

**NURSING HOME RISK ADMINISTRATION**

**RECOGNIZING POTENTIAL PROBLEM AREAS**  
**AND REDUCING YOUR RISKS**

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### III. INTRODUCTION

Since the enactment of Medicare and Medicaid in 1965, there has been a dramatic growth of nursing homes. According to estimates, there are now more than 20,000 nursing homes with an annual revenue of more than \$7 billion. More than one million persons live in them and more than 25% are operated for profit. Patient Tort Liability of Rest, Convalescent or Nursing Homes, 83 A.L.R. 3d 871 (1998).

With the rise of the nursing home population, legal experts believe that the nursing home industry will experience an increase in claims and lawsuits. This outline will provide you with information in those areas where we believe you can expect these claims to be made and advice on how to avoid liability.

### II. PATIENT'S RECORDS

A statute normally will determine the information which is required to be maintained in a patient's records. A qualified medical records administrator should supervise the organization and maintenance procedures for those records. The records should contain accurate information about family, physicians, etc. and be constantly updated. The accuracy of these records can be critical in the event of the death of a resident. Often it is the nursing home's statutory duty to notify the next of kin about a resident's death. Without the accurate information, a claim could arise.

For example, in Callsen v. Cheltenham York Nursing Home, 154 Pa.Cmwlth. 541, 624 A.2d 663 (1993), the decedent was a resident of Cheltenham York Nursing Home from 1988-1989. During that time, the nursing home kept records of family and friends who visited the decedent. However, the nursing home never entered any family information on the decedent's permanent records.

On May 27, 1990, the decedent was transferred to Albert Einstein Medical Center for treatment. The nursing home notified Albert Einstein that there was no family information for the decedent who remained at Albert Einstein until she died on June 9, 1990. Albert Einstein never made any effort to contact the decedent's family.

After her death, the decedent's remains were transferred from Albert Einstein to Temple Hospital for potential transplant and/or harvesting of certain organs. Ten days after her death, the family discovered the decedent had died. By that time, her body had been partially dissected. Not surprisingly, the family sued seeking compensatory and punitive damages.

**A. Exclude Any Personal Comments From The Records**

Normally, statutes or regulations will detail the information which is required to be maintained in a patient's records. The statutes normally require such things as:

3. Physician's orders
4. Observation and progress notes
5. Nurses' notes
6. Medical and nursing history, etc.

The records should not contain any "editorial" comments about the patient. A staff member's belief as to the motive or credibility of the patient should not be included. Moreover, comments about a patient's family are clearly inappropriate.

**B. Releasing A Patient's Records**

A patient's records are confidential. Written consent from the patient or from a designated responsible agent on the patient's behalf, is normally required before any information can be released. Written consent is not needed to release the records to authorized representatives of state and federal government or to a State Ombudsman program. A violation of this duty (ordinarily imposed by statute) could constitute an invasion of privacy and subject an institution to a potential claim for compensatory and punitive damages.

## II. TORT LIABILITY

### A. Standard Of Care

The general standard of care required is the degree of care, skill and diligence used by nursing homes generally in the community. Since a nursing home is not a hospital (i.e. hospitals have greater control over physicians and more extensive facilities), the same standard of care should not be applied. Consequently, what might be considered negligence in the hospital setting does not automatically transfer to liability upon a nursing home. The duty of a nursing home is determined on a case-by-case basis. In determining the duty, the court will consider the patient's physical and mental ability. Mae Alpine v. Martin, 205 So.2d 347 (Fla. App. D2, 1967). Although treatment is ordinarily the responsibility of the physician, it may be negligence for a nursing home, knowing that a patient has a condition requiring special precautions, to transfer him or her to a hospital without giving the hospital instructions for his or her special supervision.

The duty of care of a nursing home is also determined by contract. Courts will refer to the admission papers and/or treatment plan as the standard of care owed by the nursing home.

**B. Fall Down Claims**

Elderly patients who fall constitute the most common source of litigation. These claims can be divided into falls occurring while the patient is attended or unattended. The nursing home has much greater chance for successfully defending a claim which occurs while the patient is attended. Patient Tort Liability of Rest, Convalescent or Nursing Homes, 83 A.L.R. 3d 871 (1998).

1. Occurring While Patient Is Attended

In Smith v. Silver Spring - Wheaton Nursing Home, Inc., 243 Md 186, 220 A.2d 574 (1966) an accident occurred when a nurse took her patient to the bathroom at approximately 6:30 a.m. On returning, the nurse sat the patient down in a chair. When the nurse turned away for just a moment to flush the toilet, the patient stood up for an instant and then just sat down "real hard" on the floor injuring herself.

Plaintiff-patient argued that the nurse was negligent because she removed her restraints and took her to the bathroom rather than using a bedpan. The court disagreed finding that the nurse acted appropriately. Plaintiff produced no evidence to show that she was so weak or senile that she should have not been allowed to be ambulatory. Furthermore, the family doctor had placed no restriction on her use of the lavatory. Consequently, the court concluded that there was no evidence that the nursing home failed to provide adequate supervision and care of the plaintiff.

2. Occurring While Patient Is Unattended

In Facey v. Merkle, 149 Conn. 129, 148 A.2d 261 (1959), an elderly patient was killed in a fatal fall down a stairway in the nursing home. The decedent was 79 years old and had been discharged from a hospital after a cataract operation. He was wearing new glasses and used a cane for walking.

The decedent was assigned to a room on a second floor which opened onto a landing at the top of the stairs. When arranging for the decedent's admission, the decedent's family alerted the nursing home to the potential danger that the decedent might come out of his room and fall down the stairs. In response, the nursing home assured the family that a gate would be installed at the head of the stairs and that the defendant would supervise the decedent in going up and down the stairs.

Despite these promises, no gate was installed and on the day of the accident the decedent was unsupervised. The jury returned a verdict in favor of the plaintiff.

In Dusine v. Golden Shores Convalescent Center, Inc., 249 S.2d 40 (Fla. App. D2 1971) a nursing home was found liable for leaving a patient unattended for approximately twenty minutes. The patient's records indicated that she was required to be restrained at all times. Despite this requirement, she was seen on several occasions without restraints. On one of those occasions, plaintiff fell out of bed. The plaintiff was also mentally confused, incoherent and at times unaware of her surroundings.

On the morning of the injury, the plaintiff was placed in a wheel chair which was secured by a vest restraint. Defendant's employee knew that the vest restraint had failed to stop some patients from extricating themselves. After leaving the plaintiff unattended for approximately twenty minutes, defendant's employee returned to find her lying on the floor with the vest restraint still on but untied.

The jury returned a verdict against the nursing home. On appeal, the Appellate Court upheld the jury verdict, finding the plaintiff's mental condition and the need to be restrained at all times critical factors in establishing the nursing home's liability.

In contrast, the court found in favor of a nursing home in Free v. Franklin Guest Home, Inc., 463 S.2d 865 (LA App. 2 Cir. 1985). The plaintiff, a 59 year old patient suffering from Alzheimer's Disease, sued the nursing home for injuries he sustained in a fall. Because of the plaintiff's aggressiveness and tendency to wander off, he was required to have an attendant assigned to watch him between the hours of 7:00 a.m. to 3:00 p.m. No attendant was required to watch the plaintiff between the hours of 3:00 p.m. to 11:00 p.m. On the day he injured himself, the plaintiff was found at approximately 3:45 p.m. on the floor of his room where he had fallen.

The court concluded that the nursing home did not breach its duty of care to take reasonable steps to prevent injury. The plaintiff was in fair physical condition and therefore only needed supervision when outside his room to prevent him from wandering off.

**C. Neglect**

In Ruta v. Ivy Ridge Personal Care Center, Inc., 29 Phila. 185 (Phila Cty. Reporter 1995), plaintiff was 33 years old and mentally handicapped and incompetent. Before becoming a resident of Ivy Ridge, the plaintiff's psychologist met with the administrator of Ivy Ridge to discuss the plaintiff's needs. The plaintiff's psychologist outlined the information regarding the plaintiff's background, rituals and specific needs in a memo.

During the early afternoon of the last day of plaintiff's residency, Ivy Ridge's administrator called Mrs. Ruta, the plaintiff's guardian (her mother), to notify her that her daughter was either sick or "faking it." Mrs. Ruta drove to Ivy Ridge to check on her daughter and found her unattended and in a bedroom she shared. Plaintiff was screaming and crying. She had a diaper full of feces in the form of diarrhea. The plaintiff and the area around her were covered with her diarrhea. Mrs. Ruta stayed with

the plaintiff for several hours, trying to clean her up and tend to her. No one from the Ivy Ridge staff assisted her. Mrs. Ruta placed the soil diaper in a waste basket and carried the basket to find help. She also told the Ivy Ridge staff that her daughter was very sick. No one from the Ivy Ridge staff responded or even called for medical assistance.

After a few hours, when her daughter showed no signs of improving, Mrs. Ruta took her to the hospital. The hospital admitted the plaintiff and diagnosed her with viral gastroenteritis, a fecal impaction and dehydration. Plaintiff was treated with I.V. fluids and discharged three days later.

The court, in upholding a jury verdict, found that Ivy Ridge breached its duty of care by neglecting the plaintiff's care. Ivy Ridge knew of the plaintiff's needs, but chose to ignore them. Its neglect led to the plaintiff being hospitalized.

**D. Assault**

In assault cases, the court will look to see if the nursing home had notice of the violent propensities of the patient's assailant. If the nursing home did not have knowledge of the assailant's violent propensities, the courts will still look to see if there was any reason that the nursing home should have known that the safety of other patients might have been jeopardized by any act or behavior of that patient. If evidence can be produced to show that the nursing home should have been on notice, then the court will look to see if the nursing home exercised ordinary care to protect its patients.

In Bezark v. Kostner Manor, Inc., 29 IL. App.2d 106, 172 NE.2d 424 (1961), a nursing home was found liable for failing to exercise ordinary care to protect a 73 year old patient from assault and injury by an intoxicated fellow patient. The nursing home records showed the assailant had been found

intoxicated approximately 27 times within eleven months. The assailant also became argumentative and belligerent when intoxicated.

No evidence was produced to show that the nursing home knew that the assailant was intoxicated on the day of the assault. However, the records clearly showed that the home was on notice, that the patient was frequently intoxicated, argumentative and required discipline. The court found that, in the exercise of reasonable care, this patient should have been segregated or removed from the home if the nursing home could not or would not prevent his intoxication.

**E. Wandering**

In determining whether a nursing home will be responsible for injuries suffered by a patient who wandered away from the home, the court will look at the totality of the circumstances surrounding the patient's disappearance. The patient's medical condition, treatment plan and restrictions will be important factors. In addition, the plan adopted by the nursing home to curtail the patient's wandering will also be considered.

In Murphy v. Allstate Insurance Company, 295 S.2d 29 (La. App. 1974), the nursing home was not found liable when a senile nursing home patient wandered away from the nursing home and was struck and killed by a passing car on a highway. At the time of the accident, the senility of the decedent had progressed to the extent that he had the mental capacity of a three to five year old child. His widow contended that the nursing home knew of his mental capacity and should have prevented him from wandering the nursing home.

The court rejected that argument and found that the nursing home had not acted improperly. Although the nursing home knew the decedent needed close observation, the widow never told the nursing home that, on occasion,

the decedent left his previous home without permission. Furthermore, the instructions from decedent's personal physician told the nursing home to take precautions that the decedent did not injure himself and that he should be attended by another person when leaving the premises. However, the decedent was allowed to walk from his room to the dining room and other recreational or social areas of the institution unattended.

In contrast, a nursing home was found negligent when a 68 year old nursing home resident wandered away from the home and was struck and killed while crossing a nearby avenue. The decedent was confused, mentally incompetent and needed supervision. The home was aware of his mental condition and his propensity to wander off the nursing home grounds unattended. Furthermore, there was evidence that the home failed to properly use its alarm system which was intended to notify the staff when a patient left the building without authorization. Fields v. Senior Citizens Center, Inc., 528 S.2d 573 (La. App. 2d Cir. 1988)

**F. Breach of Statute**

The duties of a rest, convalescent or nursing home may be affected by statute, ordinance or regulation. Thus, the rules and regulations of the State Board of Health relating to nursing homes represent a standard of at least reasonable care which should be adhered to.

In Diggs v. Susquehanna Center for Nursing and Rehabilitation, 35 D.&C.4<sup>th</sup> 373 (1996), the plaintiff used Medicare and Medicaid administrative regulations to establish the necessary claim of negligence per se under Restatement (Second) of Torts, § 286. In this case, the plaintiff was admitted to the Susquehanna Center for Nursing and placed under the care and treatment of Dr. Larson. Plaintiffs allege that while under the care of the nursing home and Dr. Larson, they failed to provide her with appropriate

treatment to prevent her from developing pneumonia.

In support of their contentions, the plaintiffs argued that the defendants' violations of the Medicare and Medicaid regulations constituted negligence per se because the regulations were enacted to protect the plaintiff by establishing the appropriate treatment and services.

Defendants argued that the regulations did not establish a duty of care. Rather, the regulations were enacted to implement legislation contained within Title 19 of the Social Security Act which focused on the requirements for skilled nursing facilities which participate in the Medicare and Medicaid program.

The court rejected the defendants argument. In reviewing the history of the Acts, along with the regulations, the court concluded that the statutes intended to protect the plaintiff, since she was the person actually receiving or eligible to receive Medicare and/or Medicaid. Consequently, a violation of those regulations could establish negligence per se.

### **III. ANTI-DISCRIMINATION LEGISLATION APPLIES TO NURSING HOMES**

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 4, prohibits a federally funded state program from discriminating against a handicapped individual solely by reason of his or her handicap. Section 504 of the Rehabilitation Act reads in pertinent part:

No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of or be subjected to discrimination under any program or activity receiving Federal financial assistance ....

29 U.S.C. § 794. A "handicapped individual" for purposes of the Act is defined as "any person who (i) has a physical or mental impairment which

substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. § 706(7)(B). In order to establish a violation of the Rehabilitation Act, a plaintiff must prove (1) that he is a "handicapped individual" under the Act, (2) that he is "otherwise qualified" for the position sought, (3) that he was excluded from the position sought "solely by reason of his handicap," and (4) that the program or activity in question receives federal financial assistance. Strathie v. Department of Transp., 716 F.2d 227 (3d Cir. 1983); Nathanson v. Medical College of Pennsylvania, 926 F.2d 1368, 1380 (3d Cir. 1991).

After enacting the Rehabilitation Act, Congress enacted the ADA because it found that "historically, society has tended to isolate and segregate individuals with disabilities, and ... such forms of discrimination ... continue to be a serious and pervasive social problem." 42 U.S.C. § 12101 (a)(2) (emphasis added). Congress also concluded that "individuals with disabilities continually encounter various forms of discrimination, including ... segregation ....", 42 U.S.C. § 12010(a)(5) (emphasis added).

Both the Rehabilitation Act and the ADA are intended to insure that qualified individuals receive services in a manner consistent with basic human dignity rather than a manner which shunts them aside, hides, and ignores them. "Much of the conduct that Congress sought to alter in passing the Rehabilitation Act [and the ADA] would be difficult if not impossible to reach were the Act[s] construed to proscribe only conduct fueled by a discriminatory intent." Alexander v. Choate, 469 U.S. at 296-7. Thus, courts would eviscerate these Acts by conditioning their protections upon a finding of intentional or overt discrimination.

Despite the "aggressive" tenor of the language of the Acts, the courts

are still reluctant to interfere with medical judgment. If a nursing home can establish that its refusal to admit a patient is based upon a bona fide medical reason, then it will not run afoul of the ADA and/or Rehabilitation Act.

If an individual is refused admission based upon an administrative decision, then the court will look more closely at the nursing home's actions. Although the courts will give some measure of deference to an administrative decision, the nursing home will first have to establish a factual basis for its decision. The courts will look for evidence that the nursing home had to either modify the essential nature of its program or that the admission will be unduly burdensome. Without this evidence, the court will not give any deference to an administrative decision. Consequently, once the patient establishes that he or she was otherwise qualified for admission with reasonable accommodations, the nursing home will be found to have discriminated against that patient. Wagner v. Fair Acres Geriatric Center, 49 F.2d 1002 (3<sup>rd</sup> Cir. 1995)

One of the major "battle fronts" on this area will be with the admission of patients with degenerative diseases like Alzheimer's. Since Alzheimer's impairs intellectual and neurological functioning, over time a patient loses basic skills. Consequently, a patient may be suitable for a particular home one month and unsuitable the next. The effects of the disease (i.e. screaming, agitation and aggressiveness) could render the patient unsuitable for admission into the nursing home.

In Wagner v. Fair Acres Geriatric Center, 49 F.2d 1002 (3<sup>rd</sup> Cir. 1995), Fair Acres was faced with this issue. Fair Acres repeatedly refused to admit Mrs. Wagner because of her severe episodes of agitated behavior and confusion. Fair Acres concluded that Mrs. Wagner was unsuitable for

admission because it could not provide the necessary staff to meet her needs.

Mrs. Wagner, through her husband, sued alleging that she had been discriminated because of her handicap. She believed that Fair Acres violated her rights under the Rehabilitation Act by refusing to admit her. At trial, Fair Acres was successful in defending the claim. On appeal, the Third Circuit found in favor of Mrs. Wagner. The court ruled in her favor for the following reasons:

1. She was otherwise qualified. The court rejected the argument that Mrs. Wagner sought a benefit because of her handicap and not in spite of it. Instead, the Court of Appeals held that she was denied access because of her handicap.
2. The decision to deny her admission was not medically based - no medical person ever actually examined Mrs. Wagner.
3. No deference was given to the administrative decision to deny admission to Mrs. Wagner because Fair Acres did not produce evidence to show that it would have been required to modify the essential nature of its program or impose an undue burden on Fair Acres.

Nursing homes will be faced with very difficult decisions in handling patients such as Mrs. Wagner. Clearly, families will desire that a parent be taken care of in a nursing home rather than at a hospital. In making its decision to admit or transfer, a nursing home must be certain to demonstrate that its decision has a medical basis or that addressing the patient's need is beyond the capabilities of the institution (i.e. modify the essential nature of its program).

#### IV. ANALYSIS OF RISK

In those cases where the juries and/or courts find liability, it almost invariably involves a nursing home that was aware of special circumstances and failed to act accordingly. Thus, where a the nursing home promised and failed to install a gate in response to the family's special request or

leaving unattended a patient for a mere twenty minutes where nursing home employee used an insecure retaining device for a patient vest he knew wasn't secure for a patient that had to be restrained at all times, a nursing home can be held responsible for a patient's injuries. The knowledge changes the duty.

Absent the special knowledge, the courts will examine whether ordinary care would be sufficient. Thus, the court did not find a nursing home liable where a patient fell after a nurse placed her in a chair and left her for a moment to flush the bathroom toilet or where a patient fell twenty minutes after his attendant left. In those instances, the court concluded that the homes had exercised reasonable care under the circumstances.

These cases also emphasize the importance of maintaining accurate records. A nursing home's records can be critical in establishing whether it had the requisite knowledge which might result in the court imposing a higher standard of duty. Where the patient's records show a patient needs special treatment, the courts will examine the facts to determine if the nursing home fulfilled its obligations. In contrast, if the records show that the patient required special treatment, the court will examine the nursing home's actions based upon ordinary care.

**V. REDUCING YOUR RISKS**

**A. Education**

Every employee should be required to participate in educational programs concerning risk prevention. One area these programs should concentrate on is educating employees on patient's rights. Another objective of the programs should be to indoctrinate staff with the idea that good resident care equals loss prevention. Constant training sessions should also

be a part of these education programs.

**B. Incident Reports**

Develop a clear policy on the filing of written incident reports. Assigning responsibility for completing the report to certain employees is critical. Once a report is filed, there should be follow-up from the risk manager to determine the severity of the injury. In addition, the family of the patient should be notified.

**C. Develop A Database**

This database should be useful in establishing trends in nursing home care. It should also help the nursing home address potential shortcomings in patient care.

**D. Act Quickly To Correct Potential Problem Areas**

**E. Good Resident Relationships**

**F. Good Family Relationships**

Invite families who want to be active in patient care to be a part of the team!

**G. Good Relationships with Resident Advocates, Ombudsmen And The Community**

**H. Documentation**

**I. Medical Control**

Closer supervision and influence over medical services and their providers is imperative.