People at Risk

Neglect in Nursing Homes

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Inhumane treatment and needless suffering in nursing homes have been repeatedly chronicled in the media and at congressional hearings during the past three decades. Although the 1987 Nursing Home Reform Act has positively influenced certain aspects of care, systemic and deadly neglect still abounds.

Why? Because there is a lack of accountability for long-term care facilities, and there is unwillingness by physicians to recognize the existence of nursing home neglect.

Erratic enforcement of state laws designed to protect the health and dignity of nursing home residents has created an environment where facility management believes it can safely sacrifice the well-being of residents for the sake of profit. About 40 percent of all facilities certified by the Health Care Financing Administration have repeatedly violated federal standards over the last four years.'

Unlike the drunk driver whose license is suspended and who then may be jailed if convicted of driving -while intoxicated, the habitual nursing home offender can repeatedly endanger residents without meaningful sanction. Fines imposed for violations of nursing home safety laws routinely go uncollected. When paid, they are regarded as the cost of doing business by offending homes. Facilities are rarely, if ever, closed.

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The taxpayer, not the nursing home, pays the cost of the neglect. According to the U.S. Senate Committee on Labor and Human Resources, billions of tax dollars are spent annually on damage resulting from poor care-treating bedsores that Should never have developed, hydrating residents who should never have become dehydrated, amputating limbs that should never have withered .[2]

Physician response to this problem has been disappointing. Studies have found that physicians are less effective than other professional groups in identifying cases of elder abuse, and they are unfamiliar with laws that require health care workers to report suspected abuse and neglect cases. [3]

Rarely do physicians use differential reasoning to rule out neglect as a cause of injury. In over 100 death cases involving injuries recognized by the Institute of Medicine as prima facie indicators of nursing home neglect,[4] our firm has seen fewer than five cases where the attending physician considered neglect as a possible cause.

Nursing home neglect is defined by state and federal regulators as "the deprivation of life's necessities of food, water, shelter, or the failure of an individual to provide services, treatment, or care to a resident which causes harm, mental or physical injury, or death."[5] Systemic nursing home neglect results from a breakdown in fundamental systems that were designed to ensure delivery of care to residents.

Federal and state regulations require nursing homes to establish operational systems that ensure the adequate care and safety of residents. For example, parts of §483 of 42 C.F.R require-

- adequate numbers of nursing personnel, including aides and orderlies;
- adequate amounts of food, supplies, equipment, and medication;
- competent nurses, -aides, and orderlies who were screened when hired and who have been monitored throughout their employment to eliminate personnel who are unfit;
- adequate and systematic planning to create an individualized care plan for each resident;
- continuous and systemic assessment of each resident and notification of the attending physician when necessary;
- a record-keeping system that accurately documents the clinical condition and progress of residents as well as delivery of care; and
- an adequate quality assurance program that identifies and corrects care deficits.

Failure by the governing body of the facility and its administrator to provide such essential components can result in systemic neglect, which can cause widespread injury and death. Predictably, those most at risk are the helpless.

Systemic nursing home neglect grows out of management's disrespect for fundamental principles of nursing. It is primarily characterized by (1) dehumanization of highly dependent nursing home

residents, (2) repeated violations of fundamental nursing home regulations, and (3) administrative indifference or willful blindness by management.

Common Manifestations

Evidence of systemic neglect is often revealed through (1) persistent deprivation of basic care for totally dependent residents, (2) injuries and deaths within this subgroup that are linked to progressive neglect, and (3) similar problems involving other residents.

Any of the following conditions should raise a red flag. These are common types of injuries that may be due to progressive neglect:

- necrotic mid festering stage-4 pressure sores,
- septicemia secondary to infected pressure sores,
- osteomyelitis secondary to pressure sores,
- severe dehydration,
- severe protein calorie malnutrition,
- septic shock,
- undetected progressive gangrene, and
- multiple occurrence of the above injuries among residents.

Similarly, certain observations about the operation, supervision, or management of a nursing home should raise red flags.

- *Insufficient number of nurse aides.* Evidence of shortfalls may include incontinent residents who are routinely allowed to soak in their own excrement for hours; urine rings, dried feces, and urine burns on residents; and failure to reposition patients to prevent pressure sores.
- *Failure of nursing personnel to adequately examine and assess vulnerable residents.* Unassessed skin breaks, pressure sores, and other changes in condition may lead to festering necrotic sores.
- *Lack of basic supplies.* The nursing staff may complain about a lack of linens, dressings, or gloves.
- *Failure to adequately screen potential employees.* Examples include the hiring of employees convicted of violent criminal offenses or the rehiring of aides previously discharged for unacceptable behavior.
- *Failure to implement an individualized care plan.* Nurse assistants may be unaware of a resident's individualized care plan and their specific responsibilities under the plan.
- *Managerial refusal to budget for additional staff.* The cumulative workload imposed on nurses and other personnel may exceed their physical capacity and available time.
- *Medications and treatments not provided in accordance with the physician's orders.* The attending physician may not be informed by nursing staff of significant changes in the resident's condition.
- *Failure to maintain the resident's medical record.* All relevant symptoms, responses, and progress should be fully documented.
- *Failure to provide adequate in-service training.* Training programs should routinely address deficiencies in the delivery of care.

Without the neglect, would death have occurred at this time?

The role that facility and corporate in systemic nursing management play in home neglect cannot be overemphasized. This point was succinctly made by Florida's Fifth District Court of Appeals in the case of *Eastbrooke Health Care Ccnter v. Spilman* .6

In October 1989, Walter Spilman was admitted to Eastbrooke Nursing Home totally dependent and suffering from Alzheimer's disease, prostate cancer, and cardiac problems. During his one-year stay, he developed rotting pressure sores, severe malnutrition, and dehydration. At trial, the plaintiff offered extensive evidence of understaffing, falsification of records, and employee incompetence. The jury awarded compensatory and punitive damages.

The court wrote

> Eastbrooke cannot escape responsibility by managing its facility with managers who close their eyes, refuse to hear, and dull their sense of smell. Certainly, Eastbrooke's managing agents should not be charged with knowing every isolated event that occurs, but the events surrounding decedent were not isolated.... It is difficult to imagine that an employee with managerial responsibilities either knew of Walter Spilman's plight and failed to take any action to assist this totally dependent human being or so totally ignored the operation of the nursing facility that Walter Spilman's plight went unnoticed. Either situation exhibits a reckless disregard of human life or of the safety of persons exposed to its dangerous effects, or reckless indifference to the rights of Walter Spilman for whom the nursing home was being compensated for every detail of sustaining his life in the most dignified and comfortable way possible.[7]

Regulations and Standards

The cornerstones of nursing home regulation are 42 U.S.C. §1396R, popularly known as the Nursing Home Reform Act, and 42 C.F.R. §483, entitled Requirements for Long-Term Care Facilities. Under these laws, nursing homes are directed to care for residents "in such a mariner and in such an environment as will promote maintenance or enhancement of the quality of life of each resident." Services are to be provided "to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident. [118]

Based on a comprehensive resident assessment and plan of care for each resident, the nursing home facility must ensure that residents' abilities and conditions do not diminish "unless the circumstances of the individual's clinical condition demonstrate that diminution was unavoidable."[79]

Each state participating in Medicaid/ Medicare is required to promulgate regulations conforming to those established by the federal government. A facility must operate and provide services in compliance with all applicable federal, state, mid local laws. It must comply with regulations and codes and with accepted professional standards and principles that apply to professionals providing services in a nursing home. [10]

In a case involving systemic neglect, the plaintiff's attorney must be familiar with these regulations and laws. The attorney should also be familiar with state laws regarding the rights of the elderly" and penal code provisions regarding the mistreatment, neglect, and abuse of the elderly. [12]

The attorney must also study

- the defendant nursing home's administrative policies and procedures manual, which outlines general operating policies and procedures at the facility;
- written resident care policies, which outlines the nursing care, related medical services, mid other services provided: and

merits, working hours, overtime, proper dress, and appropriate conduct.

Litigating Systemic Neglect

The unexcused violation of a law or regulation designed to prevent injury to a class of people is negligence per se.[13] Liability for the violation may be predicated on a finding that the nursing home violated a state or federal regulation or statute governing long-term care.

Federal and state regulations that mandate compliance with "accepted professional standards and principles"[14] open the door for a negligence per se finding based on violations of rules relating to nursing and other professions. Unless the defendant proves some legally recognizable excuse, the negligence inquiry can be narrowed to whether the defendant violated the regulation or professional standard.

Attorneys may also find advantages to pleading breach of contract. To participate in the Medicaid program as a provider, a nursing home must contract with the state agency responsible for administering the program. The home covenants that it will comply on a continual basis with the rules and regulations promulgated by the agency. The nursing home also contracts to correct all deficiencies in a timely manner.

These provisions set the stage for a cause of action for breach of contract where a home has a long-standing history of relevant deficiencies. The primary benefit of this cause of action is the evidentiary latitude afforded to the plaintiff. This provides a foothold from which to argue that historical deficiencies constitute admissible evidence.

Primary Defenses

Typically, the plaintiff in these cases is 67 to 95 years old, a Medicaid recipient, and dependent on nursing staff for help with basic activities like toileting and bathing. From the defendant's perspective, the plaintiff suffers from a cluster of maladies and diseases, has been exposed to a large number of medications prescribed for various preexisting conditions, and has a limited life expectancy.

Because the potential to earn wages usually was impaired long before the resident entered the nursing home, the plaintiff is not a candidate for damages based on lost earnings. Moreover, the ability of a nursing home resident to recover residual damages based on continuing health care expenses, future pain, and diminished capacity to enjoy life is severely limited by reason of the short life expectancy. These realities shape defensive strategies.

Preexisting condition, weakness, and frailty form the nucleus of the typical defense. The primary thrust is that the injury was the inevitable product of a compromised health status. This argument revolves around "cause in fact" as opposed to "foreseeability," obligating the plaintiff to show that the injury was more probably the result of external forces for which the defendant is responsible rather than the plaintiffs preexisting weaknesses.

The relationship between the injury and a preexisting condition depends principally on the status of the underlying disease at the time of the neglect and the severity and extent of the neglect. In most of these cases, the preexisting condition was known and treated for many years before the plaintiff entered the facility. Accordingly, the key question focuses on the stability or rate of deterioration of *relevant* disease processes.

The plaintiff must establish that the severity of the neglect independently caused death or altered the preexisting condition's rate of deterioration. The test is this: Absent the wrongful conduct, would the adverse condition (or death) have occurred *at this time?*

When the condition in question has been "accelerated" or "hastened" by the defendant's wrongful conduct, it is generally held that the defendant caused the result. A defendant that accelerates a death by even an hour or minutes is liable for the death. As one court stated, "The burning candle of fife is such a precious fight in anyone's existence that no one has a right to extinguish it before it flickers out into perpetual darkness' and oblivion.""

Another tactic the defense uses is to attack the credibility of the resident's family or responsible party. This tactic is based on the family's failure to intervene "as a reasonable person would in a similar situation."

A list of possible actions serves as the springboard for this attack. The failure of family members to take actions that the defendant deems "reasonable" gives rise to arguments that they were uninterested in the resident and that the alleged systemic neglect is simply the product of fabrication or fantasy.

This defense can be nullified only through diligent preparation to ensure that the plaintiff's testimony is founded on solid fact. Extensive investigation and discovery must uncover all sources of proof that might corroborate the plaintiffs position.

More Accountability Needed

Today the quality of care at hundreds of nursing homes is poor or questionable. The reasons for this have not changed over the decades. They are lack of detection and lack of accountability.

With enactment of the 1987 Nursing Home Reform Act, lawyers have become more involved in the fight for decent and dignified care. Successful litigation against systemic neglect can be a significant deterrent to violations of trust and the law.

But deterrence does not come easy. It hinges on the lawyer's ability to recover damages for repeated violations of human dignity, chronic indifference to violations of safety regulations, and the needless pain and suffering of helpless residents.

Unfortunately the civil justice system's ability to provide deterrence is presently threatened by several congressional actions that seek to dismantle federal nursing home quality standards and limit the damages that a resident may recover. These initiatives signal a backward slide to a time without uniform standards and with virtually no accountability.

As the debate over these measures comes more sharply into focus, we must not allow Congress to forget the scandals of the past. Long-term care residents and taxpayers need more accountability -not less.

Notes

1 *Nursing Homes Men a Loved One Nerds Care*, CONSUMER REP., Aug. 1995, at 519.
2 *Nursing Home Residents Rights: Hearings Before the Senate Comm. on Labor and Human Resources,* 102d Cong., 2d Sess. (1991).
3 Mark S. Lachs & Karl Pillerner, *Current Concepts: Abuse and Neglect of Elderly Persons,* 332 NEW ENG. J. MED. 437 (1995).
4 INST. OF MEDICINE, IMPROVING THE QUALITY OF CARE IN NURSING HOMES (1989).
5 *See, e.g..,* 40 TEX. ADMIN. CODE §19.01 (1995).
6 661 So. 2d 867 (Fla. Dist. Ct. App. Sept. 29, 1995).
7 Id. at 873.
8 42 C.F.R. §§483.15, 483.25.
9 Id. §483.25(a)(1).
10 Id. §483.75(b).
11 *See, e.g.,* TEX. HUM. RES. CODE ANN. §102.003 (West 1994); TEX. HEALTH & SAFETY CODE ANN. §242.012 (West 1994).
12 *See, e.g.,* TEX. PENAL CODE ANN. §22-04 (West 1994).
13 Dusine v. Golden Shores Convalescent Ctr., Inc., 249 So. 2d 40 (Fla. Dist. Ct. App. 1971).
14 42 C.F.R. §483.75(b).
15 Valdez v. Lyrnan-Roberts Hosp., Inc., 638 S.W.2d 111, 116 (Tex. Ct. App. 1982).