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Welcome to Speaking of Health Law

Hi, I'm Norm Tabler, host of the AHLA podcast series, *Speaking of Health Law*, where we focus on the *Lighter Side of Health Law*. I hope you enjoy this month's edition.

For Want of a Nail

Remember the proverb that begins, *for want of a nail* and ends up showing that because of the missing horseshoe nail, a kingdom was lost? Ever wonder whether the king had a valid claim against the blacksmith responsible for the missing nail?

This comes to mind in reading about a lawsuit alleging that the negligence of a Dallas hospital caused a bridal shop a thousand miles away to go out of business.

Coming Attractions Bridal Shop sued a Dallas hospital on the theory that if only the hospital had taken the precautions recommended by the CDC, then when Thomas Duncan was admitted after being infected by the Ebola virus, nurse Amber Vinson wouldn't have become infected from caring for him, and then her visit to the bridal shop in Akron, Ohio, to buy a dress wouldn't have caused health authorities to close the shop for cleaning. And if that hadn't happened, then the shop, after reopening, wouldn't have been cursed with a stigma that drove it out of business.

Can the shop's lawsuit stand up to the hospital's motion to dismiss? *No,* according to the Texas Court of Appeals. But maybe not for the reason you think. The case was dismissed with prejudice, and the shop was saddled with the hospital's attorneys' fees, because the negligence it alleged was *medical* negligence, and the shop failed to file an expert's report, as required by the Texas med mal statute.

The case is *Tex. Health Resources v. Coming Attractions Bridal & Formal*, Tex. Ct. of Apps.

Be Careful What You Ask For

Davenia Porter sued a hospital because it gave her the information she repeatedly asked for.

When Davenia checked in for tubal removal surgery, she asked the staff not to share details of her surgery with her family. During the procedure the surgeon discovered a mass that required a hysterectomy.

With her father and uncle in the room, Davenia asked a nurse about her bleeding, pain, and her catheter. The nurse said all that was normal after a hysterectomy. That's when Davenia first learned she'd had a hysterectomy.

She told her father and uncle the nurse didn't know what she was talking about, so the nurse repeated: you've had a hysterectomy. The next day, with her father and uncle in the room, Davenia again asked about the pain and was again told it was normal after a hysterectomy.

Davenia sued the hospital for disclosing the hysterectomy to her father and uncle. The hospital moved to dismiss, pointing out that the nurse was simply responding to questions Davenia asked in front of her father and uncle.

The court granted the motion, ruling that Davenia had waived any right to privacy by asking the questions. The Minnesota Court of Appeals affirmed, emphasizing the absurdity of arguing that a nurse shouldn't answer a patient's questions about her treatment.

The case is *Porter v. United Hosp*., Minn. Ct. of Apps.

A Judicial Catch-22

Pharmacist Anthony Mimms sued CVS for defamation because a CVS employee told a customer that he was under DEA investigation.

Relying on truth as a defense, CVS offered two pieces of documentary evidence. First, there was the DEA subpoena served on the clinic where Anthony used to work, specifically seeking records of Anthony's patients, including patients who died or were convicted of drug crimes. Second, there was a criminal trial transcript in which an HHS agent testified that he and a DEA agent had, in fact, investigated Anthony.

Sure-fire winners, right? Not according to the trial court, which excluded both documents. The court's reasoning? Well, the subpoena of Anthony's patient records was issued after Anthony left the clinic.

Second—and this is the Catch-22--the criminal trial transcript showing Anthony was under DEA investigation might prejudice the jury against him. You heard correctly: CVS has to prove Anthony was under DEA investigation but can't introduce a trial transcript proving Anthony was under DEA investigation because it might prejudice the jury against him.

You can't make this stuff up. No wonder the jury awarded Anthony a million dollars. Happily for CVS, the Seventh Circuit reversed the trial court's evidentiary rulings and ordered a new trial.

The case is *Mimms v. CVS*, 7th Cir.

Don't Take it Sitting Down

When the hospital's HR department rejected Judy Shotwell's request for accommodation due to leg surgery, she didn't take the decision sitting down. That turned out to be the problem … and why she lost her job and her lawsuit.

Judy underwent multiple surgeries that made her miss several months of work. When her absences exceeded leave policy, she had to quit or take furlough status. She chose furlough.

Later she presented a letter from her doctor saying she could work, if she did it from a wheelchair, but HR rejected her request and she was terminated.

Judy sued under the ADA for failure to accommodate, discrimination, and retaliation. The hospital won summary judgment on every count. Why? Because Judy knew all along that the accommodation she requested—to work from a wheelchair—wasn't *reasonable*. It wouldn't work, because Judy was unable to perform any job that required much sitting. In fact, she had applied for long-term disability, claiming she was, quote, "unable to sit for any length of time."

So Judy hadn't requested the wheelchair accommodation in good faith and hadn't been denied accommodation that was *reasonable.* One lesson is the danger of taking conflicting positions in different procedures, like insisting in a lawsuit that you *can* work from a chair, while insisting to your disability insurer that you can't.

The case is *Shotwell v. Regional West Med*. Center, 8th Cir.

Walking Under the Influence

You don't hear about *walking* under the influence the way you hear about *driving* under the influence. But walking under the influence recently cost a Wisconsin hospital over half a million dollars.

Brennan Cain spent Christmas evening drinking with friends in bars. Returning to his sister's home, he was staggering a little. (His blood alcohol level would later prove to be three times the DUI limit.) Heading to the basement, Brennan lost his balance taking the first step, fell, and landed unconscious at the foot of the stairs.

Rushed to the hospital, he died from his injuries, but not before receiving $560,000 worth of trauma services.

When the hospital sought reimbursement from Brennan's health plan, the claim was denied based on an exclusion for, quote, "injury sustained … as a result of alcohol… use."

The hospital sued, leveling several arguments. The most interesting was a variation on the *but-officer-I-can-hold-my-liquor* defense, namely, that through heavy chronic drinking Brennan had built up a tolerance to liquor and probably wasn't all that impaired.

The hospital's *best* argument was that the exclusion should apply only when alcohol was the *sole* cause of the accident. But the court upheld the insurer's position that the exclusion applied whenever alcohol was a *substantial* cause of the injury.

The case is *Univ. of Wisc. Hosp. v. Air Products & Chemicals*, W.D. Wis.

Not *Going* the Extra Mile but *Charging* for It

Have you ever been tempted to fudge your mileage expenses? Texas-based BestCare Lab gave in to the temptation to fudge its *Medicare* mileage expenses and in a big way. How big? Try *$11 million* in mileage overcharges.

How do you overcharge Medicare--or anyone else--$11 million in mileage? Well, if you're a lab, you charge Medicare one dollar for every mile a specimen travels, whether or not an employee travels with it.

So if your employee drives ten miles to the airport to drop off a specimen to be flown 500 miles, you charge $510 for mileage.

And you use this same approach even if the employee transports multiple specimens in one trip. So if there were ten specimens in that trip, you'd charge Medicare *$5,100* in mileage for that trip to the airport.

The gravy train ended when a plaintiff filed a False Claims action. BestCare not only has to repay the overcharge. Hit with the statute's treble damages provision, it owes the government *$31 million*.

The case is *U.S. ex rel. Drummond v. BestCare Lab*, S.D. Tex.

Well, that's it for this month's edition of the AHLA podcast series, *Speaking of Health Law*. I hope you enjoyed it. Check your *AHLA Weekly* and *Connections* magazine for the next edition of *Speaking of Health Law*.