talking about and what they think is wrong with it.

The FDA is also considering warning labels for devices such as standard injection syringes for which it would not be feasible to issue an outright ban.

FEDERAL REGISTER, June 20, 2002
Pages 41890 – 41892

In March, 2001 the Service Employees International Union and the Public Citizen's Health Research Group filed a formal petition with the FDA for an outright ban on non-needleless IV infusion equipment, butterfly syringes and IV catheters and blood collection devices that do not conform to the FDA's recommendations dating back to 1992 to reduce bloodborne pathogen exposure from sharps injuries.

According to the FDA, the most recent data in 1998, show that needlestick injuries are still a significant hazard to healthcare workers. Syringes account for 33% of the injuries, needles on IV lines 2%, butterfly needles 8%, vacuum tube blood collection needles 6% and IV catheter stylets and glass capillary tubes less than 1%.

Regulations issued by OSHA in consultation with the FDA in 2001 under The Needlestick Safety and Prevention Act of 2000 require healthcare employers, as part of their required exposure-control plan for employee needlestick injuries, to document the extent to which the employer uses, or has considered using, products that will minimize workplace exposure to needlesticks and other percutaneous injuries.

Under existing regulations employers must also document each year the extent to which they have made themselves aware of changes in technology in the last year that could reduce or minimize needlestick injuries to their employees. As long as the exposure-control plan meets Federal guidelines, the use of older, more hazardous products is still allowed.

FEDERAL REGISTER, June 20, 2002
Pages 41890 – 41892

Bad Faith: Malpractice Carrier Has A Legal Duty To Settle A Liability Claim Within The Policy Limits, Court Says.

There were allegations that the obstetrician and the hospital's labor and delivery nurses negligently delayed phoning for a pediatric specialist to attend to the baby immediately after his birth by emergency cesarean section.

That is, it was claimed a pediatrician should have been summoned right when the emergency cesarean was called, in anticipation of the newborn's needs, rather than waiting until after the birth, when his needs were obvious and emergent.

The jury awarded $9,600,000 as damages, pro-rating fault 75% to the obstetrician ($7,200,000) and 25% to the hospital's nurses ($2,400,000).

The hospital's primary malpractice insurance limit was $1,000,000. The hospital's excess carrier had to pay the excess $1,400,000. The excess carrier turned around and sued the primary carrier for bad faith, that is, for breach of the legal duty to make a reasonable attempt to settle the case for $1,000,000 or less.

The family's attorney indicated after the fact he would have recommended his clients accept $1,000,000 if that amount had been offered during the trial.

The US Circuit Court of Appeals for the Second Circuit upheld the second insurance company's suit against the first.

Insured Is Entitled To A Good Faith Effort To Settle A Liability Claim

The principle is the same when a healthcare provider with malpractice insurance coverage is faced with a significant liability exposure.

The insured should consult different legal counsel than the defense counsel provided by the insurance company to explore whether the insurance company is honoring its legal obligation to avoid exposing the insured to an over-limits verdict. **New England Ins. Co. v. Healthcare Underwriters Mut. Ins. Co., __ F. 3d __, 2002 WL 1467282 (2nd Cir., July 9, 2002).**

A medical malpractice insurance company has exclusive control over how liability cases against the insured are handled.

The insurance company must make a realistic assessment of the patient's chances of proving the healthcare provider guilty of negligence and a realistic assessment of the amount of money a jury would be likely to award.

In some cases, like birth and neonatal injuries, the damages for lifelong special care for an impaired individual can reach into the tens of millions of dollars and can potentially exceed the limits of the insured's malpractice policy.

The insured can hire independent legal counsel to evaluate whether the insurance company and its legal counsel are doing all they can to settle the case.

The insured's legal counsel can write to the insurance company and insist on a good faith settlement offer to the patient within the policy limits.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
July 9, 2002

Lymphedema: Court Rules It Can Be An Occupational Disease.

A nurse had a left-side mastectomy and a right-side node resection.

Three years later because of staff reductions her employer began to require her to lift patients as part of her job as a hospital staff nurse.

Over the next few years she developed lymphedema in her upper left arm.

A worker's compensation judge denied her claim for an occupational injury.

A pre-existing infirmity aggravated or accelerated by a series of events characteristic of a particular employment combining to produce disability is an occupational disease.

It is immaterial that the disability could have been brought on by causes other than work-related trauma, if, in fact, trauma on the job is a disabling factor.

COURT OF APPEAL OF LOUISIANA
NON-PUBLISHED OPINION
June 21, 2002

The Court of Appeal of Louisiana, in an opinion that has not as yet been released for publication, agreed it was not an occupational injury.

However, the court ruled the nurse was entitled to compensation, as the victim of an occupational disease rather than an occupational injury.

It was true that lymphedema can develop after breast surgery for causes unrelated to the demands of the individual's job. But in this case the nurse's physician linked it directly to lifting patients at the hospital, the court pointed out. **Dunn v. Riverview Medical Center, 2002 WL 1350456 (La. App., June 21, 2002).**

Labor Relations: Court Upholds Hospital Nurses' Union's Safe-Care Campaign.

The Massachusetts Nurses Association had represented the nurses at an acute-care hospital for over twenty years.

Several months before the Association's collective bargaining agreement with the hospital expired the Association began what it called a safe-care campaign.

The Association's campaign involved distributing literature to nurses at the hospital. Off-duty nurses distributed literature to other nurses at the front entrance and in the public vestibule, at the rear entrance to the hospital and at the emergency/ outpatient entrance.

The union's position was that the literature consisted of reprinted articles stating that downsizing and restructuring of nursing staff and use of non-professional employees giving care and treatment to patients which formerly had only been given by professional nurses can have an adverse effect on the quality of patient care.

The hospital's position, on the other hand, was that the literature contained shocking and sensational headlines focusing on horror stories of patient death and injury due to allegedly unsafe care, at other hospitals.

The hospital stopped the off-duty nurses from distributing the literature and banned further distribution, on the grounds it would shock and disturb patients and thereby have an adverse impact upon patient care.

Court Sides With The NLRB And With the Nurses' Union

The US National Labor Relations Board (NLRB) found the hospital guilty of an unfair labor practice and asked the court for enforcement authority.

The US Circuit Court of Appeals for the District of Columbia agreed with the NLRB. There were several reasons for the Court's ruling.

No Effect on Patients

In this case the Nurses Association was careful to make sure that its safe-care campaign literature *did not* get into the hands of the hospital's patients.

Management can prohibit the distribution of union literature in work areas on the premises.

For hospitals the courts have limited the definition of work areas to immediate patient-care areas. Immediate patient care areas do not include entrances and vestibules used by patients and family coming or going from the hospital.

Outside immediate patient-care areas a hospital can ban distribution of union literature only as necessary to avoid disruption or disturbance.

No union is allowed to disparage the quality of the employer's products or services as an organizing or bargaining tactic. Disparagement is an unfair labor practice.

However, a hospital nurses' union can issue general public statements about patient-care issues and can hand out literature to union members and other nurses about the general effect of staff cutbacks on patient care.

That is not an unfair labor practice as long as the employer hospital itself is not accused of wrongdoing.

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
June 28, 2002

The Association's people testified they were careful only to hand out literature to nurses and pointed out the custodial staff carefully picked up stray litter on a moment-to-moment basis where the literature was being distributed.

There was a debate whether or not the union's literature would tend to frighten hospital patients, which the court settled by deciding that the hospital's patients never actually saw the union's literature.

This case leaves open the issue whether the hospital would have had a valid case for disruption or disturbance of patient care if the Nurses Association had targeted patients rather than nurses.

No Disparagement of the Quality of the Hospital's Patient Care

The Court pointed out the Nurses Association's literature about patient-care and staffing issues did not refer directly to the hospital. There was no disparagement of the hospital's products or services and, therefore, no unfair labor practice.

By contrast, without being guilty of an unfair labor practice a hospital was able to fire a nurse for going on local television and claiming a patient's highly-publicized death at the hospital was caused by nursing staffing changes. See *Labor Relations: Nursing Employee Falsely Disparaged Quality of Care, Not Protected By National Labor Relations Act, Court Says.* Legal Eagle Eye Newsletter for the Nursing Profession, (10)1, Jan 02, p.5.

Work Areas

In labor law the courts devote considerable attention to the definition of a work area. It was a major victory for organized labor when unions were allowed to distribute union literature on an employer's premises as a matter of Federal labor law, regardless of state laws on civil and criminal trespass, as long as the distribution did not take place in work areas.

Patients being escorted or assisted by nurses in the vestibules and entrances does not make those places work areas, the court ruled. **Brockton Hospital v. National Labor Relations Board, __ F. 3d. __, 2002 WL 1393571 (D.C. Cir., June 28, 2002).**

Nursing Expert: No Opinion Linking Death To Nursing Negligence.

The patient died in the hospital the morning after endoscopic removal of a stone in the common bile duct. The cause of death was acute calculous cholecystitis. The surviving spouse sued the physician, the hospital and the staff nurse.

A nursing expert can review a patient's chart and can identify instances where the patient's nursing care did not meet the nursing standard of care.

A nursing expert is qualified to testify on the nursing standard of care in a malpractice case.

However, malpractice requires proof that a failure by the nurses to meet the nursing standard of care was a proximate cause of the injury to the patient.

Causation is a medical issue and requires a physician's expert testimony.

COURT OF APPEALS OF WASHINGTON
UNPUBLISHED OPINION
June 27, 2002

In an unpublished opinion, the Court of Appeals of Washington ruled that a nurse's testimony about deficits in the patient's nursing care was not sufficient to hold the hospital and the staff nurse liable.

The nursing expert herself testified she could not find a link between the deficits in nursing care and the cause of death noted in the autopsy report. **Stewart v. Newbold, 2002 WL 1389415 (Wash. App., June 27, 2002).**

Off-Duty Drug Use By CNA: Court Ruling Reversed, No Evidence Work Was Affected.

A case from the Commonwealth Court of Pennsylvania we reported in our December, 2001 issue has been reversed by the Supreme Court of Pennsylvania.

See *Willful Misconduct: Court Rules Off-Duty Illicit Drug Use Is Grounds To Fire CNA*. Legal Eagle Eye Newsletter for the Nursing Profession (9)12, Dec 01, p.1.

An attempt was made to justify the CNA's termination for cause from her position at a nursing home with statements that her off-duty drug use could have harmed patients and that she might have attempted to work in an impaired condition.

There must be direct evidence that her job performance was affected, not just vague speculation about safety problems, to justify termination for cause.

SUPREME COURT OF PENNSYLVANIA
July 16, 2002

The Supreme Court of Pennsylvania squarely disagreed with the Commonwealth Court of Pennsylvania which had upheld her termination for cause.

Even for healthcare workers, the Supreme Court said, there must be evidence showing that the employee's on-duty performance has been affected by off-duty drug use, to justify termination. **Burger v. Unemployment Compensation Board of Review, __ A. 2d __, 2002 WL 1558347 (Pa., July 16, 2002).**

Morphine Toxicity: Ruling Against Hospital Reversed.

A case from the Court of Appeals of Minnesota that we reported in our August, 2001 issue has been reversed by the Supreme Court of Minnesota.

See *Morphine Toxicity: Nurses And Physicians Ignored The Signs, Did Not Treat Appropriately, Court Holds Them Negligent*. Legal Eagle Eye Newsletter for the Nursing Profession (9)8, Aug 01, p.6.

An expert witness in a medical malpractice case must specify the acts or omissions by the defendants that fell below the standard of care, and indicate specifically how those acts or omissions caused harm to the patient.

SUPREME COURT OF MINNESOTA
June 13, 2002

First, the Supreme Court was not satisfied that the physician whose expert witness affidavit was relied upon by the patient's attorneys had the proper qualifications to render an opinion in this case.

That is, a physician with extensive experience in general pediatrics is not an expert in pediatric oncology. When the nurses did note respiratory depression and did report it to the physicians the physicians elected to go with a Nubain test rather than Narcan reversal, fearing the side effects of Narcan reversal in a critically ill pediatric oncology patient. The plaintiff's expert was not qualified to second-guess that medical judgment.

Secondly, the plaintiff's expert failed to establish a cause-and-effect link between the patient's death from morphine toxicity and the time it took for the nurses to notice the signs and for the physicians finally to order Narcan. **Teffeteller v. University of Minnesota, 645 N.W. 2d 420 (Minn., 2002).**

Accidental Strangulation: Bed Rails Seen As A Restraint, Nursing Home Should Have Considered Less Restrictive Alternatives.

The resident was admitted to a nursing home following a massive stroke that paralyzed her on her right side.

She was at the nursing home two months before her tragic death. During that time her cognitive abilities progressed to the point she could communicate in whispered tones.

She was still unable to swallow, had a feeding tube and was incontinent of bowel and bladder when she died.

She was completely unable to move her right arm and leg. However, apparently with her left arm and leg she was able to "wiggle" from side to side in bed. No one had ever actually seen her do this.

She apparently could also hold on to a fixed object such as the side rail of her bed with her left arm and pull herself over to one side. The nurses, nurses aides and her physician had never actually seen her do this either.

Resident Had Moved To Side Of Bed

Regardless of exactly how she was getting there, staff had on previous occasions found her at the extreme left side of her bed with her body caught between the side of the mattress and the bed rail.

Accidental Strangulation

At about midnight a CNA saw the resident resting on her left side with her eyes closed and pillows propped under her to support her at a 35 to 40 degree angle with her head raised so she would not aspirate fluids from the feeding tube in her stomach. The aide had come to the room to try to calm down her roommate.

An hour later she was found dead with her head wedged between the side of the mattress and the bed rail. The mattress was pushed up against the bed rail on the opposite side of the bed.

Nursing Home Ruled Guilty of Negligence

The Court of Appeals of North Carolina upheld the jury's finding of negligence and award of more than $1,000,000 as damages to the family.

For this resident, a stroke victim, the bed rails should have been seen as a form of restraint and their use evaluated under the legal criteria for use of restraints.

State and Federal statutes and regulations require that less restrictive alternatives be considered and ruled out before a particular form of restraint is used.

The nursing home's own policy manual on use of restraints was included in the evidence against the nursing home in court.

The nursing staff should have performed an assessment and documented the assessment on the nursing home's restraint assessment form.

The nursing staff should have documented the effectiveness of less restrictive measures than the restraint that was to be used.

The restraint selected should have been reviewed by the nursing home's Restraint Alternative Team/ Committee.

It is evidence of civil negligence for a healthcare provider not to follow its own internal policies.

COURT OF APPEALS OF NORTH CAROLINA
July 2, 2002

Bed Rails Seen As Physical Restraint
No Restraint Assessment
No Consideration of Less Restrictive Alternatives

The family had expert witness testimony from a nurse whom the court accepted as an expert on the legal standard of care for nursing homes.

The family's expert faulted the nursing staff for failing to see the bed rails as a form of physical restraint and for failing to follow generally accepted standards and the nursing home's own internal policies for use of physical restraints.

Death Was Foreseeable / Negligence

Apart from the restraint-assessment issue, the jury also found the nursing home negligent because the way the resident died was foreseeable.

In a civil jury trial the court can allow either side to present evidence and make arguments to the jury on more than one theory for their case.

She had got herself caught before and that hazard should have been anticipated and dealt with. According to the court, padded side rails, half side rails or a bed alarm should have been considered.

The court pointed out this resident on several occasions prior to her death had somehow slid over to the side of her bed and become caught between the edge of the mattress and the bed rail.

The family's expert witness also testified it was foreseeable in general terms with patients like this for them to get themselves caught between the side of the mattress and the bed rail.

Family Had Complained When Bed Rails Were Down

The jury apparently completely disregarded testimony that the family themselves had on numerous occasions complained to the nursing staff that the bed rails were not raised, being concerned about her falling out of bed. **Estate of Hendrickson v. Genesis Health Ventures, Inc., __ S.E. 2d __, 2002 WL 1462267 (N.C. App., July 2, 2002).**

LEGAL EAGLE EYE NEWSLETTER
For the Nursing Profession

Patient Murdered: Court Denies Access To Criminal Investigation.

Two nurses and a mental health worker in a state facility for the retarded were sued for the death of a patient who allegedly was strangled by another resident in the facility.

In the civil wrongful death lawsuit the Supreme Court of Alabama denied the deceased's personal representative's request for a copy of the internal investigative file of the state Department of Mental Health and Mental Retardation.

In this situation, the court ruled, the Department acts as a police agency. Police investigative files are generally exempt from discovery in civil cases.

To access police files a civil plaintiff has to show undue hardship, that is, explain why the plaintiff's attorneys cannot contact the witnesses on their own and generate their own independent investigation. **Ex Parte Alabama Department of Mental Health and Mental Retardation, __ So. 2d __, 2002 WL 1434135 (Ala., July 3, 2002).**

Student Nurse Falsely Accused Of Rape: Civil Suit Dismissed.

To gain practical experience for her LPN program a student nurse enrolled in a CNA training program at a nursing home.

She was assigned to work with an advanced Lou Gehrig's Disease patient. According to the Court of Appeals of Tennessee, the patient was known by the nursing staff to be highly resistant to changes in her routine and to make unfounded complaints about imagined grievances.

The patient became upset when the student nurse did not pulverize her pill directly in front of her so she could see it done. When the patient was told the student nurse who bathed her was a lesbian, she filed criminal charges of rape which a local judge threw out.

The student nurse sued the nursing home for negligence for assigning her a difficult patient. The court ruled the resident's reaction was not foreseeable and dismissed the lawsuit. **Lewis v. Life Care Centers of America, Inc., 2002 WL 1489602 (Tenn. App., July 12, 2002).**

Home Health: Family Says Nurses Ignored Their Elderly Mother, Court Sees Elder-Abuse Lawsuit.

The family filed a civil lawsuit for elder abuse against their home health nursing agency.

The agency was hired to provide in -home care for the family's elderly mother after her discharge from the hospital for decubitus ulcers on her hips and feet. The discharge orders were for a professional nurse to re-apply Duo-Derm to pressure sores and re-evaluate every two to three days.

During the initial visit the dressings were applied. The nurse said she would return in two days but she did not. The dressings became wet and malodorous, according to the court record, and the family phoned the agency. The best the family could get was instructions over the phone how to change the dressings themselves.

It appears the home health nursing agency recklessly or intentionally disregarded its own determination that the elderly client would require treatment again within two days of the initial visit.

The family alerted the agency that the client's skin ulcers were deteriorating. The agency said it was understaffed and too busy to respond.

CALIFORNIA COURT OF APPEAL
NON-PUBLISHED OPINION
July 16, 2002

They had to take their elderly mother to the hospital and have her re-admitted for sepsis.

The Superior Court for Los Angeles County dismissed the family's civil lawsuit without giving them their day in court. The California Court of Appeal overruled the Superior Court.

If the family could prove their allegations, the Court of Appeal ruled, there was a case of elder abuse that could result in a civil jury verdict.

Elder abuse by a healthcare provider can include deliberate indifference to a patient's care needs established by the patient's care plan.

A home health agency is required to maintain sufficient staffing to meet its clients needs, the court said. **Trujillo v. Superior Court, 2002 WL 1558830 (Cal. App., July 16, 2002).**