

Hospital in hot water after complying with police

A hospital in New Mexico is facing a lawsuit that alleges clinicians there forcibly subjected a man to multiple manual searches of his rectum, along with three enemas, two X-rays, and a colonoscopy — all at the request of police who suspected he was hiding narcotics. After 12 hours in custody, the police finally relented when no drugs were found.

The lawsuit states that 54-year-old David Eckert was subjected to the invasive searches after police officers from Deming, NM, and Hidalgo County, NM, pulled him over for a traffic violation and suspected he was hiding narcotics in his body. Eckert was never charged, but according to the lawsuit, the hospital billed him for the cavity searches to which he did not consent. *(For more on the incident, see the story on p. 6.)*

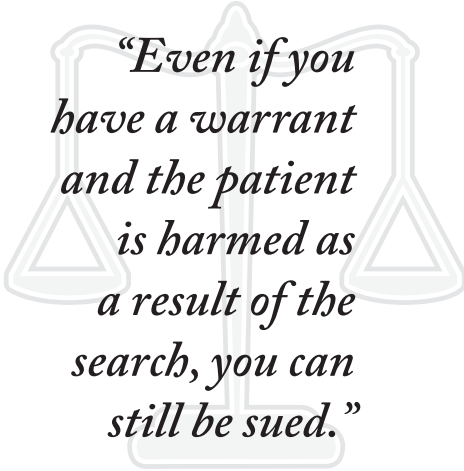
Police obtained a search warrant and initially took the man to Mimbres Memorial Hospital in Deming, but doctors there said the requested search was unethical and refused the police request, according to the lawsuit. Officers then took Eckert to Gila Regional Medical Center in Silver City, NM, outside Hidalgo County. The lawsuit alleges that crossing the county line invalidated the search warrant.

The police and both hospitals declined to comment for this story, but attorneys familiar with the laws on forcible searches say Gila Regional might be in serious trouble for complying with the search request and taking it as far as the plaintiff claims. But they also acknowledge that hospital clinicians and administrators can find themselves in a difficult position when police request a blood draw or other invasive search on an unwilling subject.

Hospitals should always require a search warrant before even considering such a request, says **David Smith, JD**, a partner with the law firm of Garvey Schubert Barer in Seattle. He recently

assisted the Washington State Medical Association in updating its guidance to Washington hospitals regarding disclosures to law enforcement, and he has researched the issue raised by a forced body cavity search. *(For more on why a search warrant is necessary, see the story on p. 6.)*

Even with a search warrant, the



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hospital still must tread carefully, Smith says. It can be reasonable for the hospital to decline the search, he says.

“Even if you have a warrant and the patient is harmed as a result of the search, you can still be sued. The warrant is not something that immunizes you from liability,” Smith says. “Things like this are fraught with risk, and if a hospital called me with this situation, I would want to talk to the police officer and the judge who issued the warrant

before allowing my client to proceed. The risk of being sued is very, very big.”

Clinicians should be trained not to automatically comply with such police requests and to consult the risk manager and legal counsel. If you are sued, the insurance company might refuse to pay because the clinicians intentionally performed the search rather than the tort being the result of an accident or error, Smith says.

A body search at police request goes beyond a question of consent, Smith notes. Even if a person consents to the action by hospital personnel, the subject also must waive the constitutional right against unreasonable search and seizure. That is a legal issue that cannot be addressed solely by an emergency department physician, Smith says.

“The problem is that people often try to apply medical judgment to a problem that actually requires legal judgment,” he says. “A hospital will be in trouble if it just complies with a request from law enforcement without really understanding that situations become very technical when you’re talking about the Fourth Amendment.”

In addition to a civil lawsuit, a public hospital is considered an agent of the state and can be sued under the federal Civil Rights Act, Smith notes.

The plaintiff in New Mexico also alleges that the repeated searches went beyond what was authorized by the

Executive Summary

A New Mexico hospital is being sued by a man who was subjected to repeated searches against his will because police thought he was hiding narcotics in his rectum. The case raises questions about when hospitals should comply with such a request and how far to go.

- ◆ One hospital refused the police request.
- ◆ Police had a search warrant, but the actions might have exceeded it.
- ◆ Risk managers should train clinicians to refer police requests to the risk manager and legal counselor for legal assessment and to avoid automatically complying with requests.

search warrant, and Smith agrees.

“The warrant probably authorized a search, but it did not authorize repeated procedures,” he says. “Once you made the first search, you probably have done what the warrant authorizes. Anything done after that probably was done without legal justification.”

Though emergency department clinicians usually try to cooperate with

local police, risk managers should counsel clinicians against taking that relationship too far, says **Craig B. Garner**, JD, an attorney and adjunct professor at the Pepperdine University School of Law, Malibu, CA. He previously was chief executive officer at Coast Plaza Hospital in Norwalk, CA.

“It is reasonable to give the police a presumption that they are acting in good faith, to give them some benefit

of the doubt,” Garner says. “But you can’t just follow them blindly.”

SOURCES

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Always require search warrant for forcible searches

Taking a person's blood or conducting any other invasive search is unconstitutional without a search warrant, explains **David Smith, JD**, a partner with the law firm of Garvey Schubert Barer in Seattle. Doing so opens up the hospital to serious liability.

In April 2013, the U.S. Supreme Court ruled in *Missouri v. McNeely* that warrantless blood draws were unconstitutional in most circumstances, Smith says. In so ruling, the Supreme Court overturned 46 years of precedent that had created

a de facto exception to the warrant requirement for blood draws in arrests for driving under the influence of alcohol or drugs.

"Prior to *McNeely*, it was acceptable to justify warrantless searches under the exigent circumstances exception to the Fourth Amendment's requirements based on the government's argument that the natural elimination of alcohol from the bloodstream was sufficient justification for a warrantless search," Smith explains. "The Supreme Court rejected this argument in *McNeely*

and required that warrants be obtained whenever possible."

Without a warrant it is likely that a common law battery claim could be established as a matter of law and that additional claims could be made for attorneys' fees and other relief under the federal civil rights statute, Smith says.

"The bottom line is that no hospital should agree to conduct a search of a patient's body for blood, drugs, or anything else without patient consent, a court order, or a warrant," he says. ♦

CNE QUESTIONS

- 1. According to R. Stephen Trosty, JD, MHA, CPHRM, president of Risk Management Consulting and a past president of ASHRM, what was one effect of the introduction of regulatory issues such as the Emergency Medical Treatment and Labor Act (EMTALA) and the Health Insurance Portability and Accountability Act (HIPAA)?**

 - A. They greatly increased the need for compliance within healthcare organizations, which in turn created more value for the risk manager.
 - B. They had little or no effect on the role of the risk manager.
 - C. They diminished the value of the risk manager because other administrators more clearly understood the related risks.
 - D. They created a hurdle for the advancement of risk managers because they required additional education.
- 2. In the lawsuit filed by David Eckert regarding invasive searches at a hospital, which of the following is true?**

 - A. Police had no search warrant.
 - B. Police had a search warrant, but it specifically disallowed a cavity search.
 - C. Police had a search warrant, and there is no dispute at its validity.
 - D. Police had a search warrant, but the plaintiff argues that it was not valid in the county where the search took place.
- 3. What does David Smith, JD, a partner with the law firm of Garvey Schubert Barer, advise regarding the need for a search warrant before complying with a police request to draw blood or take other invasive action?**

 - A. It is never necessary to require a search warrant.
 - B. It is always necessary to require a search warrant.
 - C. A search warrant is needed only if the person must be restrained.
 - D. A search warrant is needed unless the person is in police custody.
- 4. In Hartford Casualty Ins. Co. v. Corcino & Assocs., what did the court decide regarding the insurer's obligation to pay for data breach expenses under the general liability policy?**

 - A. Hartford must pay, even though there was an exclusion clause that the insurer said applied to the situation.
 - B. Hartford must pay because there was no exclusion clause.
 - C. Hartford does not have to pay because the exclusion clause nullified other sections that seemed to indicate coverage.
 - D. Hartford does not have to pay because the policy was not a specific policy for cyber insurance.