LEGAL EAGLE EYE NEWSLETTER

October 2004 **For the Nursing Profession** Volume 12 Number 10

No Assistance To Bedside Commode, Bed Wheels Not Locked: Jury Finds Negligence.

The patient was admitted to the hospital for back pain, for her a long-standing condition.

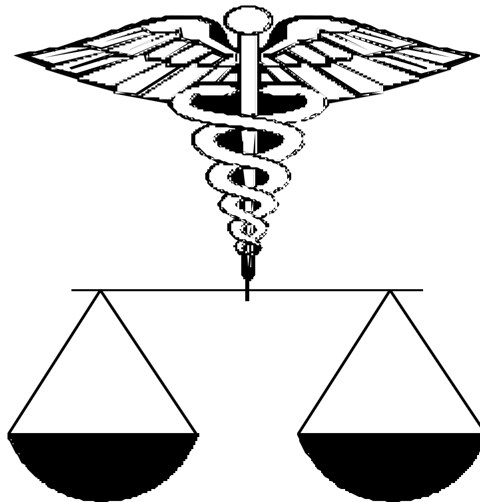
Because she was unstable on her feet and had a history of falls due to her back condition the hospital placed the patient on fall precautions. She was not to get up out of bed without assistance, her bed rails were to be raised and her call button was always to be placed within her reach.

However, on the night in question, five days into her hospital stay, hospital staff placed a commode beside her bed and told her to use it herself for her restroom needs throughout the night.

When the patient tried to get up to the commode by herself she fell because the bed rolled. She tried to stand up by herself and fell again because the bed rolled due to the fact the bed wheels were not locked.

She was discharged home four days later, but continued to have more back pain than usual. Her treating physician, an anesthesiologist specializing in chronic pain, related her back pain after the incident to aggravation of her back condition caused by her injuries from the fall in the hospital.

The patient sued the hospital. The jury ruled the hospital was negligent, but awarded her no compensation.



The patient was on fall precautions. She was not to get up without assistance.

A commode was placed at her bedside and she was told to use it on her own as needed throughout the night.

She tried to get up on her own, fell and re-aggravated her back condition.

The bed wheels were not locked. That is negligence.

SUPREME COURT OF IOWA
September 1, 2004

Hospital Is Ruled Negligent

The Supreme Court of Iowa accepted the patient's nursing expert's testimony that the hospital was negligent. The nursing expert focused on the fact the hospital bed wheels were not locked to prevent movement during a transfer or when the patient got up.

The Supreme Court of Iowa overruled the jury's decision not to award damages. The jury was unable to find any connection between the fall and aggravation of the patient's back condition because the lower-court judge refused to allow the patient's pain specialist to testify on the patient's behalf. The lower-court judge ruled the patient's lawyer missed the court's deadline to designate the patient's pain specialist as an expert witness.

The Supreme Court of Iowa, however, ruled that in Iowa a patient's treating physician, not being a "hired gun," is not what the law contemplates as an expert witness who must be identified by a certain deadline or is prohibited from testifying. Thus the patient's pain specialist should have been allowed to testify on her behalf. A new trial was ordered so the patient's case could receive full consideration. **Hansen v. Central Iowa Hosp. Corp., __ N.W. 2d __, 2004 WL 1936475 (Iowa, September 1, 2004).**

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New! Instructional Videos
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Medicare Advantage: CMS Considering URAC As Accrediting Organization.

On August 27, 2004 the US Centers for Medicare and Medicaid Services (CMS) announced that it is considering approval of the Utilization Review Accreditation Commission (URAC) as an accrediting organization for managed care organizations that wish to participate in the Medicare Advantage program.

This is analogous to HCFA's acceptance some years ago of the Joint Commission as an accrediting organization for hospitals and nursing facilities. Accreditation by the organization is considered equivalent to direct certification by Federal authorities for Medicare or Medicaid participation.

We have placed CMS's 8/27/04 announcement from the Federal Register on our website at http://www.nursinglaw.com/urac.pdf.

FEDERAL REGISTER August 27, 2004

The minimum-allowed thirty-day public comment period will have expired on September 27, 2004.

CMS by law must announce its decision whether to accept the URAC as an accrediting organization by mid-January, 2005.

We will continue to watch the Federal Register for further developments.

FEDERAL REGISTER August 27, 2004
Pages 52706 – 52708

Discrimination: Insignificant Age Difference No Basis For Suit, Other Factors Present.

The fifty-five year-old nursing director of the hospital's emergency department was fired after twenty-six years in her position when new management took over the hospital. She sued for age discrimination.

A fifty-five year-old nursing department head was replaced with an outside hire who was forty-eight.

Given the weakness of the other circumstantial factors, this insignificant age difference does not prove age discrimination.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
UNPUBLSIHED OPINION
August 26, 2004

The US Circuit Court of Appeals for the Tenth Circuit ruled the age difference insignificant, in light of the other factors present, and dismissed the case.

The hospital's ER was found substandard by Federal inspectors and the nursing director was unresponsive to demands she correct the problems.

New management was not impressed with her reluctance to be visible in the ER and to interact with her subordinates, particularly during non-day-shift hours.

Her thirty-eight year-old assistant director was given the job of interim director, but not promoted to director as she was not considered qualified.

The hospital flew a fifty-four year old from Florida to Oklahoma to interview her, but decided not to hire her. **Perry v. St. Joseph Reg. Med. Ctr., 2004 WL 1903507 (10th Cir., August 26, 2004).**

Spider Bite: Hospital ER Staff Were Not Negligent.

While lying on an x-ray table in the hospital's emergency room a patient was bitten by a black widow spider.

The patient sued the hospital for negligence.

Hospital employees are not expected to inspect a hospital gown for spiders before giving the gown to a patient.

Even if the hospital's nurses and other personnel were, as the patient claimed, not taking his complaints seriously and were joking about the chain of events, there still was no negligence by the hospital causing the spider bite, and the staff's attitude, in and of itself, caused the patient no harm over and above the effects of the bite itself.

DISTRICT COURT OF APPEAL
OF FLORIDA
September 10, 2004

The District Court of Appeal of Florida sided with the hospital and dismissed the patient's case.

The hospital's maintenance department had a contract with a pest control company for regular inspection and pest-control services appropriate to the climate where the hospital was located.

Unless the hospital is known to have a problem with spiders there is no legal duty for nurses or other caregivers to anticipate a patient will be bitten by a spider and no liability for not taking steps against it. **St. Joseph's Hospital v. Cowart, __ So. 2d __, 2004 WL 2008477 (Fla. App., September 10, 2004).**

Skin Care: Nursing Care Found Substandard, Court Upholds Civil Monetary Penalties.

The US Court of Appeals for the Sixth Circuit, in an unpublished opinion, upheld a civil monetary penalty of $10,500 ($500 x 11 days) levied by state department of health surveyors who inspected the long term care facility on behalf of the US Centers for Medicare & Medicaid Services (CMS) for violations of the CMS participation requirements relating to pressure sores.

The Court went into detail as to why each of five residents in question did not receive the required level of care.

Peripheral Vascular Disease

The Court rejected the argument that pressure sores on a resident's leg were clinically unavoidable due to her medical condition which placed her at high risk for skin breakdown.

Her pressure sore condition was not addressed by the nursing staff until ten days after pressure sores were first observed. A special mattress ordered by her physician was not provided, in direct violation of her care plan.

Obesity, Incontinence, Total Care

The Court agreed that an obese total-care patient who is incontinent presents a special risk of skin breakdown, as the resident must be allowed to sleep only on her back.

However, inspectors observed an aide feeding the resident her breakfast while she was still lying on her back on urine-soaked sheets. That is substandard care, the Court ruled, which likely explains the avoidable pressure sores on her back.

No-Harm, No-Foul Rule Rejected

The resident had a pressure sore on his big toe. The facility could not show that it was unavoidable, but argued that since there was no harm other than the lesion itself, the facility should not be penalized.

The Court reiterated that the focus of the Federal CMS regulations is to prevent patterns of care which have the potential for harm. Not providing the best practicable pressure relief is considered substandard care.

No Pressure Relieving Devices

For two additional residents inspectors observed that the pressure relieving devices required by their care plans were not in use. One was to have a heel cradle boot while in bed and the other was to have a cushion under him while sitting in his wheelchair.

Each was seen on at least one occasion without their protective devices and each had a pressure sore on the related area of his body. **Livingston Care Center v. Dept. of Health & Human Services, 2004 WL 1922168 (6th Cir., August 24, 2004).**

Code of Federal Regulations Title 42, Section 483.25 (c) states:

Pressure sores. Based on the comprehensive assessment of a resident, the facility must ensure that —

1. A resident who enters the facility without pressure sores does not develop pressure sores unless the individual's clinical condition demonstrates that they were unavoidable; and

2. A resident having pressure sores receives necessary treatment and services to promote healing, prevent infection and prevent new sores from developing.

A civil monetary penalty of $500 per day is appropriate for the eleven days during which these residents' care was found substandard.

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT
UNPUBLISHED OPINION
August 24, 2004

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Child Abuse: Court Accepts Trauma Nurse As Expert Witness.

The parents went back to court to appeal a decision terminating their parental rights and removing their children from the home on grounds of intentional child abuse.

The parents argued specifically that a registered nurse was not qualified to testify as an expert witness that burns to their fifteen month-old's legs were the result of intentional scalding in hot water.

This ER nurse is qualified to testify as an expert witness in this child-abuse case.

The child's burns are the result of trauma.

The mother's story how it happened is not consistent with what the nurse observed.

COURT OF APPEALS OF TEXAS
September 15, 2004

The Court of Appeals of Texas disagreed with the parents.

An experienced emergency room trauma nurse can testify that the burns she observed were the result of scalding in hot water. She can testify that the explanation she elicited from the child's mother/primary caregiver did not match the injuries the nurse actually observed.

The nurse in question was also qualified to give an expert opinion in court that a discrepancy between what is seen in the physical examination of the child/victim and the caregiver's explanation for the injuries is positive evidence of intentional abuse, the court ruled. **In the Interest of B. L.D., 2004 WL 2066845 (Tex. App., September 15, 2004).**

Arbitration: Admission Contract Upheld.

The patient was admitted to a nursing home after another facility where she had been living closed its Alzheimer's unit. She fell twice at the nursing home shortly before her death. Her probate estate sued the nursing home.

The nursing home countered the lawsuit by insisting the case be transferred to an arbitrator according to the arbitration agreement in the admissions contract.

Arbitration of nursing-home negligence cases does not limit the resident's legal rights or the right of the estate to sue after the resident is deceased.

The only limitation is on the forum in which those rights must be pursued.

COURT OF APPEALS OF INDIANA
August 13, 2004

The Court of Appeals of Indiana sided with the nursing home.

The admissions papers were signed by the patient's daughter who had full power of attorney to sign binding contracts on the patient's behalf, the patient being unable to do that on her own.

The nursing home's marketing and admissions director was willing and able to explain each and every aspect of the admissions papers before they were signed, including the fact that the part about arbitration meant the patient would be giving up the right to jury trial if a claim or dispute could not be settled.

Family members are often feeling stress when placing a loved one in a nursing home. That is not a factor in the validity of an admissions contract. **Sanford v. Castelton Health Care Center, 813 N.E. 2d 411, 2004 WL 1814036 (Ind. App., August 13, 2004).**

Workers Comp: Nurse On The Job Picking Up Check, Cannot File Lawsuit.

A nurse went to her place of employment, a nursing home, for the sole purpose of picking up her paycheck. She was not working that day.

She slipped and fell on a paved walkway from the parking lot to the operational building and sustained wrist, back and neck injuries.

She filed a civil personal injury suit against her employer.

Workers compensation is the sole legal remedy for on-the-job injuries.

An employee injured in the course and scope of employment duties cannot sue his or her employer for negligence.

COURT OF APPEALS OF KENTUCKY
September 10, 2004

The Court of Appeals of Kentucky agreed with the employer that this employee was acting in the course and scope of her employment at the time she was injured. Whether or not she elected to file a claim for workers compensation, she had no right to file a personal injury lawsuit against her employer.

Ordinarily if an employee is injured while off duty due to the employer's negligence the employee would have the same right as the general public to sue. However, according to the court, collecting one's pay is an integral part of the employment relationship and the employee is not off duty when doing so. **Nunn v. First HealthCare Corp., 2004 WL 20011282 (Ky. App., September 10, 2004).**

Workers Comp: Field Nurse On The Job While At Home.

A home health nurse/weekend supervisor slipped and fell in her own driveway at home carrying her job-related paperwork, pager, cellular phone, a newspaper and a take-out pizza she had bought for her family on the way home.

She applied for workers compensation for a broken ankle.

The RN field nurse/ weekend supervisor was on call 24 hours a day over the weekend to respond to patient calls. She did her required paperwork at home.

She was bringing her job-related paperwork and equipment into her home when she fell in her own driveway.

COURT OF APPEALS OF GEORGIA
September 16, 2004

The Court of Appeals of Georgia ruled she was conducting business for her employer at the time and was entitled to workers compensation benefits.

She was bringing time-sensitive paperwork into her home, the place where she conducted her employer's business of being on call for home-health patients 24/7 over the weekend and completing required paperwork that would be due first thing on Monday morning.

Ordinarily when an employee has ceased the employer's tasks for the day and is going home the employee ceases to be eligible for workers comp, but that was not the situation here, the court said. **Amedisys Home Health, Inc. v. Howard, __ S.E. 2d __, 2004 WL 2066519 (Ga. App., September 16, 2004).**

Faulty Transfer: Court Allows Patient To Sue.

Shortly after an outpatient hernia repair a clinic employee tried to help the patient transfer from a wheelchair to his car.

The clinic employee tried to have the patient stand up by himself on both legs during the transfer. One leg still being numb from the anesthesia, the patient fell and was injured.

The patient sued the outpatient surgical center for negligence.

The patient's lawyer mistakenly designated a physician as his expert witness on the legal standard of care for transferring a patient, while it was the patient's nursing expert who was qualified as an expert and gave an expert opinion that the transfer technique was faulty.

One of the patient's legs was still numb from the surgical anesthesia.

Even a non-expert lay person should know the patient cannot stand up on his own and that two persons must assist him in transferring from a wheelchair to a car.

COURT OF APPEAL OF CALIFORNIA
UNPUBLISHED OPINION
September 17, 2004

The Court of Appeal of California was unwilling to decide the ultimate validity of the patient's case based on a legal technicality in the designation of expert witnesses. The patient had all the expert and lay testimonial evidence he needed.

Any caregiver who knows a patient's leg is numb should know not to stand the patient up and that two persons, himself and a family member or himself and another caregiver, must assist in a safe transfer from a wheelchair. **Lawrence v. Frost Street Outpatient Surgical Center, 2004 WL 2075401 (Cal. App., September 17, 2004).**

Faulty Assist: Patient Must Have An Expert Witness.

The patient had been treated in the hospital for a broken pubic bone.

The patient filed a lawsuit against the hospital claiming that she was injured while a hospital employee was assisting her in moving from the bathroom back to her hospital bed.

The patient's case was dismissed by the lower court on grounds that the patient's case required but did not have an expert witness on the legal standard of care.

This case sounds more like medical malpractice than ordinary negligence.

Expert testimony is an absolute prerequisite to the patient's case.

If the patient cannot or does not have expert testimony the defendant healthcare professional is entitled to dismissal of the patient's lawsuit.

MICHIGAN COURT OF APPEALS
UNPUBLISHED OPINION
September 9, 2004

The Michigan Court of Appeals agreed with the lower court and ruled in the hospital's favor dismissing the case.

The act of assisting a patient in her condition required professional training and the exercise of professional judgment to minimize the patient's discomfort and to guard against further injury.

This was not a case where the issues would be within the common knowledge of lay persons on a jury who could decide the case without the benefit of expert testimony. The lack of such testimony was a fatal flaw requiring dismissal of the case. **Campins v. Spectrum Health, 2004 WL 2009264 (Mich. App., September 9, 2004).**

Incident Reports: Court Upholds Hospital's Quality Review Privilege.

Shortly after surgery a patient fell and broke his hip in the hospital's intensive care unit while attempting to get up to go to the bathroom.

His widow sued the hospital for negligence. The lawsuit alleged the patient should have been classified as a high risk for falling because his physical and mental capabilities were impaired by his medications. Further, his physician had ordered his bed rails to be raised and that he be kept under direct observation at all times, yet he was allowed to get up unassisted.

Patient's Widow's Lawyers Demanded Nurse's Incident Report

At this point the court has not passed judgment on the allegations of negligence filed against the hospital. This issue at this point is whether the lawyers should be allowed a copy of the ICU nurse's incident report. The hospital has claimed it is unable to locate this document, but is arguing that even if it can be located it is privileged and does not have to be turned over.

Quality Review Privilege Upheld

The hospital has a specific quality review form that is to be filled out by the nursing staff on duty any time a patient falls.

The Court of Appeal of California, in an unpublished opinion, pointed out this form was not intended to be used for risk management purposes, that is, it was not intended as advance preparation for the eventuality that the hospital could be sued over the incident in question.

Instead, the form was strictly to be used for internal quality review. Quality review had seen a specific need to cull out and review all incidents at the hospital involving patient falls to look at what could be done to prevent patient falls, the purpose being to improve patient safety and enhance the quality of care at the hospital. The quality review privilege applies to all aspects of quality improvement, not just medical staff review. **Sutter Davis Hospital v. Superior Court, 2004 WL 1988009 (Cal. App., September 8, 2004).**

The records and proceedings of organized committees in hospitals having the responsibility of evaluation and improvement of the quality of care rendered in the hospital are not to be made available to patients suing the hospital.

This includes not only medical staff committees but also multidisciplinary committees where the members may be nurses and administrators.

The rationale is that outside access to investigations conducted by staff committees stifles candor and inhibits objectivity in voicing constructive criticism which is necessary to enhance safety and improve the quality of care.

Inability to access a hospital's internal quality review records may impair a patient's ability to pursue a lawsuit against a doctor or the hospital, but on balance quality improvement as more important.

Patients' lawyers still have access to testimony of hospital employees and the patient's medical chart to prove their cases

COURT OF APPEAL OF CALIFORNIA
UNPUBLISHED OPINION
September 8, 2004

Pregnancy Discrimination: Comparison Must Be The Same In All Respects.

A night-shift patient care observer (PCO) was fired after a staff nurse and a nursing supervisor both verified they saw her sleeping on duty sitting with a patient who was considered a suicide risk and had been assigned a one-on-one PCO for that reason. After her termination she sued for pregnancy discrimination.

Even though sleeping on the job is a serious infraction for a patient caregiver, the US District Court for the Eastern District of Pennsylvania agreed with the PCO that she might have valid grounds to sue for pregnancy discrimination, if she could prove the hospital did not terminate other non-pregnant patient-care personnel for sleeping on the job.

To prove pregnancy discrimination, the person filing the lawsuit has to demonstrate that she was treated differently than at least one person who was exactly the same in all relevant respects except not pregnant.

UNITED STATES DISTRICT COURT
PENNSYLVANIA
August 5, 2004

Two aides who were not pregnant had been caught sleeping on the job and were not fired. One was sleeping in the break room on break. One was sitting with a non-suicidal patient.

The Court ruled neither of them committed an offense as serious as the PCO. The PCO's basis of comparison failed and her lawsuit was dismissed. **Jones v. Hospital of University of Pennsylvania, 2004 WL 1773725 (E.D. Pa., August 5, 2004).**

Racial Discrimination: Comparison Must Be The Same In All Respects.

The US District Court for the Northern District of Illinois dismissed an African-American nurse's racial discrimination suit filed against the nursing care center where she had worked. Although given numerous promotions, she was not offered an assistant executive director position for which she was not considered qualified. She resigned and filed suit.

The nurse who filed this lawsuit has not been able to identify any non-minority who was situated similarly to her in the workplace who was treated more favorably.

The nurse has not shown that the person who got the executive director position had basically the same qualifications and experience as her, except for not being a minority.

UNITED STATES DISTRICT COURT
ILLINOIS
August 31, 2004

To prove discrimination it is necessary to identify a non-minority similar in all relevant respects who was treated more favorably. The nurse could not show that the person who got the promotion had the same qualifications as she, specifically the same lack of management experience.

After she resigned and sued, her job was filled with a non-minority making $1.45 per hour less than what she was making, tending to disprove a discriminatory climate existed in her workplace. **Hussey v. Sunrise Senior Living Services, 2004 WL 2033754 (N.D. Ill., August 31, 2004).**

Incident Reports: Court Upholds Hospital's Quality Review Privilege.

The hospital's risk management committee investigates identified risk exposures and reports of patient dissatisfaction with the quality of care.

The hospital's risk management committee has a function which is financial in nature, attempting first to quantify and then to adjust the hospital's risk exposure.

The hospital's risk management committee does not come under the quality review privilege or the medical review privilege.

On the other hand, the hospital's quality review committee exists to review and evaluate the provision of patient care in the hospital. There is also a medical review committee which specifically reviews issues of physician competence in the rendering of medical care. Both functions are geared toward quality improvement and come under legal privileges against outside disclosure of internal documents.

Patients have other avenues to obtain evidence for their legal cases.

COURT OF APPEALS OF TEXAS
August 31, 2004

A patient sued the hospital after an incident in which she allegedly was over-medicated by a patient controlled analgesia (PCA) morphine pump during the night while she was asleep following surgery.

Her over-sedated and unresponsive condition was detected in time by her nurses and the morphine overdose was immediately corrected with Narcan.

It was not clear from the court record what harm the patient claimed to have suffered.

The patient's own expert witness admitted he had no idea whether the PCA was defective or if the hospital's caregiving staff had somehow mis-programmed it. On the basis of inadequate proof, the lower court dismissed the case.

The patient's layers asked the Court of Appeal of Texas to rule that the hospital should have been required to turn over its quality review file on the incident, from which the lawyers speculated the patient's medical expert would have been able to extract sufficient factual data to be able to render and opinion that the hospital was negligent. The Court of Appeal disagreed.

Quality Review Privilege Upheld

Some confusion resulted from the fact it was the hospital's risk manager who provided an affidavit to the court that the nurse's incident report was exempt from disclosure as a quality-review document.

Risk management, strictly speaking, does not involve improvement of patient care. Risk management is not covered by the quality review or medical review privilege.

However, quality review, the process of trying to improve patient care by investigating adverse incidents, comes under a legal privilege which cannot be violated even if the patient requires quality review materials to pursue a successful lawsuit, which of course has secondary risk-management benefit. **Martinez v. Abbott Laboratories, __ S.W. 3d __, 2004 WL 1944403 (Tex. App., August 31, 2004).**

LEGAL EAGLE EYE NEWSLETTER
For the Nursing Profession

Entrapment: New Draft Guidance From FDA Re Hospital Bed Systems.

The US Food and Drug Administration (FDA) has jurisdiction over manufacture and sale of medical devices.

The FDA has begun the process of formulating Federal regulations to define engineering specifications for hospital beds to reduce the risk of life-threatening patient entrapment. On August 30, 2004 the FDA published "Hospital Bed System Dimensional Guidance to Reduce Entrapment." At this time this draft guidance document is not mandatory for manufacturers, sellers or users of hospital bed systems. It is intended only to express the FDA's current thinking on the scope and severity of the problem and what may need to be done about it.

Entrapment – Awareness

We believe the FDA's draft guidance document is an excellent formulation of the risks of entrapment and may be useful to nurses and risk managers. We have placed the 35 page document on our website at http://www.nursinglaw.com/entrapment.pdf. It is also available directly from the FDA at http://www.fda.gov/cdrh/ocer/guidance/1537.html.

The FDA has identified seven potential zones for entrapment:

1. Within the rail.
2. Between the top of the mattress and the bottom of the rail, between the rail supports.
3. Between the rail and the mattress.
4. Between the top of the mattress and the bottom of the rail, at the end of the rail.
5. Between the split bed rails.
6. Between the end of the rail and the side edge of the head or foot board.
7. Between the head or foot board and the mattress end.

Appendix D has a convenient one-page illustration showing what is meant by each of these hazard zones.

There is also an extensive list of library references.

The FDA's 8/30/04 announcement from the Federal Register invites public comments on this issue at http://www.fda.gov/dockets/ecomments.

FEDERAL REGISTER, Page 52907
August 30, 2004

Chlamydia Pneumonia: Nurse Was Infected In The Community, Workers Comp Claim Is Denied.

A hospital neonatal intensive care nurse came down with pneumonia that was linked to Chlamydia by her treating physician, an infectious disease specialist from a university teaching hospital.

The nurse became disabled. She filed for workers compensation, claiming her condition was an occupational disease.

The Supreme Court of Kentucky, in an unpublished opinion, agreed that infectious agents are far more prevalent in hospitals than in the community at large and that hospital nurses are routinely exposed to infectious agents to a much greater extent that persons at large in the community.

However, there is more to the picture than that.

To be compensable under workers compensation an occupational disease must be a condition that the worker has contracted in the workplace rather than in the community at large.

Infectious diseases are more prevalent in a hospital than in the community, but this specific infectious agent has not been identified in the nurse's workplace.

SUPREME COURT OF KENTUCKY
UNPUBLISHED OPINION
August 26, 2004

The hospital's head of infection control testified that Chlamydia had never been specifically identified in the neonatal intensive care unit at any time in the years the nurse worked there.

Further, the patient's own physician conceded that the patient more likely than not contracted the illness in the community, as Chlamydia pneumonia is uncommon in newborns and children younger than five years.

In a workers compensation case for occupational disease it is up to the worker to prove that the specific infectious agent was more likely than not contracted in the workplace. Even for hospital nurses the law presumes an infectious agent was acquired in the community. **Roberson v. Norton Hosp., 2004 WL 1908247 (Ky., August 26, 2004).**