Studies Point to Hospitals' Role in Prevalence of Hospital-Acquired Infections; Public Initiatives Gather Steam[1]

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Three studies recently published in the American Journal of Medical Quality showed that most nosocomial, or hospital-acquired, infections ("HAIs") arise as a result of hospital procedures rather than the level of sickness with which the patient entered the hospital.[2] The editor of the journal noted that the study's results were inconsistent with hospitals' claims that "'in the sickest patients it's inevitable that someone is going to get a hospital-acquired infection . . . ."[3] Important hospital procedures that could reduce the transmission of HAIs include more vigorous hand-washing by medical staff, "greater care in donning gowns and other infection-preventing clothing during medical procedures, reduc[tion] of traffic in and out of operating rooms, isolat[ion of] patients when necessary and use [of] antibiotics more selectively." *Id*.

These latest studies confirm the disturbing prevalence of HAIs: between "1975 and 1995, the HAI rate rose by 36%."[4] HAIs add between $4 and $6 billion in patient care costs, and increase the average direct health care costs for an infected patient by 136% (of which an average of nine extra days of hospitalization is a factor).[5] Even prior to the latest studies, there was little doubt that "transmission of microorganisms from the hands of health care workers is still the main cause of nosocomial infections."[6]

Several Houston-area hospitals have already instituted programs designed to enhance hospital procedures so as to minimize the risks of hospital-acquired infections. The Methodist Hospital, for example, has actually begun to use "hand-washing spies. These undercover trained observers – wearing scrubs or lab coats and Methodist badges – cruise the patient wards of the 900-plus bed facility and note how often health care professionals take advantage of hand-washing 'opportunities.'"[7] Studies indicate that "[h]ealth care personnel wash their hands just one-third to one-half as they should . . . ."[8] Apparently, the Joint Commission on Accreditation of Healthcare Organizations ("the Joint Commission") has also made determination of the best methods to measure "hand hygiene compliance in hospitals" a "top priority."[9] Hopper quotes Columbia University's Elaine Larson, "scientific adviser to [the Joint Commission]'s hand

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[1] This Health Law Perspectives article is based on an article that appeared in the Health Law & Policy Institute's November *Update on Health*.
[2] *See* Christopher Lee, *Studies: Hospitals Could Do More to Avoid Infections*, WASH. POST, Nov. 21, 2006, at A03.
[3] *Id*.
[4] Jennifer M. Miller, Commentary, *Liability Relating to Contracting Infectious Diseases in Hospitals*, 25 J. LEG. MED. 211, 211 (2004), *citing CDC: Stronger Infection Controls Needed*, 15 MED. MAL. L. & STRATEGY 1 (1998).
[5] *Id*. (citations omitted); *see also* Nicholas Graves, *Economics and Preventing Hospital-Acquired Infection*, 10 EMERGING INFECTIOUS DISEASES 561 (2004).
[6] *Id*. at 214-15, *citing* Didier Pittet et al., *Compliance with Handwashing in a Teaching Hospital*, 130 ANNALS INTERNAL MED. 126 (1999).
[7] Leigh Hopper, *Hand-Washing Spies on the Prowl*, HOUS. CHRON., Nov. 29, 2006 (pagination unavailable).
[8] *Id*.
[9] *Id*.

hygiene project," as endorsing the use of the hand-washing spies, and suggesting that the method be published in "the scientific literature so other people can give it a try."[10]

However, the Joint Commission has required precautions designed to prevent HAIs for years, as in standards pertaining to the treatment of urinary tract infections, but these standards are "frequently" violated.[11] There is little question but that "[t]he failure of health care workers to wash their hands when indicated is a violation of these infection control standards as set forth by the [Joint Commission] standards."[12] The fact that Joint Commission accreditation is a condition for eligibility to participate in Medicare seems to have done relatively little to ameliorate the frequency and severity of HAIs.

One might surmise that if the Joint Commission standards have not posed enough of a spur to change infection control practices, tort liability might act as a more powerful spur. There are reported cases in which plaintiffs have prevailed in a negligence suit against a hospital based on the plaintiff's acquisition of a HAI.[13] More recently, there are several Texas cases involving hospital-acquired infections, with two of them arising in the last eighteen months.[14] However, there are significant barriers for the plaintiff in prevailing in such a suit: first, it may "be impossible to identify the source of the pathogen that caused the disease;"[15] and second, much of the information regarding adherence to infection control policies generated by a medical peer review committee in connection with a specific case may fall under the purview of the medical peer review privilege, rendering the information nondiscoverable.[16]

Aside from promoting more stringent handwashing, other facilities are participating in different programs designed to reduce HAIs. The DeBakey VA Medical Center in Houston is currently "one of seventeen facilities participating in the nationwide initiative to prevent in-hospital transmission of methicillin-resistant staphylococcus aureus ("MRSA")."[17] MRSA is a type of bacteria that is resistant to a number of different antibiotics.[18] According to the CDC, MRSA accounted for 63% of all staphylococcus infections in 2004.[19] The VA has endorsed frequent hand-washing for staff and patients, but also uses swabs to take nose cultures "to determine if

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[10] *Id*.
[11] Pamela Nolan, Note, 34 COLUM. J.L. & SOC. PROBS. 133, 138 (2000).
[12] *Id*. at 141-42.
[13] *See, e.g.*, St. Paul Fire & Marine Insurance Co. v. Prothro, 590 S.W.2d 35, 36 (Ark. App. Ct. 1979); Helman v. Sacred Heart Hosp., 381 P.2d 605, 607 (Wash. 1963).
[14] *See* Gray v. Woodville Health Care Ctr., __ S.W.3d __, No. 08-05-00033-CV, 2006 WL 2192212 (Aug. 03, 2006, Tex. App.—El Paso, pet. filed); Rollins v. Zafar, No. 05-04-00123-CV, 2005 WL 1425854 (Jun. 20, 2005, Tex. App.—Dallas, no pet.); In re Methodist Hosp., 982 S.W.2d 112 (Tex. App.—Houston [1st Dist.] 1998, no pet.). The two most recent cases (*Gray* and *Rollins*) involved medical negligence suits where allegations of hospital-acquired infections were part of the plaintiff's prima facie case. *See Gray*, 2006 WL at *4; *Rollins*, 2005 WL at * 3. However, in *Gray*, the court ruled that the expert's affidavit that the plaintiff submitted was conclusory and affirmed the trial court's grant of summary judgment. *Gray*, 2006 WL at *6. Similarly, in *Rollins*, the court found that the expert report was deficient and affirmed the trial court's grant of a motion to dismiss. *Rollins*, 2005 WL at *4.
[15] Nolan, *supra* note 11, at 142.
[16] *See* Miller, *supra* note 4, at 220-21 (discussing whether hospital infection control guidelines are discoverable).
[17] Salatheia Bryant, *Initiative Aims to Stem In-Hospital Germ Transmission*, HOUS. CHRON., Nov. 29, 2006, at B2.
[18] *See* Centers for Disease Control and Prevention, *Overview of Healthcare-Associated MRSA*, http://www.cdc.gov/ncidod/dhqp/ar_mrsa.html (last visited Jan. 31, 2007).
[19] *See* Centers for Disease Control and Prevention, *MRSA in Healthcare Settings*, http://www.cdc.gov/ncidod/dhqp/ar_MRSA_spotlight_2006.html (last visited Jan 31, 2007).

[the patients] are carriers or have an active MSRA infection."[20] As of late November 2006, since the VA began its initiative aimed at reducing hospital-acquired infections in October 2006, no patient had acquired an active MRSA infection while in the facility. .[21]

Florida and Pennsylvania have passed laws requiring public disclosure of HAI rates, and according to the U.S. Federation of State Public Interest Groups, fourteen states are currently considering legislation that would require hospitals to report their HAI rates to the relevant state entity.[22] The 79th Texas Legislature enacted a provision in the Health and Safety Code establishing an Advisory Panel on Health Care Associated Infections (whose powers expired on January 1, 2007) and directing them to study and recommend methods for "collecting and reporting evidence-based data" on hospital-acquired infections.[23] The Advisory Panel's report ultimately recommended "that a mandatory [hospital-acquired infection] reporting system be implemented by the State of Texas."[24]

Consumers' Union, the publisher of the popular magazine Consumer Reports, has created a website entitled "Stophospitalinfections.org" designed to pressure policymakers to take action designed to reduce the prevalence of HAIs. A glance at the "Newsroom" portion of the website reveals over fifteen news articles on the subject in the last two months alone, including several articles on various state initiatives and bills designed to foster HAI prevention.[25] Where the practices driving the prevalence of HAIs have proved so recalcitrant to change, analysis of both the movement toward laws requiring HAI reporting and subsequent assessments of those laws' efficacy will be integral. Hopefully, state and regulatory efforts at reducing HAI prevalence will prove more successful than either Joint Commission standards or tort liability have been thus far.[26]

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[20] *Id*.
[21] *Id*.
[22] *See* U.S. P.I.R.G., *Lawmakers Approve Reporting of Hospital Infections*, Jan. 3, 2006, http://www.uspirg.org/newsroom/health-care/health-care-news/lawmakers-approve-reporting-of-hospital-infections. Missouri also passed such a law in 2004. *See* Missouri Healthcare-Associated Infection Reporting, http://www.dhss.mo.gov/HAI/.
[23] TEX. HEALTH & SAFETY CODE ANN. § 96.101 (Vernon Supp. 2006).
[24] *Recommendations and Key Findings: Advisory Panel on Health Care-Associated Infections*, at *6, http://www.dshs.state.tx.us/legislative/HAIPanelReport.pdf.
[25] *See* Consumers' Union, *Stop Hospital Infections Newsroom*, http://www.consumersunion.org/campaigns/stophospitalinfections/newsroom.html (last visited Jan. 28, 2006).
[26] Of course, this is not to deny the importance of either Joint Commission standards or tort liability in ameliorating the HAI problems, but simply to note that they have not proved efficacious thus far. Perhaps such efforts might produce better outcomes if linked to state initiatives. Whether this will occur remains to be seen.