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MED-MAL MATTERS

In February, we wrote about a disturbing trend of elder abuse in nursing homes involving caregivers taking photographs and videos with smartphones of patients in embarrassing situations. According to a recent story reported by *Outpatient Surgery Magazine*, this abject lack of professionalism and concern for patient privacy and safety is not limited to post-acute care facilities.

In September, *Outpatient Surgery* published a story with the headline: "Hospital in Hot Water After Staff Snap Pics of Patient's Penis." According to the story, a patient presented to the University of Pittsburgh Medical Center's Bedford Memorial Hospital in Everett, Pa., with an unusual genitourinary injury — he had an unidentified foreign object stuck in his penis.

Word quickly spread throughout the hospital and staff curiosity turned his operation into a "circus." After an employee came forward a month later to complain that staff members had taken pictures of the patient's predicament and were circulating them, the hospital, and eventually the Pennsylvania Department of Public Health, investigated. The findings would give anyone pause before being put to sleep in a hospital.

According to the state health department's report, the surgeon admitted to having an assistant take photos with a personal cellphone for "teaching and documentation" purposes, though there was a dedicated camera in the operating room for that purpose. The medical center's policies required specific, written consent from the patient before any filming or recording for internal teaching use. The surgeon stated that he was "... very busy that day, [and] can't read words verbatim on the consent, but I know the consent cover[ed] it."

It didn't.

The surgeon apparently had a vague memory of all that education and training he had undergone in the past because he told investigators that he realized the presence of extraneous personnel taking pictures in the operating room was "a HIPAA [Health Insurance Portability and Accountability Act] violation," so "[he] respected the patient" by telling the crowd to wait until the patient was asleep. And then the operating room became the Big Top.

One staff member told the health department that there were so many people in the room vying for space that it looked like a "cheerleader type pyramid." That employee, apparently the circulating nurse, took photos for the surgical team because they were gloved and sterile.

Another surgeon heard about the "genitourinary anomaly" while performing a tendon repair in a different operating room. After he finished, and while his patient was still in the recovery room, he joined the circus. He had nothing else scheduled the rest of the day, so he stayed and watched. He admitted to the health department that he had no legitimate reason to be in the room, it was just



SURGERY TO CIRCUS

Discipline after an unusual injury drew gawkers

By THOMAS A. DEMETRIO and KENNETH T. LUMB

"shear [sic] curiosity." He must have assumed his wife would be curious too, because he took photos and shared them with her.

Several members of the team tried to clear the gawkers from the room and one even retrieved a poster that read, "No pics," but to no avail. Staff members told the health department that there was "chaos" in the operating room with a "ton" of unauthorized people present. Another staff member told some of those gawkers to leave, but only because they didn't have appropriate equipment to protect their eyes from the "sparks" flying from the tools being used in the procedure.

Pictures of the unfortunate patient and his "anomaly" were shared among staff, their spouses and even sent to at least one other medical center.

The hospital was cited by the state health department and the U.S. Department of Health and Human Services for multiple violations of 42 CFR Part 482, Conditions of Participation for Hospitals, including failing to protect the personal privacy, dignity and respect of the patient and failing to protect the patient's confidentiality.

The hospital was also cited for failing to protect the patient's safety by allowing persons not involved in his care to enter the operating room, a clear violation of infection-control best practices

and plain common sense.

Under the laws of most states, including Illinois, this unprofessional conduct arguably gives rise to a number of potential causes of action, including the public disclosure of private facts, invasion of privacy and intentional or reckless infliction of emotional distress. Indeed, as it is unlikely the patient consented to anyone touching his penis for the purpose of posing it for a photo, he may also have a battery cause of action.

But why should a patient have to cobble together a theory from existing torts that may or may not apply based on the specifics of state law? A violation of patient privacy, dignity and safety should always be actionable. If not, hospitals and health-care providers will never have the incentive to fully eradicate it. CL

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