LEGAL EAGLE EYE NEWSLETTER

October 2002 *For the Nursing Profession* Volume 10 Number 10

Post-Operative Orders: Court Rules The Nurses And The Physician Were At Fault.

The patient had suffered an orbital blowout in an auto accident, an injury in which the skull is fractured near the orbit of the eye.

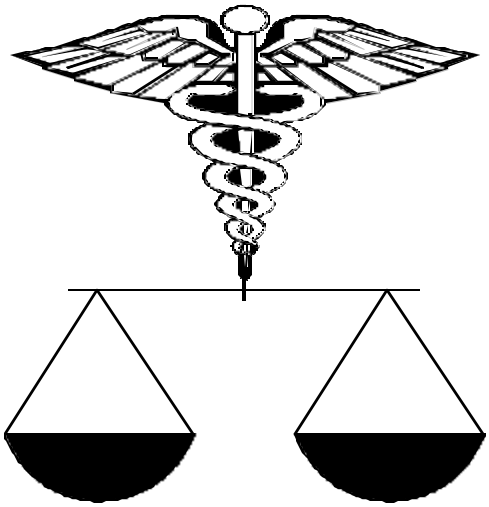
The injury required two surgeries. After the first surgery the surgeon wrote specific post-operative orders for the nurses.

After the second surgery, three and one-half months later, only very general post-op orders were written. The orders did not instruct the nurses to look for specific signs or symptoms of complications or define when the nurses needed to phone the surgeon.

During the night the patient began to have severe pain. It quickly progressed to extreme pain with swelling in and bleeding from the eye.

The night nurse had extensive experience in post-operative care of ophthalmic cases but she did not know that for this specific surgery any pain beyond minimal discomfort and any swelling or bleeding are highly abnormal complications, according to the Supreme Court of Delaware. The court was also alarmed that no nurse thought to check the sight in the eye.

The nurses only followed very general protocols for post-operative care, under which pain, bleeding and swelling are to be expected.



The acts and omissions of the physician and the hospital's nurses were intertwined. They both failed to provide adequate post-operative care.

The physician should have given specific instructions for when he was to be phoned.

The nurses, having received no such specific instructions, should have called to ask for such instructions.

SUPREME COURT OF DELAWARE
September 4, 2002

The next morning when the surgeon came in for regular rounds he detected a significant problem and re-operated immediately. It was too late to save the eye from the effects of excessive internal fluid pressure.

Physician and Nurses At Fault

The court ruled a nurse is responsible for knowing the normal and expected post-op course for the specific procedure that has been done with any patient being cared for. Pain, bleeding, swelling and compromised sight were abnormal and unexpected post-op complications for this patient.

The physician is nonetheless responsible for writing orders for the nurses that delineate normal and abnormal sequelae and define the signs and symptoms or severity of symptoms which mandate the physician be called.

When there are no specific post-operative orders from the physician, the court ruled, it is a nurse's responsibility to contact the physician and obtain orders what to watch for, what is normal and expected, what is not normal and not expected and what to do for abnormal complications. A nurse must be sure to obtain guidance for the specific procedure. **Lupinacci v. The Medical Center of Delaware, __ A. 2d __, 2002 WL 31006263 (Del., September 4, 2002).**

Inside this month's issue ...

October 2002

Religious Discrimination: Court Says Veganism Not A Religion, Healthcare Employee Must Consent To Mumps Vaccination.

An individual who worked for a hospital corporation as a computer operator through a temporary agency was offered permanent employment, provided he would consent to being vaccinated for mumps as required of all employees, office or patient-care, by corporate policies.

He refused to be vaccinated and was not hired. His refusal was based on his strict vegan beliefs. The mumps vaccine was derived from chicken embryos. His strict vegan beliefs were that all living things were to be valued equally and that it is wrong for humans to kill or exploit animals, even for food, clothing or to test product safety for humans. He would not eat meat, dairy products, eggs, honey or any food that derived ingredients from animals, wear leather, silk or other material that came from animals or use products such as cleansers or toothpaste that had been tested on animals.

The Court of Appeal of California threw out his religious discrimination claim against the hospital.

Religion *versus* Code of Ethics

The court acknowledged the law protects non-conventional religious beliefs the same as conventional religious beliefs.

However, according to the court, veganism is not a religion. It is a personal code of ethical conduct. The laws against religious discrimination protect only against religious discrimination, not against discrimination based on a person's personal code of ethics that runs counter to the employer's judgment as to what is necessary and appropriate for its employees.

A healthcare employer can require employees to be vaccinated against communicable diseases, even if it goes against their personal code of ethics, as a condition for gaining or keeping employment, the court ruled. **Friedman v. Southern California Permanente Medical Group, __ Cal. Rptr. 2d __, 2002 WL 31043819 (Cal. App., September 13, 2002).**

Veganism is not a religion. It is a personal code of ethical conduct.

Veganism does not speak to the meaning or purpose of life or its ultimate place in the universe and has no other-worldly component.

For religious discrimination in employment, religion includes traditionally recognized religions as well as beliefs, observances or practices which an individual sincerely holds and which occupy a place of importance in the individual's life parallel to that of traditionally recognized religions.

A personal moral or ethical code of conduct is not a religion.

Religious discrimination cases usually involve non-traditional Sabbaths or other holy days.

A court can find religious discrimination when an employee or prospective employee had a bona fide religious belief, the employer was aware of the belief and the belief conflicted with a requirement of employment as defined by the employer.

CALIFORNIA COURT OF APPEAL
CERTIFIED FOR PARTIAL PUBLICATION
September 13, 2002

Labor Law: State Faulted, Strike-Related Subsidies To Nursing Homes.

In 2001 the US District Court for the District of Connecticut ruled that the State of Connecticut did not violate the National Labor Relations Act (NLRA) through its response to a strike threat from the union representing seven thousand employees at seventy-one privately owned nursing homes in the state. See *Labor Relations: Medicaid Reimbursement To Nursing Homes For Strike-Related Expenses Does Not Violate NLRA, Court Says.*, Legal Eagle Eye Newsletter for the Nursing Profession (10)2 Feb '02 p.5.

However, in a detailed opinion handed down September 13, 2002 the same District Court ruled the State *did* illegally intrude upon the private-sector collective-bargaining process.

Anticipatory Medicaid Subsidies Declared Illegal

The court pointed out its ruling applies only to the specific and very complicated facts of this particular case. The court did not categorically rule out discretionary use of Medicaid funding prior to and during labor disputes.

According to the court's most recent ruling in this case, the State, without an adequate basis to conclude the subsidies were necessary to avoid an immediate negative impact upon the health and safety of the nursing-home residents, provided subsidies to the nursing homes to prepare for the strike by hiring replacement workers and by arranging to transfer certain residents to other facilities.

In essence it was an attempt by the State to shift the balance of power to management in the labor dispute, and that is a violation of Federal labor law, the court ruled. **New England Health Care, Employees Union, Dist. 1199, SEIU/AFL-CIO v. Rowland, __ F. Supp. 2d __, 2002 WL 31050733 (D. Conn., September 13, 2002).**

Sexual Assault: Court Rules Photos Of Other Psych Patients Are Confidential, Denies Access.

A former patient filed a civil lawsuit against an acute-care hospital claiming that during her stay on the hospital's psych unit she was sexually assaulted at least twice by at least two male patients.

The District Court of Appeal of Florida was not called upon to rule on the validity of the patient's underlying claim that the hospital was negligent for failing to protect her from dangerous fellow patients. It is already well established that failing to protect a patient from sexual assault by fellow patients who are known to be dangerous is grounds for a negligence lawsuit against a hospital.

Photographs of Other Patients Sought

While still in the pre-trial discovery stage of the litigation the patient's attorneys demanded the hospital turn over photos of all male hospital patients who were present at any time in the psychiatric unit at any time during the three-day interval when the patient claimed the sexual assaults occurred.

The hospital's attorneys filed a formal objection to the patient's request for the photos. The patient's attorneys countered by filing a motion to compel discovery, on the grounds the patient needed to be able to identify her assailants to prove her case.

Clinical psychiatric records are confidential.

The reason for confidentiality is to enable a person suffering from a mental, emotional or behavioral disorder to seek treatment without being needlessly exposed to public scrutiny.

It is clearly in society's advantage to encourage people experiencing problems to obtain such assistance.

Medical confidentiality applies to photographs of the other patients who were in the facility when the plaintiff patient was sexually assaulted.

Even if the other patients' names are withheld, the photos could lead to inadvertent discovery of their identities.

Unless the victim can show the court a compelling need for the photos, the privacy rights of the other patients must prevail.

DISTRICT COURT OF APPEAL
OF FLORIDA
September 4, 2002

The lower court sided with the patient. The District Court of Appeal of Florida sided with the hospital and quashed the lower court's order for the hospital to turn over the photos.

No Compelling Reason Seen To Violate Medical Confidentiality

The law highly values and strongly guards the confidentiality of patients' medical records, particularly records of mental health treatment.

Medical confidentiality is not absolute. If a patient/plaintiff has a compelling need for access to other patients' records to prove the patient's civil case against a healthcare provider a court theoretically can grant access to confidential records.

Courts rarely allow it. Patients usually can find other ways to corroborate their cases. Witnesses may come forward voluntarily. Patients can testify from their own recollections and can submit their own treatment records.

Patient Not Required To Identify Her Assailants

The most telling point for the court was that this patient did not have to identify her assailants to prove her civil case. If the jury believed her testimony, that and the medical evidence would hold the facility liable. There was no compelling need for the patients' photos, the court ruled.

Confidentiality Extends To Patient Photos

The court ruled that medical confidentiality applies to photos of patients even when their names are omitted. **Cedars Healthcare Group, Ltd. v. Freeman, __ So. 2d __, 2002 WL 2009940 (Fla. App., September 4, 2002).**

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Patient Falls In Nursing Home: Court Rules Out Patient's Expert Witnesses, Dismisses Case.

An elderly patient was admitted to a nursing home with diagnoses of mental confusion, dementia and disorientation. Her admitting nursing assessment indicated she was ambulatory only with assistance, was confused and was only sometimes oriented to place and time.

She was categorized as a high risk for falling. She fell twice, once out of bed and a second time in the dining room. The falls occurred fifteen and sixteen days after her admission. She started to deteriorate after the second fall and ten days later was taken to the hospital. At the hospital a hip fracture was diagnosed and operated upon with a prosthesis.

She sued the nursing home for damages. She died of unrelated causes before trial and the personal representative of her probate estate continued the lawsuit on behalf of her family who stood to inherit the proceeds of the lawsuit.

Expert Witnesses Disallowed

One of the personal representative's physician experts had been in general medical practice for years and had seen countless geriatric patients.

However, according to the Supreme Court of Virginia, he had no particular expertise in care planning in nursing homes to testify how the lack of a care plan could have caused a resident to fall.

A second physician was not allowed to testify about the delay in diagnosing the hip fracture, presumably from the second fall, because he had no facts to support his opinion how the fracture could or should have been detected earlier.

Finally, the court disallowed the family's nursing expert because she had not worked in nursing homes and was not familiar with the standard of care for nurses in nursing homes. Her extensive experience with geriatric patients in acute-care settings did not make her an expert on nursing home care, the court ruled. **Perdieu v. Blackstone Family Practice Center, Inc., __ S.E. 2d __, 2002 WL 31048324 (Va., September 13, 2002).**

The nursing expert the resident's family's lawyers wanted to have testify was not qualified as an expert in nursing home care.

Expert testimony is generally necessary to establish the appropriate standard of care, to establish a deviation from the standard of care and to establish that such a deviation was the legal proximate cause of the damages claimed in the lawsuit.

The resident's family's lawyers alleged two theories as to how the nursing care she received was substandard.

The lawyers alleged the nursing home was negligent for failing to implement a care plan that would have prevented the resident's falls.

They also alleged the nursing home generally failed to properly attend, restrain, assist, examine, diagnose and treat her.

Either of these legal theories would require expert testimony.

Without expert testimony the resident's family's case must necessarily be dismissed.

SUPREME COURT OF VIRGINIA
September 13, 2002

Alzheimer's: Resident Killed On Freeway, Wandered From Nursing Home.

An elderly Alzheimer's patient wandered from the nursing home at least twenty times over a five-month period before she walked onto a nearby freeway and was struck and killed by a car.

In an unpublished opinion, the Court of Appeals of Texas approved a $9000 civil verdict against the nursing home.

The nursing home had inadequate facilities to monitor this resident's wandering.

The nursing staff should have communicated to the rest of the staff that this resident was prone to wandering and instructed them to watch her more closely.

COURT OF APPEALS OF TEXAS
UNPUBLISHED OPINION
August 22, 2002

Door Alarm Was Disconnected

It was three days before Christmas. Groups of family, volunteers and civic organizations were frequently going in and out the front door, so someone disconnected the alarm. The patient apparently slipped out with a group of visitors.

Patient Let Out of Geri Chair

The nursing staff had placed the patient in a geri chair. A member of the kitchen staff apparently let her out to eat, but apparently had not been instructed and did not understand the need to see she got back into the chair when she was done.

Attempt to Transfer Was Too Late

The court acknowledged the nursing staff that very afternoon was actively trying to place her in a more secure nursing home or in a psychiatric hospital. **Love v. CF & H Corporation, 2002 WL 1939152 (Tex. App., August 22, 2002).**

Back Injury: Nurse's Light-Duty, No-Lifting Position Eliminated, No Right To Sue For Disability Discrimination, US Court Says.

A nurse injured her back helping to lift a 400-pound patient.

After a few weeks off she returned to work as a light-duty nurse. The light-duty, no-lifting position was created informally just for this nurse.

The light-duty nurse position never existed in the hospital's human resources department's table of organization, the US Court of Appeals for the Seventh Circuit pointed out.

The nurse was removed from the light-duty position for reasons not specified in the court record. Following that the nurse's physician wrote a report saying she was permanently restricted to sedentary work with no lifting in excess of ten pounds and no patient lifting whatsoever.

The hospital assigned her to a clerical position rather than giving her back the light-duty nursing position. The clerical position paid a much lower salary than a nursing position. However, the court pointed out, her worker's comp benefits from her on-the-job injury plus her earnings from the clerical position made her after-tax income basically the same as she had before as a staff nurse.

She sued for disability discrimination, claiming she was entitled to continue in the light-duty, no-lifting position as a reasonable accommodation to her disability.

Rehabilitation Act of 1973 Applies

As a Federal employee working in a Veterans Administration hospital the nurse's case came under the Rehabilitation Act of 1973, not the Americans With Disabilities Act that applies to disability discrimination lawsuits filed by private-sector employees.

The court pointed out that is only a technical distinction. The underlying principles of disability discrimination law are the same.

The Nurse Was Not Disabled

The threshold question in any disability discrimination case is whether the employee has a legal disability, as disability is defined for purposes of employment-related disability discrimination law.

Although not required to do so, a hospital can create a light-duty, no-lifting position for the benefit of a staff nurse with lifting restrictions from a back injury.

The hospital can eliminate the light-duty, no-lifting nursing position if the nurse's restrictions prove to be permanent or for any other reason at the hospital's discretion.

A hospital is not required to "manufacture" a job that will enable a disabled worker to keep working despite the disability.

A hospital is not required to pair a disabled nurse with another nurse or with an orderly to follow the nurse around to help with lifting patients. That would essentially mean manufacturing two new positions for the benefit of a disabled employee.

Supporting patients while they ambulate, breaking their falls when they fall, picking them up from the floor, helping them in and out of bed, pulling them up in bed, etc., are essential and indispensable functions of a staff nurse's job.

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT
September 5, 2002

The hospital conceded the nurse was disabled by her back injury.

The court commented that the hospital should have raised the argument, as in the court's view the legions of person in our society who are restricted to sedentary work and cannot lift more than ten pounds are not whom the laws were meant to protect from disability discrimination.

"Manufacturing" a New Position Is Not Reasonable Accommodation

Inside and outside the healthcare field the courts have ruled uniformly that an employer has no obligation to create a new position for an employee's benefit, even if the employee is legally disabled and entitled to reasonable accommodation.

A nurse who cannot lift patients, whether the inability to lift patients arises from an injury on or off the job, has no right to have a light-duty, no-lifting position created or continued. Nor is there a right to have lifting and transferring the nurse's patients shifted to other nurses or non-licensed personnel, the court said.

Administrative Nursing Positions Utilization Review

A disabled nurse has the right to be considered for an administrative nursing position, like utilization review, that does not involve performance of physical tasks.

However, reasonable accommodation does not go so far as to give a disabled nurse the right to an administrative position for which the nurse is not qualified or the right to be trained for the position merely because the nurse is disabled or the right to special preference over other employees or outside applicants.

The court noted the patient's supervisor was not willing to testify the nurse was qualified for utilization review.

The court ruled the clerical position was a sufficient and reasonable accommodation under all the circumstances. **Mays v. Principi, __ F. 3d __, 2002 WL 2019361 (7th Cir., September 5, 2002).**

CDC: New Draft Guideline For Prevention Of Healthcare-Associated Pneumonia, 2003 (9/3/02).

The CDC's new draft guideline is *not* mandatory at this time.

In general, any Federal agency that wishes to promulgate any new regulations must first publish the new regulations in draft form in the Federal Register to invite public comments and consider any public comments that are submitted, before issuing the new regulations in final, mandatory form.

The new draft guideline applies to prevention and control of bacterial pneumonia, ventilator-associated pneumonia, Legionnaire's disease, pertussis, invasive pulmonary aspergillosis, viral pneumonia, RSV, parainfluenza, adenovirus and influenza.

The new draft guideline is on our website at http://www.nursinglaw.com/pneumonia.pdf. It is not copyrighted and readers may use our or the CDC's website to download, print and redistribute it.

The draft guideline can be accessed, downloaded and printed from the CDC's website at http://www.cdc.gov/ncidod/hip/pnguide.htm.

The Centers for Disease Control and Prevention has issued a new Draft Guideline for Prevention of Healthcare-Associated Pneumonia.

Public comments on the draft guideline will be accepted until October 18, 2002.

When finalized, the new guideline will replace the Guideline for Prevention of Nosocomial Pneumonia published by the CDC in 1994.

FEDERAL REGISTER, September 3, 2002
Pages 56292 – 56293

The CDC's 9/3/02 Federal Register announcement is on our website at http://www.nursinglaw.com/cdc090302.pdf.

Print copies of the new draft guideline can be obtained from the CDC by writing:

Resource Center, Attention: PNGuide
Division of Healthcare Quality Promotion
CDC, Mailstop E-68
1600 Clifton Rd., NE
Atlanta, GA 30333
Fax (404) 498-1244
e mail pnrequests@cdc.gov.

If you are now reading our online edition, click anywhere in this text and you will be linked to the new draft guideline.

FEDERAL REGISTER, September 3, 2002
Pages 56292 – 56293

OSHA: Ergonomics For Prevention Of Musculoskeletal Disorders In Nursing Homes.

The new guideline from OSHA is *not* mandatory at this time.

In general, any Federal agency that wishes to promulgate any new regulations must first publish the new regulations in draft form in the Federal Register to invite public comments and consider any public comments that are submitted, before issuing the new regulations in final, mandatory form. The comment period expired on September 30, 2002.

Ergonomics is the practice of designing equipment and work tasks to conform to the capabilities of the worker.

OSHA says that manual lifting of nursing home residents should be minimized in all cases and eliminated when possible, taking into account residents' rehabilitation needs, emergency situations and residents' dignity and rights.

The Occupational Safety and Health Administration (OSHA) of the US Department of Labor has issued a draft guideline for nursing homes on Ergonomics for the Prevention of Musculoskeletal Disorders.

The focus is on workers in nursing homes who are exposed to muscle strains and tears, ligament sprains, pinched nerves, herniated discs and other injuries.

FEDERAL REGISTER, August 30, 2002
Pages 55884 – 55885

OSHA says it is addressing the problems of cost control and staff turnover in nursing homes.

The new draft guideline (1.2 MB) is on our website at http://www.nursinglaw.com/ergonomics.pdf and on the OSHA website at http://www.osha.gov/ergonomics/guidelines/nursinghome/nursinghomeguideline.pdf.

OSHA's 8/30/02 Federal Register announcement is at http://www.nursinglaw.com/083003.pdf.

The new draft guideline is not copyrighted and readers may use our or OSHA's website to download, print and redistribute it.

If you are now reading our online edition, click anywhere in this text and you will be linked to the new draft guideline.

FEDERAL REGISTER, August 30, 2002
Pages 55884 – 55885

Legal Eagle Eye Newsletter Now Available In Online Edition.

Many of our readers are taking advantage of the online edition of our newsletter.

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Each month we will send you an e mail containing the Internet URL address where that month's newsletter is available. For example, October 2002 is http://www.nursinglaw.com/oct02mar9.pdf.

Most Internet users can open the link directly from their e mail.

Our online edition is in the Adobe Acrobat software format. Your computer must have the Adobe Acrobat reader software installed to read our online edition on the Internet. Many computers come with Adobe Acrobat reader version 4.0 or 5.0 already installed.

The newer Adobe Acrobat 5.0 reader software can be downloaded to your computer free of charge from the Adobe Acrobat website http://www.adobe.com.

(We had to pay about $350 for the *writer* counterpart of the Adobe Acrobat software to be able to put our newsletter on the Internet. Adobe Acrobat seems to produce the best quality image for Internet self-publishing.)

We try to have the online edition available when the newsletter goes to print, about two weeks before the print copies go out in the mail.

Transfer Of Rehab Patient, Wheelchair To Commode: Court Finds Negligence.

The patient weighed 450 pounds and had just had partial knee-replacement surgery. The non-operative leg had been surgically fused at the knee nine years earlier.

The nurses were negligent in two important respects.

First, they did not employ their skill and knowledge in providing an assessment that rehabilitation nurses would usually do in the same or similar circumstances.

Second, in transferring him from his wheelchair to a bedside commode the nurses did not employ the degree of care and caution that was necessary for a man in his condition.

The patient's nursing expert witness, in addition to identifying these departures from the legal standard of care for nurses, was allowed to testify the nurses caused the injury to the patient. The court allowed this over objections that nurses generally are not allowed to testify about medical causation of the injuries arising from nursing negligence.

MISSOURI COURT OF APPEALS
August 20, 2002

The Missouri Court of Appeals went into great detail in a recent opinion to show how the patient's rehab nurses were negligent and why a $122,000 jury verdict in his favor was appropriate.

The patient was transferred to the rehab unit at the hospital one day after partial knee-replacement surgery.

The transfer orders indicated the patient was able to transfer without assistance from his bed to a chair but not from a sitting to a standing position.

450 Pounds / Fused Knee

The patient was heavy and had had the other knee fused nine years earlier because of degenerative arthritis.

The court believed it should have been apparent to a trained rehab nurse that rising to the standing position on his own would have to be accomplished by placing excessive pressure on the operative leg.

Standing With Walker

Instead of assembling a four-person lift team to lift the patient, two rehab nurses stood by and encouraged him to stand on his own. The plan was for him to lean on a walker while the commode was put in place.

The court agreed with the patient's nursing expert witness that the nursing assessment of the patient was faulty as well as the plan to encourage him to stand rather than offering substantial assistance.

Nurse as Expert on Medical Causation

As a general rule a nurse can testify as an expert witness on the nursing standard of care but cannot testify as a medical expert linking a breach of the nursing standard of care to medical complications suffered by the patient.

In this case, however, the court permitted the nursing expert to testify that the nurses' negligence caused the injury to the patient. She did not get into the precise mechanics of dehiscence of a surgical wound. **Echard v. Barnes-Jewish Hospital, __ S.W. 3d __, 2002 WL 1902103 (Mo. App., August 20, 2002).**

LEGAL EAGLE EYE NEWSLETTER
For the Nursing Profession

Fall In Nursing Home: Residents' Bill Of Rights.

A resident fell and broke his hip while in a nursing home undergoing rehabilitation following brain-tumor surgery. He sued the nursing home for inadequate staff training, which he claimed deprived him of rights under the state's nursing home residents' bill of rights.

Nursing Home Residents' Bill of Rights

The District Court of Appeal of Florida ruled the state's nursing home residents' bill of rights gave him a separate and distinct legal cause of action apart from medical negligence. Many states have a nursing home residents' bills of rights. One isolated act can violate a resident's rights without an ongoing course of substandard treatment, the court said.

The import of the ruling is to absolve a nursing home resident from denominating expert witnesses, attending a medical review panel, filing an affidavit of merit, etc., as in a medical malpractice case. **St. Angelo v. Healthcare and Retirement Corporation of America, __ So. 2d __, 2002 WL 1972320 (Fla. App., August 28, 2002).**

Hep C Exposure: Industrial Injury, Not Occupational Disease.

A nurse was caring for a dialysis patient when his leg shunt port exploded. She and the entire room were covered with blood.

She was tested for Hepatitis C for one year and was told she was not infected, but six years later she tested positive for the first time.

The Supreme Court of Iowa stated that a sudden episode of exposure to communicable disease is an industrial injury, not an occupational disease, meaning there is a relatively short statute of limitations from the date of the injury to apply for worker's compensation.

However, the court then went on to rule in the nurse's favor. The court ruled that the date of injury in this scenario occurs on the day when the employee first learns she is infected, not on the day of the infecting episode. **Perkins v. HEA of Iowa, Inc., __ N.W. 2d __, 2002 WL 2022738 (Iowa, September 5, 2002).**

Visitor Slips, Falls In Nursing Home: Court Faults Practice Of Residents Taking Food To Rooms.

A family member was visiting her mother, a resident at the nursing home. At about 1:00 p.m. when the residents were leaving the dining room after lunch the visitor was walking in a hallway leading to the elevator to the residents' rooms and to the activities room on the same floor.

The visitor slipped and fell on a grape on the marble-type floor surface. She sued the nursing home for personal injury.

How Long Was The Hazard Present?

Pre-trial discovery focused on finding a witness, a nurse, other staff or resident who had seen the grape on the floor or finding another way to prove it was there long enough for the nursing home to know about it, the usual focus in slip-and-fall lawsuits.

The nursing home's practice of allowing elderly residents to carry food from the dining room to their rooms created a foreseeable risk of them spilling their food on the floor and creating dangerous conditions.

The focus is not on how long the grape was on the floor before the visitor fell; the focus is on whether there was a negligent mode of operation at the home.

SUPREME COURT OF FLORIDA
September 5, 2002

All that proved inconclusive and the lower court dismissed the case.

Supreme Court of Florida ruled nevertheless there were grounds for the lawsuit. The visitor was entitled to go before a jury with the theory that the nursing home's very method of operation was negligent and created a foreseeable risk of harm.

Practice Created Foreseeable Risk To Visitors, Staff, Residents

Specifically, the visitor would get her day in court to argue that allowing elderly residents to carry food out of the dining room creates a foreseeable risk they will spill something and a visitor, staff or another resident will slip and fall. A jury should decide the case. **Markowitz v. Helen Homes of Kendall Corporation, 736 So. 2d 775, 2002 WL 2018735 (Fla., September 5, 2002).**