Essentials of Long Term Care Case Selection and Initial Investigations

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As someone who dedicates my practice to representing the vulnerable in institutions – mostly the elderly in long term care facilities, but also individuals in hospitals, group homes, and psychiatric facilities – I find long term care litigation a rewarding field. However, practitioners should approach with caution. You must have access to have the proper resources. These are very expensive cases to prosecute costing on average $20,000 to $50,000 without a trial. Costs in these cases add up quickly and before a complaint is filed, so having the financing ready early is important. You also must have the proper knowledge. Long term care litigation is a specialized field that requires understanding complex state and federal regulations, knowledge of the respective industries and how they operate, recognizing deviations of the medical standard of care, and corporate issues with the defendant facilities. The purpose of this article is to provide a basic primer on case selection and initial investigations when preparing to file the complaint for long term care cases – i.e. nursing homes (NH) and assisted living facilities (ALF). It is certainly not inclusive, but should represent a good start.

Terrible things can happen absent negligence, and the most horrific medical outcome does not necessarily equal a viable cause of action. In terms of case selection, finding deviations of the standard of care that matter is central – i.e. improper or negligent care may have been delivered but it must have caused the injury or bad outcome. A thorough review of all the records (including hospital and nursing home records, as well as possibly rehab, hospice and visiting nurse records) is initially required to find meaningful deviations of the standard of care. This is followed by close work with a nursing "standard of care" expert, a medical expert for causation, and perhaps other experts if the facts require (e.g. registered dietician, registered physical therapist, nursing home administrator expert, etc.). It is extremely important that this review occur before a complaint is filed for two reasons.

First, there is the fact that these cases may quickly become expensive between the records and expert review. It would be unfortunate to find out after a case is in suit and many thousands of dollars are spent that you cannot find a necessary expert to support your theory. As stated earlier, a typical case without a trial will cost between $20,000 and $50,000, and more depending on the case. Not the kind of costs you want to write off because you did not start with proper experts.

Second, long term care cases are typically nursing standard of care cases. Nursing is a profession requiring an Affidavit of Merit (AOM) under N.J.S.A. 2A:53A-26–29. An AOM is required within 60 days of answer, although an extension of 60 additional days may be granted. Waiting for the *Ferreira* conference (the mandatory conference held to determine the sufficiency of an AOM in accordance with *Ferreira v. Rancocas Orthopedic Associates*, 178 N.J. 144 (2003)) to decide to produce an AOM is problematic. Since an AOM is necessary, a draft expert report is essential before filing suit. Our practice is to file the AOM with the complaint.

An additional important consideration in case selection is the family. This is not as important in the rare instance where the plaintiff is still alive, but if the complaint is filed on behalf of an estate, the family is very important – in particular how often they visited and their in-

volvement in the decedent's care. It is not a moral judgment, but a practical one. Certainly, a jury will never be charged with the instruction: "You should consider the family and how much they loved the decedent before you award money to the decedent's estate that the family will receive." However, you can bet that this is exactly what is on a juror's mind when considering damages. A caring and attentive family has a better chance of overcoming this prejudice.

Family visitation and involvement is also important because people at times want to blame families for what happened to the resident, no matter how illogical this seems. It may be hard for a juror to believe that terrible things happen to people who do not "deserve" it. By way of example, my own mom died of lung cancer. When people learn of this, they almost invariably ask if she smoked, to which the undoubtedly disquieting answer is no. In other words, this could happen to you despite the fact that you are a healthy non-smoking person, a concept very uncomfortable for some. In the same way, blaming the family for what happened to mom or dad may give jurors psychological comfort – i.e. blaming the family allows a juror to tell themselves "This would never happen to my mom." even if wholly untrue. Families who visited frequently and were active in a person's care minimizes this risk of blaming the family.

Lastly, it is extremely important to investigate the defendant facility before filing suit. Ultimately, you have to sue the correct people. NH and ALF cases are almost never about the care delivered by individual care givers. These cases are about staffing and management decisions made at parent corporations; they are about boardroom decisions, not shortcomings of individual caregivers. That said, standalone "mom and pop" type facilities are practically non-existent. NHs and ALFs can be extremely profitable companies and are typically owned by large corporations and part of complex corporate structures. Understanding who the real decision makers and owners are is critical.

To get this information, the first thing to procure is the licensure file and cost reports with a request under the Open Public Records Act (OPRA). Every year, a NH or ALF files an application with the Department of Health and Senior Services (DHSS) in order to receive their operating license. The licensure file will include the application, license, and other relevant information. It will also disclose what corporation owns the license, manages the facility, owns the building, owns the property, recent changes in ownership and facility size, and how the company is structured. The cost reports are documents filed with Medicare and Medicaid and are complicated documents that show basically what happens to the money once it goes into a facility, and how it is spent. The licensure file and cost reports will reveal the true liable parties. It is noteworthy that distressed facilities many times switch names and management companies, so it is important to get current licensure files and cost reports as well as those from the time of the incident.

Understanding how a NH or ALF corporation is structured is critical early. There may be a big difference between suing a LLC and a LP, depending on the facility. There is definitely a big difference between suing a for-profit corporation, and a non-profit corporation that may assert a charitable immunity defense. A county facility and some state owned veteran's homes require a tort claim notice. Understand-

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ing these differences early on may dictate pre-suit procedures, how a complaint is filed, assuredly steers discovery and possibly demand, and saves you from possible malpractice.

The OPRA request for the licensure file and cost reports during pre-suit investigation should also include another OPRA request for the survey and complaint results. Both NHs and ALFs receive an annual investigation by DHSS called a recertification survey. The survey is a process where a team of state workers go into a facility for about a week to investigate the facility. They inspect the care delivered to residents, the condition of the physical building, and make sure the facility is in compliance with safety codes. The team will issue citations for violations of state and federal regulations. The deficiencies typically include detailed explanations listed on a standardized form (FORM CMS-2567). In the same way, if a complaint about an ALF or NH reaches DHSS and it is investigated and verified, the facility will also receive a deficiency on the same standardized form including a detailed account.

Additional information regarding facilities is available on-line for free. The New Jersey Department of Health website lists the officers, licensed owner, and the current administrator with links to other facilities these individuals are involved with. In one case I handled, every officer listed had a marketing or finance background, and not one had a health care background. Most if not all of them were out of state. This certainly begs the question, what are the interests of these officers who select the top administrative and clinical personnel in a facility – profits or people?

More on-line information is the Centers for Medicare and Medicaid Services Nursing Home Compare website, which gives a brief account of the last annual survey, and rates the facility of a one to five star scale. Propublica also has an excellent website and maintains the Nursing Home Inspect Tool, which allows the user to download some slightly redacted annual and complaint surveys in PDF format for free.

Lastly, there is the New Jersey Court's website. Yours may not be the only case against a facility. You can search the discovery end dates of cases in suit to find out if the facility is being sued and who are the defendants. While certainly not dispositive to adding a defendant or not, it may make clear that other parties need to be investigated.

The proper selection and work-up is, first and foremost, essential to properly protect your client's rights. However, it is also important to note the bar that practices in this area is small. Most of the defense counsel in Mercer and the surrounding counties defending NHs and ALFs are excellent lawyers experienced at litigating long term care cases. Not having a basic command of this type of work will be readily apparent and is an instant disadvantage. Learning the basics of the long term care industry, the medicine, and the corporate issues is essential to properly prosecuting these claims. This begins with the initial intake and preliminary investigations.