LEGAL EAGLE EYE NEWSLETTER

For the Nursing Profession

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Community Blood Bank: Court Upholds Duty To Aid Non-Patients In Emergencies.

For some time a certain full-service acute-care hospital was the only facility in the area supplying outpatient surgical services. Then a new outpatient facility opened just one mile away.

The court record set the stage for the events leading to a patient's tragic and avoidable death.

A highly competitive climate arose between the top-level executives of the two facilities.

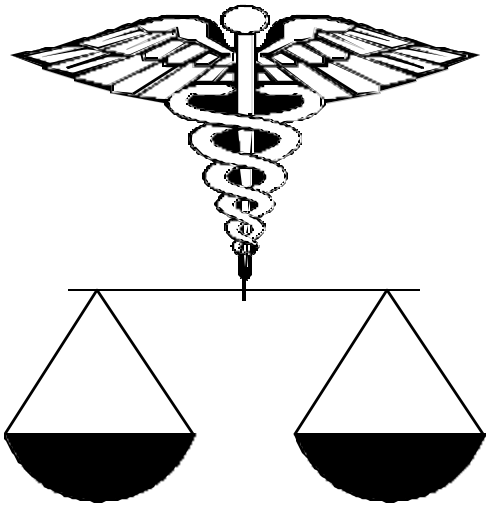
The first facility refused the new facility's request for a standing arrangement to transfer its patients to the first facility who would need inpatient hospital care following surgery.

More ominously, the first facility housed the community blood bank for the area and refused to enter into a standing arrangement to supply blood to the outpatient facility.

Request for Blood Refused

A patient was having a routine outpatient laparoscopic tubal ligation at the new outpatient facility when serious bleeding started.

The surgeon gave the perioperative nurse explicit instructions not to type and cross-match the patient's blood for the Red Cross located about thirty-five miles away, but to get four units of O Negative blood from the hospital blood bank only a mile away.



The purpose of a community blood bank is to supply blood. It is against common logic and sense to think that a hospital housing a community blood bank would refuse to supply blood in a life-and-death emergency and have no legal duty to provide such blood simply because the person in medical need is outside the hospital door.

COURT OF COMMON PLEAS OF OHIO, 2001.

The person in charge at the blood bank refused, stating she was under orders not to supply blood to the outpatient surgical center under any circumstances. About one and one-half hours after the surgeon first indicated the four units were needed, after at least three more phone calls, the hospital finally did agree to supply the blood.

When the courier arrived, however, they gave him only two units. The two units were transfused and they attempted to transport the patient from the surgical center to the hospital but she arrested and died en route.

The family sued both facilities.

Hospital's Legal Duty to Non-Patients In Emergencies

The Court of Common Pleas of Ohio said this was the first case like it ever seen by a US court. The court differentiated the long-standing legal rule that a hospital's duty of care extends only to the hospital's patients.

The court ruled in an emergency a hospital must take reasonable steps to aid a non-patient. Specifically, a community blood bank cannot refuse to supply blood to patients who are not patients of the blood bank's parent facility simply because they are not patients.

McGill v. Newark Surgery Center, 756 N. E. 2d 762 (Ohio Com. Pl., 2001).

Inside this month's issue ...

January 2002

Emergency Evacuation, No Plan: Nursing Home Resident Dies.

When Hurricane George threatened to make landfall near the New Orleans metro area in the Fall of 1998 the civilian authorities ordered an evacuation.

A nursing home in the metro area did not have an emergency preparedness plan. Buses were hastily chartered to come and take the residents to a shelter in Baton Rouge, safely inland from the Gulf.

Bedridden residents had to ride sitting up. Water, cookies and snacks were stored in the bus's luggage bay even though some of the residents were on special diets and had to be fed. The air conditioning only worked properly when the bus was moving and the bus spent hours stalled in the massive traffic jam of vehicles fleeing New Orleans. When they got to Baton Rouge one of the residents, who was on a special diet, was dead.

The nursing home did not have an emergency preparedness plan that had been approved by local authorities.

While evacuating the residents on chartered buses from New Orleans to Baton Rouge before a hurricane, one of the residents died.

COURT OF APPEAL OF LOUISIANA, 2001.

The Court of Appeal of Louisiana upheld charges of a Class C violation of the state's regulations for nursing home licensure standards.

The court did not elaborate in detail specifically what a nursing home is required to do by way of emergency contingency planning. **In re Maison Deville Nursing Home, 797 So. 2d 728 (La. App., 2001).**

Suicide Victim Resuscitated, Treated: Court Dismisses Suit Against Caregivers.

The patient's sister called 911 after the patient shot herself in the head. The EMT's transported her to the hospital. The sister arrived with a document she said was the patient's living will and demanded life saving surgery be stopped, but treatment was continued.

She was on a respirator for six days, then successfully weaned. She has permanent brain injuries and will need lifetime nursing home care.

In the absence of a valid advance medical directive or a physician's order not to resuscitate or a court order, there is no right to sue healthcare providers for prolonging a patient's life.

The living will produced by the patient's sister had only one witness signature. State law requires two.

Even so, the document did not clearly indicate the patient's expressed wishes for this particular situation.

NEW YORK SUPREME COURT, APPELLATE DIVISION, 2001.

The sister sued the hospital. The New York Supreme Court, Appellate Division, dismissed the case.

A conscious mentally competent adult can refuse any treatment, even life saving treatment.

But healthcare providers cannot be sued for treating an unconscious patient who has no valid advance directive. **Haymes v. Brookdale Hospital Medical Center, 731 N.Y.S.2d 215 (N.Y. App., 2001).**

Alzheimer's: Court Refuses To Honor Exculpatory Clause After Patient Elopes.

An elderly patient was admitted to a nursing home by his siblings after repeated bouts of confusion and forgetfulness. He was never formally diagnosed by a doctor as having Alzheimer's disease.

The nurses took their eyes off him only five minutes and he was gone. They called the police and started looking for him. A police helicopter found his body in a nearby field four days later.

In general there is no problem with an exculpatory clause in a contract, where one party agrees to relieve the other party of liability for future acts of negligence, assuming that is the intent of both parties and their intent is clearly stated in the contract.

A court will not honor an exculpatory clause in a nursing home admission contract after a resident with Alzheimer's wanders away and is injured.

MISSOURI COURT OF APPEALS, 2001.

The Missouri Court of Appeals did not rule that the nursing home was negligent. It ordered a new trial because the lower court prejudiced the jury by letting them see the admission contract with an exculpatory clause in the event a resident left without permission. **Gates v. Sells Rest Home, Inc., 57 S.W. 3d 391 (Mo. App., 2001).**

Elopement Attempt: Court Says Psych Patients Have Special Legal Relationship With Hospitals.

The police brought the patient to the hospital after an apparent suicide attempt with an overdose of Valium.

Suicide precautions were ordered the first day, but discontinued on the second day.

For a patient not assessed to be a current acute suicide risk, safety precautions included hourly checks during the day, half-hourly checks at night and environmental rounds q shift for special hazards.

Elopement Risk

The Court of Appeals of Wisconsin looked carefully at the events leading up to the patient's elopement attempt in which she fell trying to climb down a bedsheet from a third-floor window and was badly injured.

The Court of Appeals overturned the dismissal of the case by a judge in a lower court and ruled there was sufficient evidence for the judge to have submitted the case to a civil jury to decide the issues of negligence and damages.

The nurses and the psychiatrist noted that the patient's affect was volatile and that her behavior was uncooperative but they were correct that there was no longer an appreciable suicide risk, the court believed.

Ordinarily the law does not allow one to sue another for the consequences of one's own negligence.

It is different when an involuntary psychiatric patient who is a known elopement risk is injured while trying to escape.

A psychiatric facility has a special legal relationship with patients who are under the facility's custody and control.

If the facility can foresee that the patient likely will try to elope and fails to take reasonable measures to stop the patient from eloping, the facility is guilty of negligence.

It is not relevant that the patient was also guilty of negligence trying to carry out a certain plan of escape.

The patient's own negligence does not diminish the facility's responsibility for what happens to the patient while trying to elope.

COURT OF APPEALS OF WISCONSIN, 2001.

However, the court believed the nurse should have been alerted to an elopement risk, as opposed to a suicide risk, when the patient put on her shoes and went to the nurses station asking to have her personal possessions returned, then looked in her purse for phone numbers on slips of paper and began making calls.

Voluntary versus Involuntary Status

At the time in question the patient technically was a voluntary admission. The psychiatrist was going to offer her the option of continuing her stay as a voluntary patient, or the facility would get a court order to keep her involuntarily.

The court said at this point the patient was essentially an involuntary patient. She was under the custody and control of the facility and was entitled to have all reasonable and necessary precautions taken for her safety, to prevent self-harm and to prevent elopement.

Safe Place

The patient escaped by removing the window air conditioning unit in the next room. The patient in that room told her it was loose. The hospital should have discovered it and seen the risk it posed in a psychiatric facility, the court said.

JCAHO Surveys

The Court of Appeals did uphold the lower court judge's ruling that JCAHO survey documents are legally privileged and do not have to be turned over to the plaintiff's attorney in a malpractice case. These documents are basically the same as internal peer review and quality control and enjoy the same legal privilege. **Hofflander v. St. Catherine's Hospital, 635 N.W. 2d 13 (Wis. App., 2001).**

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Employee Handbooks: Court Willing To See Creation Of Employment Contract For Full Disciplinary Processes.

When she was hired the hospital gave the nurse a copy of the hospital's elaborate employee handbook.

According to the Court of Appeals of New Mexico, there was no individual employment contract or other document defining the relationship between the nurse and her employer.

The nurse was fired for allegedly calling in prescriptions to the pharmacy for patients without physicians' orders.

The nurse sued for wrongful discharge. She claimed she had rights under the employee handbook. That is, the employer's stated policies for full progressive discipline were not just a statement of the employer's policies, they were her rights as an employee.

Progressive Discipline

The nurse claimed she could not be fired without a verbal warning, written waming, suspension and probation before termination. Whether or not her conduct was wrong, she claimed, her firing was null and void because the procedures in the employee handbook were not followed.

Employer's Policies versus Employees' Rights

The court said the trend in the US is away from the traditional common-law rule that employers can fire at will when there is no union contract or individual employment contract.

The key is whether the employer, by promulgating and following an employee handbook, has created expectations among employees that the employer will follow its own policies, and whether employees have continued to work for the employer based upon such expectations. If so, there is more likely than not an implicit employment contract in which the employer's policies have become the employee's rights, for which they can sue. **Mealand v. ENMMC, 33 P. 3d 285 (N.M. App., 2001).**

Courts are beginning to see employee handbooks issued by employers as the basis for implied employment contracts in situations where there is no collective bargaining agreement with a union or written employment contract with a particular employee.

Employees are succeeding with wrongful discharge lawsuits against their former employers when fired without getting all the disciplinary processes set out in the employer's employee handbook.

The courts are taking language out of employee handbooks and giving employees substantial rights.

The traditional common-law rule is not faring well that employees can be discharged at any time for any reason with no legal recourse for wrongful discharge.

Employers customarily put disclaimers in their employee handbooks that the handbooks are not employment contracts, but those disclaimers often are not honored by the courts.

COURT OF APPEALS OF NEW MEXICO, 2001.

Sickle-Cell Screening: Result Should Have Been Verified.

The Supreme Court of Virginia had to rule on a summary judgment motion filed by the attorneys for a pediatric clinic. The court did not rule definitively that the clinic was negligent.

The court only ruled that if the parents' allegations were true there were legal grounds for a civil lawsuit. The truth or falsity of the allegations would have to be decided by a civil jury.

The mother said she asked a clinic employee for the results of the sickle-cell test for her second child.

The mother said she was told she would have been notified if the test was positive so it must have been negative.

The parents conceived a third child who was born with sickle cell beta O thalassemia.

They would not have conceived again if they had known their second child actually was positive.

SUPREME COURT OF VIRGINIA, 2001.

The court said a physician, nurse or other healthcare provider is negligent to report the results of medical tests on the basis of assumptions without actually checking. Given the parents' genetic profile, the child would not have been screened for sickle cell in the first place without a significant mathematical chance of being positive. **Didato v. Strehler, 554 S. E. 2d 42 (Va., 2001).**

Labor Relations: Nursing Employee Falsely Disparaged Quality Of Care, Not Protected By National Labor Relations Act, Court Says.

A registered nurse first assistant and a contract physician went on the local television ten o'clock news with a story that the health and safety of expectant mothers were being threatened by changes in staffing practices at the hospital.

Immediately there was a strong negative reaction to the broadcast among physicians holding staff privileges at the hospital in and out of the labor and delivery unit. Top management at the hospital responded to the physicians' concerns by firing the registered nurse first assistant four days after the broadcast.

She filed a charge of an unfair labor practice with the National Labor Relations Board (NLRB). The Board's administrative law judge ruled the hospital by firing her committed an unfair labor practice and he ordered her reinstated.

The hospital filed an appeal. The US Circuit Court of Appeals for the Eighth Circuit upheld the hospital's decision to fire this employee. The court ruled there was no unfair labor practice and refused to enforce the Board's order.

Staffing Changes

The hospital had decided to have nursing staff in labor and delivery work four twelve hour shifts each week instead of two twenty-fours. Staff affected by the changes were offered twenty-four hour shifts elsewhere in the hospital. Only this one nurse elected to stay in labor and delivery and she did so under protest.

The court did not attempt to second-guess the wisdom or the motivation of the hospital in making these changes. The only relevant issue was whether the hospital's reaction to the nurse's TV appearance was an unfair labor practice.

Unfair Labor Practice

Employers are not permitted to interfere with union activities by threats, intimidation, retaliation, etc. An employee victimized by an unfair labor practice has the right to seek restitution through a grievance filed with the NLRB.

If an employer fires an employee for engaging in union activities, and there is no legitimate basis for the firing, the employer commits an unfair labor practice.

The National Labor Relations Board can order an employee reinstated with back pay who has been the victim of an unfair labor practice.

An employee's public statements to the news media are considered a protected union activity if the statements relate to an ongoing labor/ management dispute and are not a disparagement of the company's reputation or the quality of the company's products and are not maliciously motivated.

This employee's statements related to an ongoing labor/management dispute over staffing practices in the hospital's labor and delivery unit.

However, the statements were not a protected union activity because they were basically false and were calculated to affect the hospital's reputation adversely with the public.

UNITED STATES COURT OF APPEALS, EIGHTH CIRCUIT, 2001.

Nurses going through their unions to resolve staffing issues through collective bargaining and grievance procedures are protected by from unfair labor practices by Federal labor law. The court ruled the nurse's TV appearance did pertain to an ongoing labor dispute with the hospital.

Falsely Disparaging the Company's Reputation or Products

However, as a general rule employees are not permitted as a union tactic falsely to disparage their employer's reputation or the quality of their employer's products. In this case the nurse stepped over the line using as a tactic in her and the union's dispute with the hospital sensational allegations that the safety of vulnerable patients and the quality of their care were being threatened.

Anti-Union Sentiment

In general in the labor law arena the employee or the NLRB has to prove that an employer's act alleged to be an unfair labor practice was motivated by anti-union sentiment.

In this case the nurse in question had been interviewed on TV during the months before this incident about ongoing labor/ management issues at the hospital and had been identified by the news media as the top union supporter among the hospital's nurses.

The court pointed out that nothing happened as a result, which strongly led to the conclusion that the hospital had no generalized anti-union bias, but was motivated strictly by the strong negative reaction among staff physicians to her most recent false and disparaging remarks about patient safety and the quality of care.

Finally, the court editorialized that patients' lives are at stake in hospital surgical departments. Common sense, the court said, teaches that patient care is directly affected by the ability of a team of physicians and nurses to work together. **St. Luke's Episcopal-Presbyterian Hospitals, Inc. v. National Labor Relations Board, 268 F. 3d 575 (8th Cir., 2001).**

Disability Discrimination: Drug Rehab, Hearing Disability Were Not The Reason Employee Was Fired.

The Superior Court of New Jersey, Appellate Division, ruled that a hospital employee's disability discrimination case should be dismissed. The evidence was not there to support the case.

Successfully Rehabilitated Drug Abuser

State and Federal anti-discrimination laws include in the definition of a qualified individual with a disability a person who is participating in a supervised rehabilitation program or has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use.

Employers are allowed to verify by drug testing that an employee who claims to be successfully rehabilitated from illegal drug use actually is no longer using drugs.

Employee Assistance Program Strict Confidentiality

The court accepted the hospital's claim that the employee's supervisors had no knowledge the employee in question had gone through drug rehab, as it was the hospital's unwavering policy to keep employee assistance matters strictly confidential even within the hospital.

If the decision-makers who fired the employee did not know of her drug-related disability, they could not have made their decision on that basis.

Reasonable Accommodation

The employee had bilateral hearing aids and apparently could hear normally with them. She requested a special stethoscope. Her supervisors agreed to supply it as a reasonable accommodation, but had never heard of such a device and did not know where to purchase it.

The court faulted the employee for not following through at that point and identifying the device and finding a supplier as she was asked. **Bosshard v. Hackensack University Medical Center, 783 A. 2d 731 (N.J. Super., 2001).**

A hospital employee was fired for altering a medical record shortly after she reported back to work after attending drug rehab.

She also requested the hospital get her a special stethoscope to take blood pressures and perform vascular sufficiency tests. She was told to locate a supplier and the hospital would buy it for her, but she never followed through.

If there is more than one explanation why an employee was disciplined or fired, the employee has to put forward some evidence the employee's disability or disabilities were the reason.

The hospital's strict policy was that employee assistance, who got her into drug rehab, did not share information with supervisors. There was no proof this employee's supervisors knew she was in rehab rather than on vacation.

She was having other difficulties with her job unrelated to her hearing deficit that questioned her competence and compromised patients' safety.

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, 2001.

Pregnancy Discrimination: Court Finds Other Reason For Firing.

The nurse's supervisor said changing her schedule while she was pregnant and giving her maternity leave with full benefits was costing the hospital money, but the supervisor worked with her because it was hospital policy to accommodate a nurse's requests for maternity leave.

The nurse replaced a Salem sump with a feeding tube, then charted a non-existent verbal order and was fired. She sued for pregnancy discrimination. The US Circuit Court of Appeals for the Fifth Circuit ruled in favor of the hospital.

The nurse took maternity leave three times in three years.

The nurse performed a procedure that was not ordered and which the physician did not want done, then falsified the chart.

By comparison, another nurse had done the same procedure without an order, was never pregnant and was not fired.

The other nurse did not falsify the chart.

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT, 2001.

Discrimination has to be proved by showing a non-pregnant employee, similar in all respects, was treated more favorably. Another nurse did the same thing but did not try to cover herself with a phony chart entry. She was not similar in all respects. **Wallace v. Methodist Hospital System, 271 F. 3d 212 (5th Cir., 2001).**

Confidentiality: Caretakers Not To Block Access To Medical Records.

Criminal charges were filed against the regional director of a nursing home's parent corporation after photographs were sent to state investigators of a resident with severe decubitus ulcers.

Patient confidentiality in medical records is very important, but a nursing home and its employees are not allowed to claim medical confidentiality to block access to relevant records in an investigation into possible abuse or neglect.

It does not make sense to allow a suspected wrongdoer to use another person's privilege to shield his or her own actions.

COURT OF CRIMINAL APPEALS OF OKLAHOMA, 2001.

The Court of Criminal Appeals of Oklahoma ruled a nursing home does not have the right to claim medical confidentiality to block access to patients' medical records sought by Federal or state investigators, assuming the investigators have followed proper legal procedures to obtain the records.

The court also said that a high-level management employee can be considered a caretaker for purposes of a state criminal statute that forbids abuse or neglect by a caretaker. However, in a criminal prosecution the defendant has the right to trial by jury and can have the question whether or not he or she is a caretaker submitted to a jury. **State v. Thomason, 33 P. 3d 930 (Okla. Crim. App., 2001).**

Elder Abuse: Court Extends Statute Of Limitations.

California has a one-year statute of limitations for malpractice, which is relatively short compared to other states. There may be grounds to extend the one year, but it cannot go beyond three years. Many other states also recognize grounds to extend the statute of limitations but have a similar arbitrary maximum regardless of the circumstances.

In civil cases, if a person who has cause to file a lawsuit is disabled from filing a lawsuit because of being a minor or insane, the time the person is disabled from filing the lawsuit is not part of the statute of limitations.

In this context the word "insane" means the person is incapable of caring for his or her property or transacting business or understanding the nature or effects of his or her acts.

A nursing home patient can be considered to fall within this definition of being insane, extending the time the patient can sue for substandard treatment.

CALIFORNIA COURT OF APPEAL, 2001.

The California Court of Appeal ruled recently that a nursing home resident could sue for all of the acts of neglect that occurred up to three years, not one year, before a lawsuit was filed on her behalf. Her mental status fit the civil-court definition of insanity, which extended the statute of limitations for a civil suit on her behalf. **Alcott Rehabilitation Hospital v. Superior Court, 112 Cal. Rptr. 2d 807 (Cal. App., 2001).**

Patient Burned In O.R.: Court Applies *Res Ipsa Loquitur.*

A patient awoke with third-degree burns on the back of her thigh.

It was not clear how it happened but an expert witness hired by her attorneys came up with two hypothetical explanations, both of which blamed the O.R. personnel for negligence.

The New York Supreme Court, Appellate Division, acknowledged the plaintiff's expert's theories were speculative. However, the court ruled this was something that would ordinarily not happen in the absence of negligence and allowed the case to go forward based on the legal rule of *res ipsa loquitur*, that is, "It speaks for itself." **Babits v. Vassar Brothers Hospital, 732 N.Y.S.2d 46 (N.Y. App., 2001).**

Patient Beaten In E.R.: Court Says No To *Res Ipsa Loquitur.*

A patient awoke in the emergency room with bruises all over his body.

He testified he had been drinking and went to the emergency room for chest pains, sat down, went to the restroom, sat back down and then woke up injured.

Two hospital security guards testified he came in highly intoxicated, picked up and swung a chair breaking a window and had to be physically restrained for the safety of staff and other patients.

The New York Supreme Court, Appellate Division, ruled *res ipsa loquitur* did not apply. The security guards may or may not have used excessive force. Under the circumstances the patient being injured, in and of itself, did not prove the hospital was negligent. **Garcia v. Bronx Lebanon Hospital, 731 N.Y.S.2d 702 (N.Y. App., 2001).**

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Retaliation: Court Says Independent Contractor Has No Right To Sue For Wrongful Discharge.

As a general rule the law allows an employee to sue a former employer for wrongful discharge when the employer has terminated the employee in retaliation for exercising a legal right. In the healthcare context these lawsuits sometimes follow after employees take up their patients' causes and complain about substandard or improper care.

When healthcare workers complain to proper legal authorities about violations by their employers of laws or regulations for patient-care standards and are terminated, the workers are routinely able to go to court to obtain compensation for wrongful discharge.

The courts do not honor the employer's traditional right to fire an at-will employee at any time for any reason when the employee has been trying to vindicate an important public policy. The courts value patients getting the care they deserve more highly than employers being able to fire or retain whomever they choose.

However, as the Supreme Court of Iowa recently observed, US courts generally do not extend this same protection to healthcare workers who are independent contractors rather than employees.

In this case a part-time consulting social worker at a nursing home was not an employee of the nursing home. She was an independent contractor with her own consulting business.

She went to the State Department of Inspection with her concerns that the nursing home's outright ban on smoking by residents was a violation of their legal rights.

When she did so the nursing home promptly cancelled her consulting contract, although she was paid for an additional month.

The court did not get into the issue whether nursing home patients can or cannot smoke. The only issue was that an independent contractor, not being an employee, has no right to sue for retaliation. **Harvey v. Care Initiatives, Inc., 634 N. W. 2d 681 (Iowa, 2001).**

Penrose Drain: Nurse Should Have Been Alerted To A Problem By Its Appearance After Removal.

After kidney surgery a Penrose drain was inserted into the patient's surgical wound to promote post-operative drainage.

A Penrose drain basically is just a length of soft plastic tubing.

The patient's nurse had orders from the surgeon to remove the drain three days post surgery. The nurse had over thirty years experience in post-operative care and had removed more than a hundred Penrose drains. To remove a Penrose drain the nurse or physician simply pulls it out.

In this case a 5.5 centimeter portion of the drain was left inside the patient. It was discovered during imaging studies three months later ordered because of the patient's continuing complaints of pain.

When resistance is encountered removing a Penrose drain from a surgical incision and the end comes out with an irregular jagged appearance, a competent nurse or physician should know there is a problem.

If a portion of a Penrose drain has broken off and remains inside the patient's body the physician will have to decide whether to go back in and remove it.

SUPREME COURT OF WASHINGTON, 2001.

According to the Supreme Court of Washington, it is not necessarily negligent to keep pulling on a Penrose drain when resistance is encountered.

However, when resistance is encountered and the end that was in the patient comes out jagged a nurse should know something is wrong, that is, a portion of the drain is still inside.

At that point the nurse has a legal duty to bring it to the surgeon's attention for follow-up evaluation and a medical decision how to proceed.

The court said the drain theoretically could have been that way when placed in the wound or it could have been sutured inside by the surgeon, but that was so unlikely that the surgeon was dismissed from the lawsuit. **Miller v. Jacoby, 33 P. 3d 68 (Wash., 2001).**