LEGAL EAGLE EYE NEWSLETTER

July 2004 For the Nursing Profession Volume 12 Number 7

Assessment Started, But No Fall-Care Plan In Place: Court Finds Nursing Staff Negligent.

The patient was admitted to the hospital after she fell at home trying to go to the bathroom. She broke her left arm.

Three days after entering the hospital she fell while trying to close her room door so she could use the bathroom. She broke her right arm.

Assessment Started, Not Finished
No Fall-Care Plan

On admission to the hospital the nurses began imputing data into a fall-risk-assessment computer program.

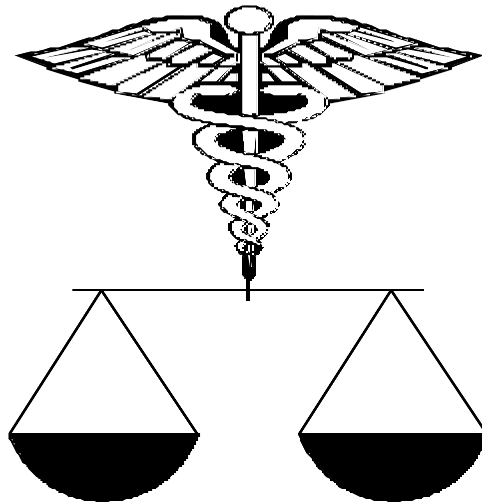
The court found that the fall-risk assessment was not completed and a fall-care plan was not in place until three days later.

The care plan was not in effect until after the patient had already fallen.

On four separate admissions to this same hospital the patient had been assessed at high risk for falling and fall-risk care plans had been implemented right away upon admission.

The patient had fallen at home. Due to multiple medical problems the patient was very weak and short of breath.

For this admission the patient's physician ordered strict bed rest, meaning the patient was not to be out of bed for any reason, even to use the bathroom.



The fall-risk assessment was started but not completed and a fall-risk care plan was not implemented until three days after admission.

The patient had already fallen and broken her good arm before the fall-care plan was in place.

No full assessment and fall-care plan on admission for this patient was negligence.

COURT OF APPEAL OF LOUISIANA
May 26, 2004

The court ruled it was negligent for the nursing staff not to have completed the patient's obviously high-risk fall assessment upon admission and not to have placed a care plan in her chart and posted appropriate warnings by her bed to alert staff caregivers.

The court did not specify in detail what data should have gone into the patient's assessment or what elements her fall-care plan should have contained. The incomplete assessment and lack of a fall-care plan in and of themselves were grounds for negligence.

Nursing Care Faulted

With or without a full assessment and a specific care plan in her chart the court believed any competent nurse would know she was at risk to fall and would have observed certain fundamental precautions in caring for her.

Apparently the patient rang her call bell and got no response, which led to her getting up on her own.

Only the upper but not the lower bed rails were up, four bed rails being considered too restrictive by the nursing staff caring for her.

The court seemed to suggest she would have been a candidate for soft restraints. **Cook v. Jefferson Parish Hosp. Service Dist., __ So. 2d __, 2004 WL 1171715 (La. App., May 26, 2004).**

Inside this month's issue ...

July 2004
New Subscriptions Page 3

Assessment/Fall-Care Plan - Infection Control/New CDC Guideline
Nurse As Expert Witness - Restraint-Free Facilities
Medical Confidentiality - Quality Assurance/Confidentiality
Emergency Room/Forced Catheterization/Civil Battery Lawsuit
Labor & Delivery Nursing/EMTALA - Ventilator Patient
Unionization/Wrongful Discharge - Abuse/Neglect/Punitive Damages
Perioperative Nursing/Counts - Tissue Donors/CDC Guideline

Infection Control In Healthcare Settings: New Draft Guideline Available From CDC.

On June 14, 2004 the US Centers for Disease Control and Prevention published a new "Draft Guideline for Isolation Precautions: Preventing Transmission of Infectious Agents in Healthcare 2004."

Draft Guideline Not Mandatory At This Time

The CDC has expressly stated that use of the Draft Guideline is not mandatory at this time.

The CDC will accept public comments on the new Draft Guideline until August 13, 2004, consider the public comments and then promulgate a finalized mandatory Guideline at a future date, observing the process any Federal agency must follow for issuing new regulations.

Hospitals, Long-Term Care, Home Care

The new Guideline will apply to hospitals, with special emphasis on ICU's, burn units and pediatric-care settings.

The new Guideline will also apply to non-acute care settings like long-term care facilities, ambulatory care settings, home care and other contexts.

Emerging Pathogens

The new Guideline deals with emerging pathogens of special concern to healthcare settings, e.g., multidrug-resistant organisms, agents of bioterrorism, prions, SARS, monkeypox and avian influenza A.

Access to New Draft Guideline

The new Draft Guideline can be obtained on the Internet or by mail from:

Resource Center
Attn: ISO Guide
Division of Healthcare Quality Promotion
Centers for Disease Control
Mailstop E-68
1600 Clifton Rd. N.E.
Atlanta GA 30333
fax (404) 498-1244
e mail isorequests@cdc.gov

FEDERAL REGISTER June 14, 2004
Page 33034

The US Centers for Disease Control and Prevention has published a new "Draft Guideline for Isolation Precautions: Preventing Transmission of Infectious Agents in Healthcare Settings 2004."

When finalized, the new Guideline will replace the CDC's 1996 "Guideline for Isolation Precautions in Hospitals."

The CDC has stated that this new Guideline is intended at this time for public comment only.

Healthcare personnel should not modify practices or policies based on the CDC's preliminary recommendations contained in the new Draft Guideline, according to the CDC.

The new Draft Guideline is available on the CDC's website at http://www.cdc.gov/ncidod/hip/isoguide.htm.

We have placed the 198 page Draft Guideline on our website at http://www.nursinglaw.com/infection.pdf.

The Draft Guideline is not copyrighted and permission is not required to download, print and distribute it.

FEDERAL REGISTER June 14, 2004
Page 33034

Nurse As Expert Witness: Court Sees No Need For Specialist.

Several hours after the patient had given birth a nurse attempted to assist her to the shower. The patient fell and was injured getting out of bed.

The patient's lawsuit against the nurse and the hospital alleged nursing negligence in that the nurse failed to assess the patient as to whether her epidural anesthetic had worn off to the point she could safely stand and walk.

The lower court ruled in favor of the nurse and the hospital because the patient's nursing expert was not an expert in the area of labor and delivery nursing.

As a general rule, without an expert witness whom the court can properly recognize as an expert, a healthcare malpractice case must be dismissed.

Post-surgical patient assessment and care is not a specialized area of nursing practice.

To qualify as an expert witness a nurse is not necessarily required to specialize in the same field as the defendant in the case.

COURT OF APPEALS OF MICHIGAN
UNPUBLISHED OPINION
June 10, 2004

The Court of Appeals of Michigan overruled the lower court in an unpublished opinion. Unlike physicians, nurses are not to be discounted as expert witnesses just because they lack clinical specialization.

The Court of Appeals in any event did not see this as a labor and delivery nursing case. The case involved more generic issues of caring for a post-surgery patient, a competency that is expected of nurses in general. **Roach v. Hakim, 2004 WL 1292049 (Mich. App., June 10, 2004).**

Restraint-Free Facility: Aide Supervised Resident Properly, No Negligence Found.

The eighty-two year-old resident was returned to the nursing facility from the hospital following surgery.

He was reported to be extremely agitated at the time of his readmission, and this was reported to the nursing assistant assigned to care for him.

That evening the nursing assistant did not observe any agitation.

The nursing assistant brought him out of his room for dinner, then took him back to his room to use the restroom, be bathed and to be dressed in his pajamas.

Then he was returned to the day room in his recliner chair.

According to the court record the nursing assistant checked on him at least twelve times while he was in the day room.

He did not seem to be agitated, nor did he ever attempt to rise from his recliner chair.

The nursing assistant last looked in on him three minutes before he was found on the floor having fallen from his recliner.

He sustained injuries, not specified in the court record, from which he died. The family sued for negligence.

There is no specific proof the aide in this case did anything wrong.

The actions of personnel working in a restraint-free nursing facility will not be questioned after the fact for failing to consider use of restraints.

A Federal regulation for long term care states that the facility must ensure that the residents' environment remains as free of accident hazards as possible and each resident receives adequate supervision and assistance devices to prevent accidents.

The regulation does no more than vaguely promote keeping the environment as free from hazards as possible. It does not make a long term care facility liable any time an accident occurs, without proof of an error or omission below the standard of care.

APPEALS COURT OF MASSACHUSETTS
UNPUBLISHED OPINION
May 20, 2004

The jury found no negligence. The Appeals Court of Massachusetts agreed with the jury and ruled the case against the facility should be dismissed.

Restraint-Free Facility

The court upheld the facility's restraint-free policies. That is, the court refused to question an employee's actions in such a facility after the fact for not considering use of restraints.

A memo from a newly-hired nursing home supervisory employee stating that confused or helpless residents were not to be left alone unrestrained was at odds with the facility's policies as explained to the nursing assistant.

The court ruled the memo irrelevant, that is, it was not a correct statement of overall institutional policy and was not how the nursing assistant in question had been oriented to institutional policy.

Federal Regulations

A Federal regulation states that a nursing facility must ensure that a resident's environment remains as free of accident hazards as possible and must ensure that each resident receives adequate supervision and assistance to prevent accidents.

The court ruled the regulation is meant to promote a common-sense approach to environmental safety.

There must be specific proof that an employee committed a violation of the standard of care before a facility can be sued for violating this Federal regulation. In this case there was nothing anyone could show that this nursing assistant did wrong. **Higgins v. Lifecare Centers of America, Inc., 20044 WL 1124736 (Mass. App., May 20, 2004).**

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Medical Confidentiality: An Exception Exists When One Patient Assaults Another.

The family and the probate administrator of a deceased nursing home resident sued the nursing home.

The lawsuit alleged that the resident had been permitted repeatedly to fall and suffer injuries.

The lawsuit also alleged that another resident who was under psychiatric care at the time was negligently permitted to sexually assault the resident in question.

Alleged Perpetrator's Medical / Psychiatric Condition

The court has not as yet passed judgment on the truth or falsity of the underlying allegations of negligence.

The issue at this point is whether the nursing home and the treating psychiatrist must provide the victim's family's lawyers with copies of the alleged perpetrator's medical records without any authorization from the perpetrator.

The Court of Appeals of Texas looked carefully at the general principles of medical confidentiality.

A patient or the patient's legal representative is always allowed access to the patient's medical records, and in most circumstances can block any and all third parties from access to the records.

When one nursing home resident sues alleging substandard care, the records of other patients are still strictly confidential even though those records could conceivably substantiate the case by proving they also received substandard care.

There is a narrow exception when a resident sues for abuse or neglect claiming that abuse or neglect came from failure to protect the resident from another resident.

In such as case it is necessary to establish the alleged perpetrator's psychiatric condition and the fact the caregivers caring for both of them knew of the perpetrator's mental problems. The only just way to establish these basic elements of the case is to break the perpetrator's medical confidentiality, the court ruled. **In re Arriola, __ S.W. 3d __, 2004 WL 1244289 (Tex. App., June 8, 2004).**

When one patient sues for negligence the medical records of other patients receiving similar care in the same facility from the same caregivers remain strictly confidential.

That is true unless the other patients agree to sign away their right to medical confidentiality as to their charts and their caregivers' recollections about them.

That is the general rule. There is a very narrow exception to the general rule.

When there is reason for the court to believe that a patient has a valid case for abuse or neglect in the form of an assault by another patient, the other patient's psychiatric condition and their mutual caregivers' knowledge of that condition are facts essential to the victim's case.

In this limited circumstance the victim's right to seek justice and vindication outweighs the alleged perpetrator's right to confidentiality.

The perpetrator's records can be looked into and caregivers can be compelled to testify.

COURT OF APPEALS OF TEXAS
June 8, 2004

Quality Assurance: Confidentiality Applies To Nursing Homes.

A deceased resident's probate administrator sued the nursing home for negligence after the resident rolled himself into an area where he should not have gone, fell out of the chair, was injured and died from his injuries. The lawsuit alleged negligent lack of supervision.

Nursing facilities are required by Federal law to have quality assurance committees.

A nursing facility risks loss of Medicaid and Medicare funding if it does not have a functioning quality assurance committee.

It makes sense that nursing homes should benefit from the same principles of quality assurance confidentiality that the law expressly applies to hospitals.

NEW YORK SUPREME COURT
MONROE COUNTY
June 7, 2004

The New York Supreme Court for Monroe County ruled that the family's lawyers should not be given copies of incident reports or other documents for this incident created by the nursing home's internal quality review committee.

Although not expressly stated in the law, nursing homes should have the same quality assurance confidentiality which the law expressly applies to hospitals, the court said. The rationale is to promote full and candid quality assurance appraisals of such incidents as this one. **Bielewicz v. Maplewood Nursing Home, Inc., 2004 N.Y. Slip Op. 224190, 2004 WL 1258034 (N.Y. Super., June 7, 2004).**

Emergency Room Nursing: Court Criticizes Forced Urinary Catheterization, Allows Lawsuit For Medical Battery To Go Forward.

The patient was brought to the hospital's emergency room by sheriff's deputies after he was found wandering a rural highway on foot inadequately clothed for the cold winter weather.

The deputies found the man in a state of marked mental confusion. They kept trying for thirty minutes to get him to identify himself and state what he was doing when they found him. He was completely uncooperative and unable to carry on a normal conversation.

The deputies believed the man was under the influence of alcohol and/or illegal drugs.

Although a resident in a nearby farmhouse reported the man was burglarizing his house when the resident drove up, the deputies could find no evidence the man had attempted forced entry.

That is, there were no grounds to hold him as a criminal suspect. However, his mental state and/or intoxication appeared to present a danger to himself, so the deputies decided to transport him in handcuffs to the emergency room as a mental-health case.

At the hospital the man was unresponsive to the triage nurse's and physician's questions.

The physician wanted a urine sample as part of the patient's medical screening. The hospital lab only had the capability to run toxicology screens on urine.

The nurse gave the man a sample cup, but he could not or would not urinate.

No Consent To Urinary Catheterization

The physician decided he should be catheterized. The physician discussed the plan to catheterize him with the nurses in front of the patient, but got no expressed or implied consent from the patient.

Then the two deputies held him down while a nurse removed his pants and catheterized him using technique that was medically appropriate in all respects.

A medical battery claim can be filed when a physician, nurse or other healthcare professional performs a procedure to which the patient has not consented.

Every patient has the basic right to exercise control over his or her own body and to make informed decisions about medical treatment.

The healthcare professional has the duty to obtain the patient's informed consent before going ahead, unless there are extenuating circumstances.

One of the recognized exceptions to the duty to obtain informed consent is when a true emergency exists which makes it impractical to obtain the patient's consent.

Unless it is an emergency the patient must consent before urinary catheterization can be done.

In the physician's judgment the patient was medically stable, even though he was not communicating.

A civil jury will have to decide if there really was an emergency.

UNITED STATES DISTRICT COURT
IOWA
June 14, 2004

The urine sample revealed amphetamines, marijuana and cocaine. The patient was not charged with a criminal offense. Charges would have been thrown out as there was no search warrant.

Medically the drugs in his system meant he would have to go to a psychiatric facility that had detox capability, or go to detox first and then to a psych facility.

Later that evening a magistrate ordered him committed to a specified facility for detox and mental-health observation based on a petition properly filed by a designated mental health professional.

Court Approves Entire Course Except Forced Catheterization

In a lengthy opinion,. The US District Court for the Northern District of Iowa threw out almost all the allegations of the man's lawsuit against the sheriffs, the hospital, the nurses and the physicians.

There was no violation of his Constitutional rights, no invasion of privacy, no false imprisonment and no intentional infliction of emotional distress.

Medical Emergency Disputed

It is a civil battery for healthcare professionals to go ahead with any medical intervention that involves touching the patient without the patient's informed consent. One exception is for a true medical emergency. There is also an exception for court-ordered medical interventions.

The court questioned whether this really was a medical emergency. The telling factor was the physician's note that the patient was medically stable at the time he was forcibly catheterized.

If the patient is medically stable and does not indicate that he wants to be catheterized, he would be within his legal rights to decline no matter how much the patient's caregivers believe a urine drug screen is in the patient's best interests.

A civil jury will have to decide if a true medical emergency existed. **Tinius v. Carroll County Sheriff, __ F. Supp. 2d __, 2004 WL 1340805 (N.D. Iowa, June 14, 2004).**

Unionization: Nursing Home Administrator Who Refused To Fire Workers Cannot Sue, Must Complain To NLRB.

According to the Court of Appeals of Michigan, a nursing home administrator was herself fired when she refused to fire nineteen named individual nursing home employees whom a corporate representative wanted fired for their unionization activities at the nursing home.

The administrator sued the nursing home's parent corporation for damages for wrongful discharge.

The court agreed she was wrongfully discharged from her employment, but denied her right to sue. The court ruled her only legal recourse was to file an unfair-labor-practices complaint with the National Labor Relations Board (NLRB).

If a nursing home is operated for a profit and has $100,000+ in annual revenues, the US National Labor Relations Board has jurisdiction over labor unionization issues.

Unfair Labor Practice

It is an unfair labor practice to interfere with, restrain or coerce rank-and-file employees in the exercise of the right to form, join or assist a labor union and to engage in collective bargaining.

It is an unfair labor practice to retaliate against a supervisory employee as a means toward interfering with, restraining or coercing rank-and-file employees in the exercise of their legal rights.

No Wrongful-Discharge Lawsuit

The other side of the coin is that there is no right to sue in state court for issues that are within the ambit of the National Labor Relations Board's jurisdiction.

Even though she is a supervisor and as a supervisor cannot join the union and even though she probably can establish her employer's illegal motive in firing her, the administrator in this case was allowed to purse her rights only by filing a complaint with the NLRB, the court ruled. **Calabrese v. Tendercare of Michigan, Inc., __ N.W. 2d __, 2004 WL 1219655 (Mich. App., June 3, 2004).**

A nursing home's owners have no right to fire employees who are attempting to get union representation.

A nursing home's owners have no right to fire an administrator or other supervisory employee who refuses to fire employees who are attempting to get union representation.

However, a supervisory employee wrongfully fired for refusing to interfere with rank-and-file employees' right to seek union representation cannot sue his or her employer for common-law wrongful discharge.

Under these circumstances a wrongfully-fired supervisory employee must file a complaint with the National Labor Relations Board and allow the Board to take it under consideration as an unfair labor practice.

The employer can be guilty of an unfair labor practice even though the supervisor, as a supervisor, would not have the legal right to join in with the rank-and-file employees' unionization efforts.

COURT OF APPEALS OF MICHIGAN
June 3, 2004

Newsletter Online.

Our newsletter is available online to paying subscribers at no additional charge beyond the subscription price.

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Most readers are able to open the link to the online edition directly from the body of the e mail we have sent them.

The online edition is posted on our website in Adobe Acrobat format.

Abuse, Neglect: Punitive Damages Allowed.

The California Court of Appeal, in an unpublished opinion, has upheld the right of nursing home residents and their families who sue for abuse and neglect to ask for punitive damages.

As a general rule, punitive damages cannot be awarded for ordinary negligence that causes harm to another person. Punitive damages are only for cases of intentional, wanton or reckless misconduct. Punitive damages are a civil penalty intended to punish wrongful conduct and can be calculated far out of proportion to fair compensation for the harm done.

In this case the allegations, if they can be proven against the skilled nursing facility, were fairly outrageous.

The facility allegedly failed to administer prn pain medications, failed to notify the physician the patient was complaining of pain and failed to implement the necessary protocol to prevent pressure ulcers, which led to necrotic decubiti, then to gangrene requiring below the knee amputation of one leg. **Country Villa v. Superior Court, 2004 WL 1240421 (Cal. App., June 7, 2004).**

Ventilator Patient: Family Saw Patient In Distress, But Cannot Sue.

The twenty-two month old patient was born with severe physical impairments and was on a ventilator 24 hours a day with around-the-clock nursing care.

The nurse on duty did not know what to do when the alarm sounded, so she phoned the mother at work. The mother rushed home, found her daughter in severe respiratory distress and called paramedics. The daughter was taken to the hospital where she recovered fully.

It would place an unacceptable burden on the treatment of patients to leave medical providers open to a broad array of possible claims.

Family members of patients could allege a broad range of physical and emotional damages from observing the care of patients.

NEW YORK SUPREME COURT
APPELLATE DIVISION
June 14, 2004

The New York Supreme Court, Appellate Division, ruled the mother could not sue for alleged aggravation of her own diabetic condition stemming from her own stress over what happened to her daughter.

The daughter was the patient, not the mother. The nurse's legal duty of care was owed to the patient, not to the mother.

The court did not approve of the nurse's actions, but the court was not willing to open up a new Pandora's box of possible liability lawsuits by family members against healthcare providers. **Shaw v. QC-Medi New York, Inc., 2004 N.Y. Slip Op. 04951, 2004 WL 1327813 (N.Y. App., June 14, 2004).**

Labor & Delivery Nursing: Court Rules Nurse, Doctor Did Not Violate EMTALA.

As long as the hospital screens the patient in a manner consistent with the screening that any other obstetric patient in the care of a private physician would receive, there is no violation of the EMTALA.

The evidence is undisputed that the labor and delivery nurse performed exactly the type of screening that would have been given to any other outpatient in this patient's condition according to the only policy that applied to her case.

If anything, she received superior care in labor and delivery as the nurse promptly summoned her physician to perform an in-person exam. According to the hospital, her wait time was less than ninety-four percent of the women who come to the emergency room to have their labor checked.

Hospitals are allowed to tailor their standard screening to the signs and symptoms of the patient. Patients with different symptoms do not have to get identical screenings just to satisfy the EMTALA.

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
June 18, 2004

The US Circuit Court of Appeals for the Eleventh Circuit could find nothing wrong with how the hospital cared for the patient and ruled for dismissal of her lawsuit under the Emergency Medical Treatment and Active Labor Act (EMTALA).

The patient was twenty-two weeks pregnant with triplets. Her personal physician sent her to the hospital for a labor check after she called about cramping and a mucous discharged she feared meant the onset of premature labor.

Seen By Nurse in Labor & Delivery

She was admitted as an outpatient in the labor and delivery unit. A labor and delivery nurse took her vital signs and medical history, listened for the fetal heart beats, examined her abdomen and placed her on a monitor for uterine contractions and left her on it for an hour.

The nurse also paged the patient's own physician to come in and see her. He came in and did a visual exam of the cervix, cultured the cervix and did an ultrasound. He decided it was only a convulsive episode and not labor and discharged her, reminding her to keep her appointment the next day with her ob/gyn.

The next day she went into pre-term labor. Her ob/gyn testified, however, that the previous day she was not in labor.

No ELTALA Violation

The EMTALA requires every patient who presents (in the E.R. or an outpatient department) with a possibly emergent condition or active labor to be screened for an emergency and/or active labor in the same way any other similar patient would be screened, and to be offered necessary stabilizing care if an emergency or active labor does exist.

Hospitals are not required to have written screening policies covering every medical contingency that might present in the emergency room. **Nolen v. Boca Raton Community Hosp., Inc. __ F. 3d __, 2004 WL 1367490 (11th Cir., June 18, 2004).**

LEGAL EAGLE EYE NEWSLETTER
For the Nursing Profession

Cell / Tissue Donor Eligibility: New Guidance From FDA.

On May 25, 2004 the US Food and Drug Administration announced the availability of a draft document entitled "Guidance for Industry: Eligibility Determination for Donors of Human Cells, Tissues and Cellular and Tissue-Based Products."

Use of the recommendations contained in the draft document is not mandatory at this time.

The draft document is being published for public comment, a requirement any Federal agency must follow before issuing mandatory new regulations in final form.

We have placed the seventy-eight page non-copyrighted document on our website at http://www.nursinglaw.com/tissuedonors.pdf.

FEDERAL REGISTER May 25, 2004
Page 29835

Seizure Disorder: Hospital Provided Nurse Reasonable Accommodation.

A registered nurse had a history of seizure disorder which her physician had stated was under control with medication.

The hospital agreed, as long as it did not impose any undue hardship on the hospital, to honor a medical restriction that she work no more than five days in a row followed by two days off.

The nurse objected to having to work on a weekend during a nursing shortage, citing her seizure disorder.

After objecting to weekend work the nurse was put on leave pending a letter from her doctor stating her seizures were still under control. The letter was not forthcoming after six months. The US Circuit Court of Appeals for the Tenth Circuit found no disability discrimination in the hospital terminating her. **Johnson v. Shawnee County, 2004 WL 1260305 (10th Cir., June 9, 2004).**

Perioperative Nursing: Sponge Inside Patient, Nurses Faulted, But Consequences Disputed.

The Court of Appeals of Michigan, in a recent unpublished opinion, expressed the following as a statement of the legal standard of care for perioperative nurses with respect to sponge and instrument counts:

The applicable standard of practice or care of the surgical nursing staff assisting in the operating room is to make a proper and correct count of the surgical sponges and/or instruments prior to the closure of an incision; and to notify the surgeon(s) of an improper count prior to closure to ensure that no surgical sponges and/or instruments are retained inside a patient's body prior to closure.

The court went on to say it is fairly straightforward that perioperative nurses and their employer can be held legally responsible for the medical costs and the patient's pain and suffering related to a second surgery to remove a retained sponge or instrument and to correct the internal adhesions.

However, the court still threw out the family's case. The patient's expert witness, an RN, offered her expert opinion that the second surgery to remove the retained surgical sponge delayed the patient's treatment for cancer and that the delay resulted in her death.

The court did not rule whether that was actually true. The court took the tack that a nurse would not have the medical expertise to offer such an opinion and without a viable expert opinion the case was without merit. **Renswick v. Providence Hosp., 2004 WL 1222924 (Mich. App., June 3, 2004).**

A registered nurse with a background in surgical nursing can give an expert opinion as to the legal standard of care for surgical nurses.

However, a nurse does not have the education or professional training to offer a medical opinion linking the patient's death from cancer to delay in cancer treatment caused by a second surgery to remove the sponge.

COURT OF APPEALS OF MICHIGAN
UNPUBLISHED OPINION
June 3, 2004