LEGAL EAGLE EYE NEWSLETTER

For the Nursing Profession

June 2003 Volume 11 Number 6

Restraints/Failure To Answer Call Bell: Large Verdict For Nursing Negligence.

The eighty-six year-old patient was admitted to the hospital for heart problems. He was experiencing confusion and disorientation.

A nurse observed him trying to get out of his hospital bed without assistance. After his third try he was moved to a room on the telemetry floor near the nurses' station. He was placed in a Posey vest.

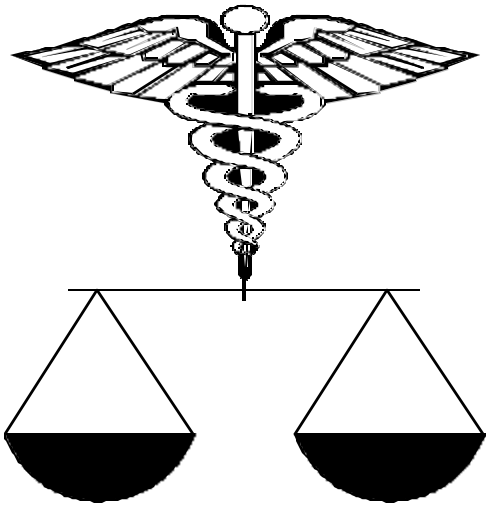
On a telemetry unit a technician watches electronic monitors showing each patient's vital signs and cardiac readouts. On this unit the electronic equipment also noted and recorded call bells activated by the patient requesting help from the nursing staff.

During the 11:00 p.m. hour the patient rang four times. At 12:01 a.m. the monitor indicated a ventricular fibrillation so the technician sent a nurse to the room. The nurse found the patient on the floor strangled by his Posey vest. A code was called but he died.

Physician's Order for Restraints

The court stated it would be a clear violation of the law and a breach of the standard of care for nurses to use a Posey vest without a physician's order.

A representative of the company that manufactures the vests pointed to the warnings on the packages and the labels on the vests themselves.



The nurses on duty testified that failing to respond to four call bells requesting assistance over a one-hour interval, with the patient in a Posey vest, is below the legal standard of care for nurses.

Putting a patient in a Posey vest without a physician's order violates Federal law and is below the legal standard of care for nurses.

SUPREME COURT OF TEXAS
April 24, 2003

Call Bell Not Answered

The court said it is below the legal standard of care for nurses not to respond promptly to a patient's call bell. The nurse's legal duty is especially acute with a confused, disoriented patient who is in a vest restraint because he tries to get out of bed without assistance. A nurse cannot assume a soft cloth restraint will keep such a patient in bed, but must anticipate the patient might try to get up anyway and get caught up in the restraint.

Order Not Transcribed

A nurse testified in court there was a physician's order for the Posey but she had not transcribed it before the patient died. The physician testified he approved the restraint, although he did not say exactly when he ordered it.

Nevertheless the judge instructed the jury to consider only the nurse's statement in the hospital incident report that there was no order for the Posey, which would be a violation of Federal and state law and a serious breach of the standard of care for nurses.

$1,369,000 Verdict Thrown Out

The Supreme Court of Texas threw out the verdict. It was wrong for the jury to consider only the nurse's statement and not her testimony.

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Inside this month's issue ...

June 2003

Restraints/Failure To Answer Call Bell: Large Verdict For Nursing Negligence.

(Continued from page 1)

The hospital had interviewed and obtained written statements from the nurses on duty and from the telemetry technician.

When the family sued for wrongful death their lawyer immediately asked for copies of the written statements. The hospital refused to turn them over, citing attorney-client privilege.

The judge ordered the statements turned over to the family's attorney. The hospital continued to take a stand on the principle of attorney-client privilege, but then gave in a few weeks before trial and turned over the statements.

As punishment the court instructed the jury to take everything stated in the nurses' and technician's statements as facts established conclusively.

As a general rule the judge has considerable latitude to decide on an appropriate punishment for one party or the other for refusing to obey a court order, whether the party is taking a stand on principle or just being difficult.

However, the lower-court judge in this case was plainly too harsh, in the Supreme Court's judgment. In full fairness a jury is not obligated to accept a witness's prior statement over the witness's testimony in court or the testimony over the statement. Deciding what to believe and what not to believe is traditionally the sacred province of the jury in civil cases.

Witness Statements Available To Patient's Family's Attorneys

Contemporaneous incident reports containing raw factual data are different from peer review, quality review and attorney-client communications.

Incident reports and straightforward factual statements of eyewitnesses do not reflect the deliberations of the institution's quality review officials or the strategic thinking of legal counsel and can get into the other side's hands if the judge believes there is no other way for the other side to get the same information.. **Spohn Hospital v. Mayer, 46 Tex. Sup. Ct. J. 604, __ S.W. 3d __ , 2003 WL 1923002 (Tex., April 24, 2003).**

Discovery sanctions that are so severe as to inhibit presentation of the merits of the case should be reserved only for instances of bad faith or callous irresponsibility.

The trial judge abused the court's discretion.

The judge instructed the jury to take the substance of the witness statements as established facts, and the jury was not at liberty to disbelieve them.

In addition, the judge misstated what one of the nurses said on the issue whether there was no physician's order or it was just not transcribed.

SUPREME COURT OF TEXAS
April 24, 2003

Newsletter Now Online.

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

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If you are interested in the online edition, e mail us at info@nursinglaw.com. Identify yourself by name and postal address and include your e mail address. About ten days before the print copies go out the Internet link to the online edition is e mailed to you. You can open the link directly from your e mail.

EMTALA: E.R. Patient Smelled Of Alcohol, No CT, No Liability.

The patient was brought in to the emergency room by ambulance at 1:36 a.m. His girlfriend found him on the ground outside the bar where they had gone and called for the ambulance.

At the hospital the patient was seen by a nurse and physician. A small laceration on his left temple was sutured. The nurse noted he was alert and awake. The physician noted his pupils were equal and reactive. No abnormal neuro signs were noted except for lethargy. He was released without a CT scan. Later that day he was treated at another hospital for right frontal and temporal lobe hematomas.

In EMTALA cases the courts do not second-guess the professional judgment of nurses and doctors who screen and treat patients in the emergency room.

The question is whether the patient was given the same care and attention a patient would get with the same history, signs and symptoms.

COURT OF APPEAL OF LOUISIANA
April 23, 2003

The Court of Appeal of Louisiana found no violation of the US Emergency Medical Treatment and Active Labor Act (EMTALA). The hospital's nursing and quality assurance directors testified any patient at their hospital with an otherwise normal neuro assessment who was intoxicated would not get a CT scan just because he was somewhat lethargic. He got the same screening examination as anyone else at the hospital in the same situation. **Scott v. Dauterive Hosp. Corp., __ So. 2d __, 2003 WL 1916273 (La. App., April 23, 2003).**

Methadone Patient In Car Accident: Court Says Physicians, Nurses Must Assess For Intoxication, Appreciate Additive Effects Of Medications.

A patient came to the methadone clinic and took his methadone while intoxicated on illicit drugs.

As he was driving home from the clinic he caused a motor vehicle collision in which two people were killed. The police forensic toxicology report turned up cocaine, Valium, codeine and methadone in his system.

A friend of the subject, also a regular patient at the methadone clinic, stated he, the friend, had told the nurse the subject was really high on cocaine that day when he was given his methadone.

The District Court of Appeal of Florida ruled there were grounds for the wrongful-death lawsuit filed by the victims' families against the clinic.

Caregivers Usually Not Liable

Physicians and nurses are usually not held liable when patients drive and get in accidents while on medications that can cause drowsiness. Although caregivers have an ethical responsibility to advise patients not to drive on the medication, the rationale for not imposing civil liability is that the patient, not the caregiver, has exclusive control over the patient's actions.

In most cases the courts have not held physicians or nurses liable when patients operate motor vehicles after taking medications that can cause drowsiness.

The rationale is that the physician or nurse has no control over the patient electing to take the medication and drive.

Even when a caregiver has neglected to advise a patient not to drive on a medication it is difficult to prove more likely than not the patient would have followed such advice if it were given.

It is different when a patient who is visibly intoxicated is administered medication with additive effects that can impair driving.

The physician or nurse has control whether or not to administer the medication and can be held liable.

DISTRICT COURT OF APPEAL
OF FLORIDA
May 7, 2003

Medication Administered To Patient Known To Be Intoxicated

The methadone clinic had full control over the decision to give or withhold his methadone and should not have given it, the court ruled. He should have been better assessed for acute intoxication. The slightest suspicion of intoxication should have caused the clinic staff to insist on a blood test or urine screen to rule out intoxication before giving his methadone.

The clinic staff should have appreciated the fairly straightforward additive effects of methadone taken with many illicit drugs and other medications.

The clinic had control whether or not to give his methadone and full responsibility for the consequences. This is different from the failure-to-warn scenario.

Medications And Patients Intoxicated On Alcohol

The court went on to comment that it is not uncommon in the emergency room and in other practice settings for physicians and nurses to treat patients who are visibly intoxicated on alcohol and to prescribe, administer or dispense medications having additive effects with alcohol.

While the caregivers have no control over what their patients elect to do, the caregivers do have full control over their own decisions to give medications or withhold them. This court would hold caregivers liable for the actions of intoxicated individuals who are given certain medications after they have been drinking. **Cheeks v. Dorsey, __ So. 2d __, 2003 WL 21014391 (Fla. App., May 7, 2003).**

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Leg Fracture: Hospital Or Ambulance Mishandled Patient, Court Applies *Res Ipsa Loquitur.*

An eighty-three year old woman lived with her daughter. She was bedridden, her left leg had been amputated due to diabetes, she was unable to speak because of a stroke and she was fed through a gastrostomal tube.

The daughter had her mother taken to the hospital by ambulance while she went out of town. Five days later the same private ambulance company returned the patient to her daughter's home.

However, on her return the patient winced in pain when her leg was moved and her leg was visibly swollen.

The daughter called 911 and city paramedics took her to a second hospital where a fractured right distal tibia and fibula and dehydration were the diagnoses.

Physician's Report Links Injury To Negligence

The daughter sued the first hospital and the ambulance company as personal representative of her mother's estate.

Her lawyers obtained a report from a physician whom they hired to review the medical records. His report stated that the leg injury and dehydration could not have happened in the absence of negligence.

Further, the physician noted that during the time in question the ambulance company and the hospital had exclusive control and management of the patient.

Court Applies *Res Ipsa Loquitur* Defendants Have To Disprove Fault

The Appellate Court of Illinois ruled that having two defendants does not rule out *res ipsa loquitur*, a legal doctrine often used in medical litigation.

The court put the burden the first hospital and the ambulance company to prove which of them did not cause the injury, or both of them would be jointly liable. The assessment data and chart notes seemed to be lacking to prove just how it happened, a fact the court ruled should prejudice the defendants rather than the plaintiff. **Collins v. Superior Air-Ground Ambulance Service, Inc., __ N.E. 2d __, 2003 WL 1971813 (Ill. App., April 29, 2003).**

There is compelling medical evidence that it had to have been one defendant or the other that injured the patient.

This is different from the usual res ipsa loquitur case, but having to sue more than one defendant does not deprive the patient's personal representative of her day in court.

Res ipsa loquitur means, "It speaks for itself." When an injury happens that normally does not happen without negligence, and the patient was exclusively under the defendant's control and management, the defendant has to disprove negligence.

Res ipsa loquitur gives patients the benefit of the doubt in cases where there is solid proof a wrong has been committed but no real proof how it happened.

The rationale should not change with two defendants, assuming there is solid proof one or the other committed a wrong and no one else could have been responsible.

The two defendants will have to look for evidence with which to sort it out.

APPELLATE COURT OF ILLINOIS
April 29, 2003

Labor Law: Court Lets Nurses Wear Buttons.

The hospital banned staff nurses from wearing "No F.O.T." (No Forced Overtime) buttons anywhere in the hospital. The National Labor Relations Board (NLRB) upheld the union's unfair labor practice complaint against the hospital.

Employees have the right to wear union insignia at work, unless there are special circumstances.

The "No Forced Overtime" buttons worn by the nurses were a silent protest of their employer's policies.

There was no evidence that by wearing the buttons the nurses engaged in an illegal strike, slowdown, work stoppage or boycott or that the buttons disrupted work productivity.

The NLRB did not believe the nurses were trying to proselytize their message to patients, which would have been illegal.

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT
May 15, 2003

The US Circuit Court of Appeals for the Sixth Circuit sided with the nurses.

Clearly there was nothing wrong with union informational activities in non-patient-care areas like the nurses' lounge. It was a closer call *vis a vis* patient-care areas. The court accepted the NLRB's decision that the buttons caused no disruption of care and were not an attempt by the nurses to carry their message to the hospital's patrons. **Mt. Clemens General Hospital v. N. L.R.B., __ F. 3d __, 2003 WL 21078179 (6th Cir., May 15, 2003).**

Union Activities: Court Holds Nursing Home Guilty Of Unfair Labor Practices.

In a recent opinion that has not been designated for publication in the Federal Reporter, the US Court of Appeals for the Third Circuit upheld charges of unfair labor practices filed by the National Labor Relations Board (NLRB) against a nursing home.

The NLRB filed the charges in response to complaints by a housekeeper and a certified nursing assistant who were terminated for alleged misconduct after they made their union membership known to their supervisors and became active in the efforts of the National Union of Hospital and Healthcare Employees, AFSCME, AFL-CIO to unionize employees at the nursing home.

Three Union Elections

The NLRB conducted a vote of employees on the issue of union representation. The union won the election and nursing-home management appealed. The NLRB set aside the election, on grounds that were not specified in the court record, and ordered a second election.

In the second election the employees voted against bringing in the union.

It was during the interval between the first and second elections that management terminated the two employees who then filed unfair-labor-practice charges with the NLRB.

The NLRB found that the housekeeper, but not the nursing assistant, was terminated for his union activities. The NLRB ordered a third election.

The rulings concerning each employee's termination were appealed. The US Circuit Court of Appeals ruled both terminations were unlawful unfair labor practices committed by management in retaliation for union activities.

The US Circuit Court of Appeals did not specify the actual effect its ruling will have. In general, employees who have been victims of unfair labor practices can be reinstated with back pay, and the union itself can argue that the broader unionization process has been tainted by an overall atmosphere of management intimidation.

An employer commits an unfair labor practice when the employer discriminates in regard to tenure of employment or any term or condition of employment to discourage membership in a labor organization or union activities by employees.

To prove that discharge of an employee or employees was an unfair labor practice, the employee, the employee's union or the NLRB representative has to show that employee conduct that is protected by the National Labor Relations Act (NLRA) preceded the employer's decision.

Then the burden of proof shifts to the employer to prove that the employer would have taken the same action even in the absence of pro-union activities by the employee.

The nursing home terminated a housekeeper and a certified nursing assistant after they announced their union membership and became active in the battle for union representation.

The nursing home had to disprove anti-union bias as its motivation in firing them for alleged misconduct.

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT
NOT SELECTED FOR PUBLICATION
May 8, 2003

Employer Must Be Able To Justify Disciplinary Actions

When the NLRB or a US Circuit Court of Appeals analyzes these cases the decision often turns on the legal issue of burden of proof. The employer is often faced with the task of having to disprove an unfair labor practice accusation brought by an employee whom a supervisor knows is actively involved with the union.

When disciplinary action is taken against an employee involved with the union, such as termination, demotion, suspension, failure to promote, etc., the employee, or an NLRB representative acting on the employee's behalf, has a *prima facie* case of an unfair labor practice.

The employer must be able to prove the employee committed the alleged misconduct, the misconduct was serious enough to justify the disciplinary action taken and the employer has had the same response to the same misconduct with other employees who were not active with the union.

In this case the housekeeper allegedly failed to clean his assigned rooms and was found to be absent from his floor.

However, an NLRB representative, arguing on behalf of the employee, convinced the Circuit Court that management did not start documenting his allegedly substandard performance and never issued any warnings until after the first union election which favored the union and which management wanted set aside.

The nursing assistant allegedly neglected a patient and was disrespectful toward another resident's family.

In her case also the NLRB convinced the Circuit Court that she was an exemplary employee with a clean disciplinary record until after the first union election. In legal parlance, the nursing home failed to meet its burden of proof to rebut the employees' *prima facie* cases of unfair labor practices, so the US Circuit Court of Appeals ruled that anti-union bias was the employer's basic motivation. **N.L.R.B. v. Lincoln Park Subacute and Rehab Center, Inc., 2003 WL 21027913 (3rd Cir., May 8, 2003).**

Arbitration: Medicare/Medicaid Funding For Nursing Homes Is Interstate Commerce, Arbitration Clause Enforceable.

The Supreme Court of Alabama has ruled that admission to a nursing home is a transaction that has a substantial effect on interstate commerce.

The logic of this ruling is that the Interstate Commerce Clause and the Supremacy Clause of the US Constitution require state courts to follow the Federal Arbitration Act and enforce arbitration clauses in nursing home admissions contracts any time a liability suit is filed against a nursing home with such a clause in its admission contract.

This is an emerging area of the law that has not been clearly delineated by other states or the Federal courts. But it is far more than an abstract discussion of dry legal technicalities.

Plaintiffs' Lawyers Want Juries

In the real world, a plaintiffs' trial lawyer is typically looking to a civil-court jury to award substantial general damages for pain and suffering. Personal injury cases are typically handled under contingency fee arrangements where the lawyer obtains a substantial percentage of the damages as the legal fee and the balance of the money for pain and suffering often goes to the surviving family members.

Nursing home cases often have only minimal special damages for extra medical expenses, etc., and there is usually no lost income or loss of lifetime earning capacity for an elderly person who is already retired and unable to work.

Defendants Prefer Arbitration

In arbitration, on the other hand, damages for pain and suffering can be and are awarded, but the potential for a large "jackpot" for the lawyer and family is far less than the exposure in a jury trial.

This case follows the emerging trend toward arbitration as a viable alternative to jury trial in nursing-home liability cases. **McGuffey Health and Rehabilitation Center v. Gibson, __ So. 2d __, 2003 WL 21040590 (Ala., May 9, 2003).**

The legal system generally favors civil cases being decided in arbitration rather than in court.

The Federal Arbitration Act relies on the constitutional supremacy of the Commerce Clause of the US Constitution.

State courts have no choice but to uphold arbitration clauses in contracts. A court must order arbitration rather than a jury trial when a contract contains an arbitration clause, assuming the subject of the contract is within the realm of interstate commerce.

Nursing home admissions contracts that contain arbitration clauses are within the realm of interstate commerce.

Medicare and Medicaid funds typically cross state lines getting from Washington to a fiscal intermediary and to a nursing home in a particular state.

In addition, supplies such as medications, bed pads, cleaning fluids, etc., that are used in nursing homes cross state lines getting to a particular nursing home.

SUPREME COURT OF ALABAMA
May 9, 2003

Race Bias: Court Says Disciplinary Histories Not The Same.

The US Circuit Court of Appeals for the Eleventh Circuit dismissed an African-American nurse's race discrimination case filed against the hospital where she had worked as a charge nurse in surgical services.

To prove racial bias lay beneath an employer's disciplinary decision a minority employee has to identify one or more non-minority employees treated less harshly for the same misconduct.

The minority and non-minority employees have to have been similarly situated in all relevant respects and must have been accused of the same or similar misconduct but disciplined in different ways.

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
May 14, 2003

The court agreed with the African-American nurse's approach to her case. She had to identify and focus on the work history of at least one non-minority nurse who was disciplined less harshly than she was for essentially the same conduct.

However, the court agreed with the hospital, on balance, that the Caucasian nurse's record of unproductive performance and inappropriate exchanges with co-workers was not as bad.

In addition, the court believed the Caucasian nurse's plan of corrective action showed motivation to keep her job, while the African-American nurse's was argumentative and proposed no solution. **Knight v. Baptist Hospital, __ F. 3d __, 2003 WL 21078179 (11th Cir., May 14, 2003).**

Nursing Home Neglect: $78,400,000 Jury Verdict For Pain And Suffering, Punitive Damages, Reduced To $26,000,000.

The Supreme Court of Arkansas reviewed the dismal record of the patient's care over a five-year period at a nursing home, focusing on the six-week period just before her death.

The court agreed with the jury that the evidence justified a substantial verdict in the family's wrongful death lawsuit, money that would go to the family of the deceased who filed the lawsuit and to the lawyers who represented the family.

But $78,400,000 was excessive. The Supreme Court of Arkansas ruled the judge who presided over the jury trial was in error not to order remittitur of the excessive damages as the nursing home's lawyers requested.

The Supreme Court itself imposed a remittitur, that is, a conditional ruling that there would be a whole new trial unless the plaintiffs agreed to accept $5,000,000 general damages for the deceased's pain and suffering and $21,000,000 punitive damages in place of the $15,400,000 and $63,000,000 figures the jury awarded.

Remittitur

Remittitur is rarely used, but it is a practice that has been upheld by the common law for centuries as a vehicle for judges and appellate courts to exercise control over excessive jury verdicts. If the plaintiffs are not willing to accept a lower figure set by the court, the excessive verdict is thrown out altogether and there is a new trial before a different jury, which is anticipated to produce a lower verdict than the first verdict and also lower than the bottom line after the remittitur.

The plaintiffs can take the remittitur for the specified sum, take their chances on a new trial or attempt to negotiate a settlement somewhere in between.

Additur is the term for the opposite practice, where the court grants the plaintiff's request for a whole new trial, conditioned on the defendant's willingness to agree to entry of a specified final judgment larger than the jury's verdict.

Pain and suffering have no actual market price. They are not capable of being exactly and accurately determined, and there is no fixed rule or standard whereby general damages for pain and suffering can be measured.

Hence, the amount of damages to be awarded for pain and suffering must be left to the judgment of the jury, subject only to correction by the courts for abuse and passionate excess.

The amount allowed must be fair and reasonable, free from sentimental or fanciful standards, and based upon the evidence disclosed in the courtroom.

The courts have traditionally exercised control over the damages awarded by juries in civil suits through the use of remittitur.

Remittitur means the court orders a whole new trial for the defendant's benefit unless the plaintiffs accept a lower damage award specified by the court, in this case $26,000,000.

The opposite is referred to as an additur, used when the verdict is too low.

SUPREME COURT OF ARKANSAS
May 1, 2003

Evidence Of Neglect
Large Damages for Pain and Suffering

According to the court, the deceased resident suffered significantly from neglect by the nursing home staff. She eventually died from dehydration and malnutrition.

She was left in her own filth, not changed, turned or bathed, and even had dried feces under her fingernails after she died, apparently from scratching herself excessively.

She was not given range-of-motion exercises for contractures, not let out of her soft bed restraints every four hours or out of her geri chair every two hours.

The evidence went on and on.

She was not fed by the nursing home staff. Her meals were just left in her room and she began to subsist on snacks from the nursing home vending machines. She failed to thrive, lost nearly fifteen pounds and was scheduled to go to the hospital for a gastrostomal tube.

Her admission was delayed a couple of weeks, but eventually she had to be rushed to the hospital where she died from the cumulated effects of neglect.

Evidence of Profit Motivation
Large Punitive Damages

The classic case for punitive damages is when a corporate defendant has deliberately allowed the profit motive to lead to serious harm to customers or the public.

According to the court, the nursing home was chronically understaffed, making it impossible for the staff on duty fully to take care of their patients' needs.

According to the court, the nursing home's corporate parent apparently had bogus names added to the daily rosters to make it appear there was no short staffing and brought in extra staff people, that is, enough people, when it was in the wind that a survey inspection could be expected.

The court ruled punitive damages were appropriate, but not as much as the jury awarded. **Advocat, Inc. v. Sauer __ S.W. 3d __, 2003 WL 1996087 (Ark., May 1, 2003).**

LEGAL EAGLE EYE NEWSLETTER
For the Nursing Profession

SARS: FDA Announces Recommendations For Blood Donor Suitability And Blood Product Safety In Cases Of Suspected Severe Acute Respiratory Syndrome.

On April 23, 2003 the US Food and Drug Administration (FDA) announced the availability of a guidance document containing the FDA's current recommendations for blood-product safety with respect to suspected cases of Severe Acute Respiratory Syndrome (SARS).

We have placed the FDA's guidance document on our website at http://www.nursinglaw.com/fdasars.pdf. It is not copyrighted by the US Government and anyone may download, print and re-distribute it from our website.

The new guidance document and the rest of the FDA's current recommendations on the subject of SARS are available on the FDA's website at http://www.fda.gov/cber/guidelines.htm.

The FDA has also indicated that printed copies of its current recommendation documents on the subject of SARS can be obtained by writing to the FDA at:

Office of Communication, Training and Manufacturers Assistance (HFM-40)
Center for Biologics Evaluation and Research (CBER)
Food and Drug Administration
1401 Rockville Pike
Rockville, MD 20852-1448

(Enclose a self-addressed adhesive return address label, the FDA asks.)

1-800-835-4709 or (301) 827-1800

The new guidance document deals with donor assessment, product retrieval and labeling, post-donation lookback investigation, physician notification about potential transfusion-transmitted SARS and notification of state and local health authorities about suspected donor cases of SARS.

FEDERAL REGISTER, April 23, 2003
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Patient Falls From Wheelchair: Is It Malpractice Or Ordinary Negligence? Court Debates Issues.

The specifics vary widely from state to state, but it is a valid generalization that there are special procedural rules for medical malpractice litigation that sets it apart from garden-variety negligence and other civil court cases.

It is also true across the board that a plaintiff's failure to follow whatever special procedural rules are in place for malpractice cases gives the defendant a trump-card legal-technicality defense.

The Court of Appeal of Louisiana recently set out six factors for the court to weigh in distinguishing medical malpractice from ordinary negligence, in a case where a nursing home resident falls from a wheelchair:

1. The injury is treatment-related or caused by a dereliction of professional skill;

When a caregiver's fault is alleged as the cause of an adverse incident in a nursing home, it may be malpractice, a violation of the nursing home residents' bill of rights, ordinary negligence or none of the above.

It makes a big difference which pre-suit formalities the plaintiff must follow. Failing to request a medical review panel is a defense to malpractice liability.

COURT OF APPEAL OF LOUISIANA
May 7, 2003

2. Expert medical evidence is required to determine whether the appropriate standard of care was breached;

3. The act or omission involved an assessment of the patient's condition;

4. The incident occurred in the context of a physician-patient relationship or was within the scope of activities a hospital or other care facility is licensed to perform;

5. The injury occurred because the patient sought treatment;

6. The act or omission was unintentional.

The Court of Appeal asked the local parish court to reconsider what happened, how it happened and what the patient alleged, in light of these factors. **Pender v. Natchitoches Parish Hosp., __ So. 2d __, 2003 WL 21017325 (La. App., May 7, 2003).**