



INTRODUCTION TO HANDLING A NURSING HOME ABUSE CASE

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Presented at Chateau Briand by E-Realty Title
440 Old Country Road
Carle Place, NY 11514
Date: February 29, 2012 at 9:00 a.m.

INTRODUCTION

The terms elder abuse, nursing home abuse and nursing home accidents are becoming common terms as the U.S. population ages and the number of patients entering these homes and facilities increases. Eldercare facilities, such as Nursing Home and Long Term Care Facilities are routinely understaffed with underpaid and poorly trained employees. In home care attendants such as nurse's aides and in home companions often lack the skill and training necessary to care for the elderly, prevent injuries, ensure proper medication and hydration and tend to patients who are susceptible to falls.

While many nursing homes do provide excellent care, far too many do not. Nursing Home and Long Term Care patients reportedly suffer from physical and emotional abuse and neglect ranging from painful bed sores, dehydration, malnutrition and broken bones related to falls. Identifying nursing home abuse can be challenging and a frustrating process when a patient is unable to speak for themselves and the ward is not present to witness the abuse. In addition to nursing home and long care facilities, accidents also arise at Group Homes, in the patient's own home, as well as during transportation. Providers such as Access-A-Ride or Para Transit vehicles are routinely negligent in causing injury to their riders by failing to properly secure the patient, wheel chair or gurney, or failing to properly assist patients alighting from or boarding their vehicles.

This outline will offer a brief guideline into the most common issues when an attorney undertakes an elder abuse case. It will highlight the steps in investigating the case, determining the claims and the damages available to the patient or their survivors.

I. WHO HAS THE RIGHT TO BRING THE CLAIM?

- The injured patient themselves - if competent and able to participate.
- If the patient is incompetent then by their legally appointed guardian, such as their son or daughter or spouse;
- Or by another appointed to be their legal representative, such as a Power of Attorney.
- If the patient is deceased - then the executor or administrator of the estate.

II. INVESTIGATION

A great place to start with any nursing home case is the New York State Department of Health, Division of Residential Services. The Division of Residential Services is responsible for investigating complaints and incidents for nursing homes in New York State which are related to State and/or federal regulatory violations. www.health.ny.gov/facilities/nursing/complaints.htm In order to file a complaint against a facility the form is available on line at its web page (see Exhibit 1).

Complaints

All complaints and incidents received about nursing homes are reviewed by the Department of Centralized Complaint Intake Unit. Some investigations require the Department Investigators to conduct interviews, review medical records, other facility documentation. Other investigations will be conducted by the Complaint and Resolution Unit comprised of clinical professionals who will contact the facility to obtain medical records, facility records and other information to determine the outcome of the investigation.

If there is a finding of a violation(s) the Department will then issue a citation to the nursing home and the facility must submit a plan of correction that is acceptable to the Department and correct the deficient practice. In certain cases starting with the Department of Health can be your best resource. For instance, they will self report all of their deficiencies and report all remedial steps taken to cure them.

By simply filing a FOIL request with the N.Y.S. Department of Health, (Exhibit B), you will be provided with the notice of violation and the institute's plan of correction. (Examples are at Exhibit C) If an investigation is opened on your patient's injury, the Department of Health is also helpful in identifying statutory violations relating to your particular case.

Inspection Reports

In addition to the deficiency reports you may also request inspection reports from the Department of Health. Inspection reports will provide a snapshot of the compliance status of a nursing home at a particular point in time. The nursing home is required to post the results of its most recent certification survey in a location within the facility that is reasonably accessible to residents and their families. The deficiencies include categories such as standard health deficiencies, life safety code deficiencies, total deficiencies, deficiencies relating to resident harm and issues that create immediate jeopardy to its patients.

Medical Records

You will need to obtain the records of the facility. These can often be voluminous and costly. You will also want the records that pre-date the admission. For instance, in a claim arising at an inpatient rehabilitation center, you will not only want the rehabilitations centers records, but those of the doctor who put the patient there. You will be looking for warnings giving by this doctor, type of rehab prescribed, “rail up” orders, or other directives given by the doctor not followed by the center.

III. DOES YOUR CASE SOUND IN NEGLIGENCE OR MEDICAL MALPRACTICE?

In the realm of nursing home abuse cases practitioners are often confronted as to whether or not the claim arises out of medical malpractice vs. negligence.

In distinguishing whether the conduct may be deemed malpractice or negligence the critical factor is the nature of the duty owed to the plaintiff whom the defendants are alleged to have breached. Pacio v. Franklin Hospital, 63 A.D.3d 1130, 882 N.Y.S.2d 247. A negligent act or omission by health care provider that “constitutes both medical treatment or bares a substantial relationship to the rendition of medical treatment by a licensed physician constitutes [medical] malpractice. Bleiler v. Bodnar, 65 N.Y.S.2d 65. More specifically, an alleged negligent act constitutes medical malpractice when it can be characterized as a “crucial element of diagnosis and treatment” and “an artful part of the process of rendering medical treatment to the plaintiff”. Bleiler vs. Bodnar, 65 N.Y.S.2d 72. The distinction between medical malpractice and negligence can be a subtle one and it has been held that medical malpractice is but a “species of negligence” and no rigid analytical line separates the two. Scott v. Uljanov, 74 N.Y.S.2d 673, 543 N.Y.S.2d 369.

Retainer Agreements:

Most relevant to the plaintiff's attorney is that the fee schedule pertaining to the claim. Should the case be signed up in accordance with Judiciary Law 474-a, (sliding scale) rather than a negligence retainer and a fee schedule pursuant to 22 NYCRR 691.2(e) (33 1/3 %).

Obviously negligence claims result in a greater fee to the attorney and as a practical matter pleading and proving a negligence case is normally cheaper and a simpler task. However, quite often defendant attorneys' are quite aware of this will move for an Order to dismiss the complaint or alternatively asking the Court to clarify the action as of one sounding in medical malpractice and for the plaintiff's attorney to comply with the procedure associate with a medical malpractice cause of action.

Requirements in Medical Malpractice Cases

CPLR 3012(a) requires among other things, a plaintiff's attorney prosecuting a medical malpractice action is to serve a Certificate of Merit along with the Complaint. The Certificate of Merit required in a medical, dental or pediatric malpractice requires that the plaintiff's attorney has reviewed the facts of the case and has consulted with at least one physician in the medical malpractice action the attorney reasonably believes is knowledgeable in relevant issues involved in the particular action and that the attorney has concluded on the basis of such review and consultation that there is a reasonable basis for the commencement of such action.

Filings in a Medical Malpractice case include:

1. File and serve a Certificate of Merit,
2. Notice of Medical Malpractice Action
3. Cause of action in the Complaint sounding in Medical malpractice such as:
 - Departure in the Standard of Care
 - Failure to Diagnosis
 - Failure to Treat
 - Lack of Informed Consent

IV. STATUTORY VIOLATIONS

Public Health Law Sec. 2801-d

Public Health Law Section 2801-d "provides a private right of action to nursing home patients injured as a result of a deprivation of any right or benefit established for that patient's well being by contract of state or federal statute code, rule or regulation" even if the plaintiff has simultaneously asserted traditional medical malpractice or negligence claims. This creates a separate and distinct cause of action to be pleaded and is a true gift by the legislature for those handling these claims.

The most common Federal Regulations you will deal with is:

Title 42; Public Health, Chapter 4, centers for Medicare Medicaid services Department of Health and Human Services, Part 483, the requirements for care facilities for instance. (Exhibit D)

483.20(i): Resident assessment facility must conduct initially a periodically a comprehensive accurate standardized reproducible assessment of each resident's function capacity.

483.20(k): Comprehensive care plans- the facility must develop comprehensive care plans for each resident that includes objectives and timetables to meet resident's medical, nursing, and mental or psychological needs that are identified in the comprehensive assessment.

The most common State Regulations you will deal with are:

10 NYCRR 415.12- Each Resident shall receive and the facility shall provide the necessary care and services to attain and maintain the highest practicable physical, mental and psychological well being in accordance with the comprehensive assessment and plan of care subject to the residents right of self-determination. (Exhibit E)

This section highlights the facilities responsibilities to the patient on issues such as:

- Ambulating
- Bathing
- Nutrition
- Pressure Sores (bed sores)
- Urinary Incontinence
- Accidents
- Hydration

By being able to understand the statutes, and apply them to your case, you can create multiple statutory claims to be presented to a jury to help establish negligence on the part of the facility and its employee's.

V. DAMAGES

Wrongful Death

The elements of a wrongful death claim include the survival of distributees who suffer pecuniary loss by reason of a decedent's death and the appointment of a personal representative of the decedent. Meroni v. Holy Spirit Assn. for Unification of World Christianity, 119A.D.2d 200, 506 N.Y.S.2d 174.

Cause of action to recover damages for wrongful death may only be brought by the decedent's personal representative on behalf of all distributees of the decedent. EPTL 5-4.1(1). In contrast a wrongful death action involves a pecuniary injury suffered by the decedent's distributees rather than pain and suffering. See EPTL 5-4.3.

A wrongful death action belongs to the decedent's distributees and is designed to compensate the distributees themselves for the pecuniary loss as a result of the wrongful act. McKinney's EPTL 5-4.4.

Pain and Suffering

To recover for pain and suffering an interim plaintiff must have some level of awareness in the elements to be considered when reaching an allocation for personal injury are the degree of consciousness, severity of pain, apprehension of impending death and duration. Regan v. Long Island Railroad Company, 128 A.D.2d 511, 1997.

A claim for conscience pain and suffering belongs to the estate of the deceased rather than the distributees. McKinney's EPTL 11-3.2(b), Kragg v. Allstate Indemnity Corp. 17 N.Y.S.3d 1118, 950 N.Y.2d 500 (2011).

A personal injury action on behalf of the deceased seeks recovery for conscience pain and suffering of the deceased and any damages awarded accrued to the estate and is personal to the deceased and belongs to the estates not to the distributees. McKinney's EPTL 11-3.2 (b), Heslin v. County of Greene, 14 N.Y.3d 67, 923 N.E.2d 1111, (NY 2010).

Punitive Damages

Trial Courts have held that the standard to recover punitive damages under Public Health Law 2801-d "appears to be a less stringent standard than those under to law governing malpractice." Osborne X. Rel. Osborne v. Rivington House, 19 Misc.3d 1132(a).

In order to prove a claim seeking punitive damages pursuant to Public Health Law 2801-d(2) the conduct of a staff of a nursing home and the deprivation any such right or benefit has been found to have been willful or in reckless and in disregard to the lawful rights to the patient, then punitive damages may be assessed. There also needs to be a finding that the acts or omissions were intentional or must have created a substantial or unjustifiable risk of harm with a conscience disregard of, or indifference to, that risk. Butler v. Shore Front Jewish Geriatric Center, Inc., 33 Misc.3d 686, 932 N.Y.S. 672

VI. APPLICATION TO SOCIAL SERVICES LIENS

In Re:Rambo, 24 Misc.3d 1212(A), 890 N.Y.S.2d 370, the plaintiff's estate sought leave from the Surrogates Court to settle a cause of action for conscience pain and suffering and wrongful death in the amount of \$100,000.00. The Department of Social Services (DOS) sought a repayment of \$786,535.60 for a public assistance provided to the decedent. The estate moved to dismiss the DOS claims on the basis that the settlement of \$100,000.00 was for wrongful death and should be paid to the estate. The estate argued that the decedent died without conscience pain and suffering and as such the \$100,000.00 should be allocated for a wrongful death to which the DOS has not right of recovery.

This demonstrates a strategic practice in drafting settlements agreements that benefit the estate. As a practical matter most defendant attorneys or their insurance companies are more interested in the amount being paid rather than the allocation of the payment. In fact, most defense attorney and their carriers cooperate to reduce the liens and structure the settlement to the end.

In evaluating the case, a plaintiff attorney must consider during settlement negotiations, the amount, if any, that must be paid back to Medicare, Medicaid or any other lien holder. In formulating a settlement demand and determining a fair recovery for the plaintiff, they must consider the lien and the amount to be paid back. If the lien can be reduced, then the carrier will need to pay less. Accordingly, most are happy to allocate the settlement in the best interest of the plaintiff and their families.