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Not for the Faint of Heart: Does a Hospital Owe a Duty to Warn a Squeamish Visitor?, 41 J. Marshall L. Rev. 473 (2008)

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NOT FOR THE FAINT OF HEART: DOES A HOSPITAL OWE A DUTY TO WARN A SQUEAMISH VISITOR?

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I. INTRODUCTION

A hospital, and particularly its emergency department, is popularly perceived as a hectic and chaotic place.[1] Physicians, nurses, and other health care professionals scramble to treat the critically and not so critically ill. Emergency medicine physicians are specially trained in this field and are required – as are all physicians – to treat emergency patients in compliance with the applicable standard of care.[2]

What are apt descriptions of the hospital and emergency department environments? A classic emergency medicine text proclaims that:

> In the ED [emergency department], entropy states favor chaos. Left to their own rhythms, events outrun the ED staff. Thus, success depends on the ability to control (1) intake of patients (2) the ED environment, (3) patient-care events, and (4) disposition resources.[3]

"The ED is governed by exigency. Actions of ED personnel are for the most part reactions. Events unfold quickly, demanding attention. These events can sometimes be steered but certainly not halted."[4]

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1. See Robert H. Dailey, Approach to the Patient in the Emergency Department, in 1 Emergency Medicine: Concepts and Clinical Practice 137 (Peter Rosen, et al. eds., 4th ed. 1998) (1983) (stating that an emergency department's chaos has contributed to emergency medical practice).

2. *See* DAN B. DOBBS, THE LAW OF TORTS, § 242, at 631-32 (West Group 2000) (explaining that physicians agree to provide their services in accordance with their professional standard of care).

3. Dailey, *supra* note 1, at 137.

4. *Id.*

A justice of the Supreme Court of Pennsylvania noted that:

> Hospitals are not pleasant institutions by definition. The struggle between life and death occurs daily within its walls. People with horrible diseases and unpleasant appearances are likely to be encountered.[5]

Family members and friends may accompany patients to the emergency room, observe, and in some fashion, assist in the care provided there. They provide comfort and support to the patient. Unquestionably, the family member or friend, not medically trained, may observe injuries or treatments that are unpleasant to view. This observation can cause fainting due to a blood injury phobia or vasovagal reaction.[6] Additionally, emergency room visitors who faint may suffer injuries, including head injuries.[7] This paper assesses the relationship between the hospital visitor and the hospital, and explores whether, on any theory, the hospital owes a tort duty to warn a visitor who may suffer an unfortunate injury precipitated by observing treatment or conditions in the hospital.

II. BASIC TORT PRINCIPLES

It is intuitively obvious that the hospital visitor who accompanies the patient is not the patient. The visitor is not owed the professional duty of care that a physician owes a patient[8] because the visitor is not in the hospital for treatment.

What, then, is the status of the visitor vis-à-vis the hospital? A short course on the duties owed by owners and occupiers of land may be helpful.

Historically, persons appearing on the property of others are characterized as trespassers, licensees, or invitees.[9] Trespassers

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5. Marcus v. Frankford Hosp., 283 A.2d 69, 75 (Pa. 1971) (Roberts, J., Opinion in Support of Judgment N.O.V.).

6. *See* Alexis M. Fenton et al., *Vasovagal Syncope*, *in* 133 ANNALS OF INTERNAL MEDICINE 714, 715-18 (Nov. 7, 2000) (describing the physical processes that lead to fainting); Alexander L. Gerlach et al., *Blood-Injury Phobia With and Without a History of Fainting: Disgust Sensitivity Does Not Explain the Fainting Response*, 68 PSYCHOSOMATIC MED. 331-39 (2006) (concluding that the tendency to faint when exposed to blood-injury stimuli may suffice as a conditioning event leading into phobia, without specific involvement of disgust sensitivity and parasympathetic activation); Ross v. Vanderbilt Univ. Med. Ctr., 27 S.W.3d 523, 525 (Tenn. Ct. App. 2000) (explaining the vasovagal reactions as a stress phenomenon).

7. *See, e.g.*, Murillo v. Griffin Hosp., 823 A.2d 1202, 1204 (Conn. 2003) (describing the severe injuries sustained when a woman fainted at a hospital).

8. *See* DOBBS, *supra* note 2, at 631 (stating that the physician stands in a special relationship to the patient); BARRY K. FURROW ET AL., HEATH LAW, § 6-2, at 238-45 (West Publishing Co. 1995) (explaining that the professional standard governs the physician when a patient is under his care).

9. W. PAGE KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 393 (W.

are "intruders" and enter or remain "upon land in the possession of another without a privilege to do so."[10] The general rule is that "the possessor is not liable for injury to trespassers caused by his failure to exercise reasonable care to put his land in a safe condition for them, or to carry on his activities in a manner which does not endanger them."[11] No further explanation is required here. It is not likely that a hospital visitor would ever be characterized as a trespasser because visitors appear in hospitals on a consensual basis.[12]

Licensees have been characterized as those who enter the premises of another for their own purposes with the consent of the possessor.[13] Social visitors have been defined as licensees.[14] In general, the possessor of land is obligated only to warn a licensee of hidden dangers known to the possessor.[15]

The invitee is the classic business customer. The invitee enters the premises at the invitation of the possessor and is owed a duty of protection against dangers of which the possessor knows and against those which, with reasonable care, might be discovered.[16]

How should the hospital visitor, accompanying a patient to an emergency room or other treatment area without objection by the hospital, be characterized? Is the visitor an invitee or a licensee? Does the visitor's presence further an economic benefit of the hospital? Does the visitor seem more of a "public invitee?"[17] Is the visitor more like the classic licensee, to whom a very restricted duty is owed? If a duty is owed, is it a duty to warn hospital visitors that they may observe unpleasant sights and faint? Judicial opinions considering this issue will be explored in order to determine the legal "dignity" and plight of the hospital visitor who is injured as a result of fainting.

Page Keeton et al. eds., 5th ed., West Publishing Co. 1984) (1941).

10. *Id.*

11. *Id.* at 393-94.

12. *See* Osborne M. Reynolds, Jr., *Licensees in Landoccupiers' Liability Law - Should They Be Exterminated or Resurrected?*, 55 OKLA. L. REV. 67, 74 (2002) (noting that a hospital's business purposes include allowing visitors to visit patients) (citing *Sutherland v. St. Francis Hosp. Inc.*, 595 P.2d 780 (Okla. 1979)).

13. KEETON, *supra* note 9, at 412.

14. *Id.* at 413.

15. *Id.* at 414-15.

16. *Id.* at 419.

17. *Id.* at 422-23.

III. CASELAW

A. Minnesota

In *McElwain v. Van Beck*,[18] the Court of Appeals of Minnesota considered a claim of an emergency department patient's sister who fainted during her brother's treatment. The facts are quite simple and ordinary. The plaintiff was standing next to her brother and holding his hand in the ER while he was treated for a nasal injury. The physician administered a local anesthetic, the plaintiff fainted, fell, fractured her skull and suffered hearing loss. Interestingly, there was no evidence connecting the plaintiff's fainting episode "to anything in the emergency room."[19] The plaintiff was neither squeamish at the sight of blood nor had previously fainted upon the sight of blood. The trial court entered summary judgment against plaintiff and the court of appeals affirmed.

The plaintiff's claim in *McElwain* was based on two theories. The first suggested the medical negligence of the physician treating her brother. The court easily dispensed of this argument, noting that in the absence of a physician-patient relationship a tort duty did not exist. The court further noted that the plaintiff's claim did not constitute a *Tarasoff v. Regents of the University of California*[20] type situation, in which a physician may owe a duty to warn a non-patient third party of the dangerous propensities of a patient who makes specific threats to the third party. Furthermore, the claim in *McElwain*[21] did not implicate a physician's duty to control a patient presenting a danger to a third party, which is also recognized by Minnesota law.

B. Connecticut

In *Murillo v. Griffin Hospital*,[22] the court considered the claim of a plaintiff who fainted and fell after observing a medical procedure performed on her sister. Essentially, the plaintiff observed multiple efforts to perform venipunctures on her sister to gain IV access. The plaintiff advised a hospital nurse that she was going to faint. She repeated the statement but the nurse made no effort to assist her. The plaintiff fainted, fell to the floor, suffered a broken jaw, broken and chipped teeth, facial lacerations and

18. 447 N.W.2d 442 (Minn. Ct. App. 1989).

19. *Id.* at 444.

20. 551 P.2d 334 (Cal. 1976); Brian Ginsberg, *Tarasoff at Thirty: Victim's Knowledge Shrinks the Psychotherapist's Duty to Warn and Protect*, 21 J. CONTEMP. HEALTH L. & POL'Y 1 (2004); Brian Ginsberg, *Therapists Behaving Badly: Why the Tarasoff Duty is Not Always Economically Efficient*, 43 WILLAMETTE L. REV. 31 (2007).

21. *McElwain*, 447 N.W.2d at 444.

22. 823 A.2d at 1202.

post-fall headaches. She required surgical and medical treatment and suffered lost wages. The court held that "as a matter of public policy, the defendants owed no duty to the plaintiff – a [non-patient] bystander . . . to prevent foreseeable injury to her as a result of her observing the medical procedures performed on her sister."[23]

In Connecticut, four factors comprise the formula that determines the existence of a legal duty as a matter of public policy: "(1) the normal expectations of the participants in the activity under review; (2) the public policy of encouraging participation in the activity, while weighing the safety of the participants; (3) the avoidance of increased litigators, and (4) the decisions of other jurisdictions."[24] The court identified the plaintiff here as a "bystander," not the focus of the medical attention. The normal expectation of the participants was to care for and about the plaintiff's sister, not to concentrate on the plaintiff, who chose to observe the needle insertion procedure.

As to the second factor, the court noted that the law should encourage physicians to concentrate on patients and not bystanders. As to the third factor, the recognition of a duty to a hospital bystander would simply encourage lawsuits due to injuries sustained by those witnessing medical procedures.

With respect to the fourth factor, the law of other jurisdictions, the court referred to cases arising in Pennsylvania,[25] Illinois,[26] and Kansas[27] in support of its position in *Murillo*. It should be noted, however, that in *O'Hara v. Holy Cross Hospital*,[28] the Supreme Court of Illinois held that a duty to protect the non-patient visitor arises once she is invited to participate in care and treatment.[29]

C. Pennsylvania

In *Sacks v. Thomas Jefferson University Hospital*,[30] the trial court considered the classic scenario of the visitor to the hospital emergency room. The plaintiff brought her daughter to the ER for treatment of a forehead wound. The ER physician asked her to hold her daughter's head while he was suturing the wound. While the plaintiff observed the procedure, she told a hospital "agent"

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23. *Id.* at 1204.
24. *Id.* at 1205.
25. Sacks v. Thomas Jefferson Univ. Hosp., 684 F. Supp. 858 (E.D. Pa. 1988).
26. O'Hara v. Holy Cross Hosp., 561 N.E.2d 18 (Ill. 1990).
27. Walters v. St. Francis Hosp. & Med. Ctr., 932 P.2d 1041 (Kan. Ct. App. 1997).
28. *O'Hara*, 561 N.E.2d at 18.
29. *Id.* at 22.
30. 684 F. Supp. at 858.

"that she felt faint and was going to leave the treatment room."[31] While leaving the room, she fainted, fell and was injured.

The issue for the trial court was classic. The plaintiff contended that since the physician requested her assistance, the hospital created a risk of harm to her and created a duty of care to protect her. The hospital's position was that it owed no duty to "a non-patient observing treatment of a patient in an emergency room setting."[32]

The court analyzed this scenario in a traditional negligence context. It emphasized that the hospital never accepted the plaintiff as a patient and she was never in a physician-patient relationship with the hospital. By voluntarily entering the treatment room, the plaintiff "accepted the risk that she would witness events or conditions inherent in the medical treatment which could upset her. She was not required to be present nor was she required to hold her daughter's head. Indeed, she abandoned her daughter to leave the room when she felt faint."[33]

Not surprisingly, the plaintiff argued her fainting episode was foreseeable. The court countered that "forseeability of injury, however, in the absence of a duty to prevent that injury is an insufficient basis on which to rest liability."[34] The court held that the plaintiff failed to prove the existence of duty owed to her by the hospital.

Finally, the trial court emphasized the plaintiff's role with respect to her daughter's emergency as well as the plight of her claim:

> Parents have a duty to obtain medical attention for their children when the need arises. However, this only creates a duty of care on the part of the hospital not to injure the child and in no way imposes a special duty of care on the part of the hospital to protect the child's parents from encountering the unpleasantness of their children's injuries or the unpleasantness necessarily inherent in a medical emergency response to those injuries.[35]

The court granted the hospital's motion to dismiss.

In *Sacks,* the court cited the Supreme Court of Pennsylvania in *Marcus v. Frankford Hospital*[36] to distinguish the facts. *Marcus* is an interesting case and yields, perhaps, a surprising result. In *Marcus*,[37] a fourteen year old volunteer "candy striper" worked at Frankford Hospital. She attended an orientation, but, as with others in this program, was not permitted to work in the pediatric,

31. *Id.* at 859.
32. *Id.*
33. *Id.*
34. *Id.* at 860.
35. *Id.*
36. 283 A.2d at 69.
37. *Marcus*, 283 A.2d at 71.

obstetric, emergency department or operating room. The plaintiff's typical assignment included "reading mail to patients, filling water pitchers, giving out flowers, changing unoccupied beds and accompanying patients to the discharge desk."[38] On the day in question, the plaintiff was requested by a hospital nurse to assist her and another nurse with a male patient. The plaintiff held the patient while the nurses washed him and attended to his bedsores. The patient was unconscious and naked and covered with excrement. The plaintiff became nauseated and told a nurse she did not feel well. She fainted, fell and struck her face on an oxygen tank. She suffered serious facial injuries as a consequence.

The plaintiff filed a suit against the hospital and won a verdict of eleven thousand dollars for her "pain, suffering and embarrassment."[39] The hospital moved for judgment notwithstanding the verdict.

On appeal, the court considered the hospital's position that it owed no duty of care to the plaintiff. The court disagreed, stating:

> Given the nature and purposes of the services to be performed by [plaintiff], the circumscribed extent of the training she received, the limited experience she had had during her two to three day period of work at the hospital, combined with her extreme youth, all as described . . . it cannot be said as a matter of law that appellant owed no duty to its nurses' aid not to subject her, without warning or preparation of any kind, into a situation as unpleasant and emotionally disturbing as that to which this child was subjected. That in such circumstances the minor might become so upset as to faint, with injurious consequences to herself, was not beyond the bounds of foreseeability to a reasonably prudent master.[40]

At trial, the hospital failed to convince the court to instruct the jury on the plaintiff's assumption for risk. On appeal, the court held that neither plaintiff's training nor experience would have predicted her assistance in the activities leading to her fainting spell and injuries. Therefore, plaintiff would not have voluntarily encountered a known risk and accepted it.

Judge Roberts authored a separate opinion in support of the hospital's request for judgment notwithstanding the verdict ("JNOV"). This opinion emphasized that the hospital discharged its duty to the plaintiff by its training, orientation, and assignment limitations. This opinion forcefully concluded as follows:

> Hospitals are not pleasant institutions by definition. The struggle between life and death occurs daily within its walls. People with horrible diseases and unpleasant appearances are likely to be encountered. I cannot agree that the hospital, with its carefully

38. *Id.* at 72.
39. *Id.*
40. *Id.* at 73.

regulated volunteer program, was negligent in any way toward appellee. I would grant judgment N.O.V.[41]

D. Kansas

The Court of Appeals of Kansas, in *Walters v. St. Francis Hospital and Medical Center*,[42] reviewed the order granting summary judgment for the hospital in connection with the plaintiff's claim. The plaintiff fainted and was injured while his fiancée was receiving treatment following ER care and admission to her room.

The plaintiff observed his fiancée receive a nasogastric tube. His fiancée requested that the plaintiff stay to hold her hand during a third attempt at tube placement, which was successful. Thereafter, the plaintiff stated he did not feel well, sat down in his fiancée's room and rested for a short time. He then left the room and went to the nurses' station, where he was asked if he was all right and replied that he was. However, as the plaintiff stood at the nurses' station, he lost consciousness and fell to the floor. He suffered a head injury, which required brain surgery.

The hospital took the position that it breached no duty to the plaintiff and that there was an absence of proximate causation. The trial court applied the law of premises liability and granted summary judgment.

The court of appeals noted that the plaintiff was not a patient when he fell, and therefore the hospital did not owe him a professional duty of care. The court of appeals characterized the plaintiff as a hospital visitor and an "invitee." Therefore, the hospital owed him a duty to exercise reasonable care.

The issue was whether the hospital duty of care included the duty to warn the plaintiff "that he might become distressed or ill from watching and assisting while the tube was being inserted, to ask him if he had a sensitivity to the sight of blood, to warn him that he should leave the room, and to assist him after he stated he was not feeling well."[43] The trial court held that St. Francis had no duty to warn of an open and obvious danger – the danger of fainting from feeling queasy.[44] The court of appeals noted that "a possessor of land is under no duty to remove known and obvious dangers."[45]

The court of appeals embraced the *Sacks*[46] analysis previously discussed in this paper, but held, without explanation, that the

41. *Id.* at 75.
42. 932 P.2d at 1041.
43. *Id.* at 1044.
44. *Id.*
45. *Id.*
46. *Sacks*, 684 F. Supp. at 859.

hospital owed the plaintiff "the duty to inform him of the procedure that was going to be performed."[47] If this is a true duty, what is its basis? Why does a hospital owe a non-patient any medical information? If this is so, isn't it only a short leap of logic to expect that the hospital should then warn the non-patient of the adverse reaction which may occur when observing the procedure?

The court of appeals opted out of this quandary, relying on something in the nature of assumption of risk.[48] The court stated:

> The danger of becoming queasy or fainting, however, was open, obvious, and known to Walters. We conclude that ordinary and reasonable care does not require a hospital to warn an invitee that he or she might have an adverse reaction to witnessing a medical procedure. More specifically, a hospital has no duty to warn an invitee about the possibility of becoming queasy or fainting from witnessing a medical procedure because this is a danger that is open, obvious and known to the invitee. The myriad of possible adverse reactions of an individual accompanying another to the hospital are not within the knowledge of the hospital. A contrary conclusion could open hospitals to claims that would cause hospital to bar all visitors during all treatments.[49]

Therefore, the court of appeals concluded that the hospital did not breach a duty owed to plaintiff. There was no issue of proximate cause.

E. Oklahoma

In *Jackson v. Mercy Health Center*,[50] the Supreme Court of Oklahoma considered a claim that is factually pertinent to the focus of this paper, but disposed of the claim by examining the State's Good Samaritan Act. Here, a husband accompanied his pregnant wife to the hospital and to an operating room to observe her Caesarean section delivery. He became dizzy while observing the preoperative anesthesia preparations. Attending hospital personnel assisted him in sitting on his wife's hospital bed, which was in the hall outside of the OR. He then fell from the bed and was injured. He claimed that the hospital owed him a duty to prevent his fall.

The supreme court clearly characterized the plaintiff as a "visitor" and the hospital as the "invitor."[51] However, the plaintiff urged the court to transform his status from a visitor to a patient, as he had attended a childbirth class and agreed to pay his wife's hospital expenses as well as those of his child. Not surprisingly, this argument was to no avail. In a footnote, the court

47. *Walters*, 932 P.2d at 1045.
48. DOBBS, *supra* note 2, at 534-39.
49. *Walters*, 932 P.2d at 1045.
50. 864 P.2d 839 (Okla. 1993).
51. *Id.* at 844.

acknowledged that the Oklahoma law of premises liability would be implicated in a "visitor-invitee" scenario.[52] One commentator has noted that "courts have held that a hospital's business purposes include allowing visitors to visit patients."[53] Therefore, the visitor would be classified as an invitee.

F. Florida

In *Ziegler & Ziegler v. Tenet Health Systems*,[54] a husband became an ER visitor and observer of his wife's emergency treatment. He arrived at the ER to see his wife receive treatment for an injured finger. His assistance with and observation of her treatment was explained as follows:

> When Ziegler saw that the nurse was having trouble treating his wife, he got up onto the gurney, put one arm around his wife's waist to hold her steady, and held out her injured hand so that the nurse could treat the finger. As he did so, he viewed her injury, which appeared to him as though she had severed the top part of her finger.
>
> Once the nurse finished applying the dressing, a physician's assistant came in and began applying a second dressing. As that occurred, Ziegler said that he felt hot. The physician's assistant told Ziegler he should go back to the waiting room. After getting off the gurney, Ziegler started to walk away and fainted, falling face-first to the floor and severely injuring himself.[55]

The husband urged that a tort duty was owed him based on the foreseeability of his injury. Predictably, the defendant urged that no duty was owed and that the risk of fainting was "open and obvious."[56]

The *Ziegler* court reviewed the opinions in *Sacks*,[57] *Walters*,[58] *Zenkina v. Sisters of Providence in Washington*,[59] and *O'Hara*,[60] all previously discussed here. Simply, the court declined to apply *O'Hara*[61] and held that the "hospital owed no duty to protect a non-patient bystander from fainting."[62]

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52. *Id.* at 842 n.4.
53. Reynolds, *supra* note 12, at 74.
54. 956 So. 2d 551 (Fla. Dist. Ct. App. 2007).
55. *Id.* at 553.
56. *Id.*
57. *Sacks*, 684 F. Supp. at 859.
58. *Walters*, 932 P.2d at 1045.
59. 922 P.2d 171 (Wash. Ct. App. 1996).
60. *O'Hara*, 561 N.E.2d at 18.
61. *Id.*
62. *Ziegler*, 956 So. 2d at 551.

G. Illinois

In *O'Hara v. Holy Cross Hospital*,[63] the Supreme Court of Illinois confronted the issue of whether the defendant hospital "owed plaintiff, a nonpatient bystander in the emergency room of a hospital, a duty to protect her from the injuries sustained herein."[64] In *O'Hara*, the plaintiff took her son to the ER for treatment of a facial injury. A nurse invited her to accompany her son. She wiped anesthetic from her son's mouth, fainted, hit her head, and suffered a brain injury.[65]

In pre-trial discovery, the plaintiff testified that the ER physician "asked her to take a piece of gauze and wipe the Novocain from her son's mouth while the nurse lifted the covering from her son's face."[66]

The ER physician's deposition testimony, predictably, was different. He testified that the plaintiff desired to be with her son and that she informed him she had previously observed the placement of sutures and "assured him that she would not become ill."[67] He instructed her not to wipe her son's mouth due to the risk of infection and then gave her a sterile gauze to do so. The anesthetic took effect, so he began to suture the wound and the plaintiff moved away and fainted.[68]

After disposing of arguments in support of and against the existence of a "special relationship" between plaintiff and her son,[69] the court addressed whether the hospital owed plaintiff a duty to protect her from fainting. The court identified two rules: (1) a hospital ER owes no duty to protect a non-patient bystander from fainting simply by allowing the bystander to remain with the patient during treatment; (2) the duty to protect from fainting does exist if the bystander is invited to participate in care and treatment of the patient.[70]

The court, without citation to authority except the deposition testimony of the ER physician, noted a minimal likelihood that a bystander would faint. The court emphasized the enormity of the burden of guarding against such episodes, short of excluding visitors from emergency rooms, an undesirable result.

The court, in recognizing the duty owed to a bystander "actively" involved in emergency care, stated the burden to guard against fainting and the consequences of the burden are not

63. *O'Hara*, 561 N.E.2d at 18.
64. *Id.* at 19.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.* at 20.
70. *See generally id.* (describing a hospital's duty of care to a nonpatient bystander if the bystanders asked to participate in the treatment).

onerous because "an emergency room should not have to enlist the aid of a nonpatient bystander."[71] The court held that whether plaintiff was invited to participate in the care of her son was a question of fact for the trial court.

What is the duty owed to protect an actively involved bystander from fainting? Must the hospital provide personnel to hold the bystander? Must the hospital provide a soft landing?

Frankly, how would a court determine the involvement of a visitor as "active"? Can a visitor be inactively involved in patient care? How can any non-medical professional bystander actively participate in the treatment of a patient? The *O'Hara* court does not answer these questions.

H. Washington State

In *Zenkina*, the aunt of a ten-year-old boy observed his chin wound in the hospital emergency room and fainted after the ER physician opened the wound to clean it.[72] She suffered head injuries and was hospitalized.

The plaintiff, the boy's aunt, was assisting in interpreting for the patient. She had testified that the ER physician asked her to hold the child's hands in the event he attempted to move suddenly. She placed her hand on top of the child's head to comfort him and thereafter fainted. Plaintiff claimed that the hospital owed her a duty to warn of the risks attendant to observing the treatment, including the risk of fainting. The hospital moved for summary judgment, urging the lack of a duty owed to a non-patient, that she was not directed to assist the treatment and that she assumed the risk of fainting. The motion was granted.[73]

Pursuant to a premises liability analysis, the court held that the plaintiff was an invitee to whom a duty of ordinary care was owed.[74] That duty essentially encompassed maintaining the hospital premises in good condition.[75] The court held that it would be an unreasonable burden to prevent non-patients in the hospital from fainting without banning them from the premises.[76]

The plaintiff urged the court to adopt the *O'Hara* participation in treatment basis for a duty.[77] The court simply concluded that plaintiff was not requested to participate in medical treatment. The plaintiff was requested to translate, to

71. *Id.* at 22.
72. 922 P.2d at 172.
73. *Id.* at 173.
74. *Id.* at 174.
75. *Id.*
76. *Id.*
77. *O'Hara*, 561 N.E.2d at 23.

comfort and to restrain a child, and the court characterized these as "acts of human kindness."[78]

The *Zenkina* court found that to prevent bystanders from fainting would require barring them from the premises.[79] Requiring hospitals to warn of the risk of fainting "would be to require hospitals to warn of a risk that is so well known as to require no warning at all."[80] The court declined the invitation to impose the duty to warn.

IV. CONCLUSION

"The professional duty of a hospital is to provide a safe environment for patient diagnosis, treatment and recovery."[81] Certainly, a hospital owes a duty as an owner or occupier of land to keep its premises safe. Somewhere between the patient and the typical business invitee is the hospital visitor who accompanies a patient to the ER or other treatment area and observes injuries or treatment.

What duty is reasonably owed to the squeamish hospital visitor who observes these unpleasant sights, faints, and is injured? Hospitals are not likely interested in banning visitors from accompanying patients to ERs and other treatment rooms. Although this practice will protect against a bystander who faints at the sight of blood, it is inhumane and not good for business. Assuming the presence of visitors, merely warning them that fainting may occur at the sight of blood or injury will not protect against fainting. How would the hospital give the warning? A writing would add yet another document to a hospital chart.

Illinois, in *O'Hara*,[82] gives lip service to the higher duty to protect the bystander from fainting if the bystander is invited to participate in patient care. This duty appears to mandate more than merely warning that fainting may occur. How can the hospital discharge this duty? If the vasovagal reaction[83] occurs, fainting will occur. If the bystander faints and falls to the floor or contacts an object before hitting the floor, injury may occur. The only method that could protect from injury as a result of fainting is the assignment of a person (or device of some sort) to the bystander to intervene once fainting occurs but before injury occurs. Therefore, there is no effective protection against fainting other than (1) barring visitors from accompanying patients in

78. *Zenkina*, 922 P.2d at 176.
79. *Id.*
80. *Id.*
81. FURROW ET AL., *supra* note 8, at 461.
82. *O'Hara*, 561 N.E.2d at 21-23.
83. *See* Fenton et al. *supra* note 6 (explaining the vasovagal syncope and fainting).

treatment areas or (2) barring other hospital visitors from observing any unpleasantry that could trigger fainting.

Simply put, duties to warn of and protect against fainting or injury due to fainting are unworkable. Hospital visitors should understand that hospitals are filled with ill persons, who bleed or have unpleasant injuries – the observation of which may cause fainting.