GARDEN STATE CLE LESSON PLAN

A 1.0 credit course

FREE DOWNLOAD
LESSON PLAN AND EVALUATION

PREPARING TO TRY A NURSING HOME CASE

With

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Program description

When a nursing home case is going to trial there is an enormous amount at stake for everyone involved. This 1.0 credit CLE will provide you with a plaintiff's road map for proving your case.

I. Introduction
- **Kevin Riechelson – admitted in New Jersey and PA – providing insurance company perspective**

II. Nursing Home v. Assisted Living cases
- **Approach them the same way**
- **Nursing home litigation – case dealing with nursing home abuse and neglect – more regulations**
- **Assisted living not so much governed by regulations**
- **Same problem – custodial care – someone who enters the facility because need support and help**
- **Not a skilled nursing care required in assisted living – so this may be a more challenging case**
- **Nursing home case requires skilled nursing care – even if assisted living home with skilled nursing care ward**
- **Regulations are the same/are applicable when there is an assisted living home with a ward manned by skilled nurses, i.e. for Alzheimer patients – considered a nursing home**

III. Recommendations for families looking to place a loved one in a nursing home or assisted living facility
- **Families may have concern even if there has yet to be any abuse/neglect**
- **Must have as much hands on care as possible**
- **Skilled nursing homes and assisted living facilities not always have someone assigned to an individual – not going to be 24 hours a day – aides are responsible for 10 or more patients in a facility that is properly staffed**
- **When fewer staff is where neglect begins**
- **There is information on the internet where you can research nursing homes to determine if there are any complaints or citations – do you research**
- **Staff to resident ratio under federal regulation – must have sufficient staff to meet the needs of the residents – if not then in violation of regulations – case by case analysis**

IV. Staffing Issues
- **8-10 patients per aide is typical – but must look at the level of care for those residents**

- **CNA – certified nurses aide – hands on day to day care – addresses hygiene issues, etc.**
- **If CNA is providing that level of care to 8-10 residents then that may be outside the federal regulations to meet the needs of the residents – must evaluate patient needs to determine whether sufficient staff is present**
- **Look at hands on care of the nurses – how much they are there – physicians are typically not there and are relying upon nurses**
- **Staffing levels decrease at night typically because less activity but still need someone who is there and available**
- **If sub-standard person there – how is that a liability to the nursing home? negligent hiring, negligent supervision**
- **Background checks are done for nurses and nurses aid – knew or should have known for liability for nursing home**
- **On occasion background checks do not happen - Vast majority of cases settle under these circumstances**
- **Competence – training received at facility, continuing education – in service training; what qualifications had when hired**
- **Supervision – issue that is plead in complaints – RN and LPN are supervising staff – handful of nurses aides supervised by 1 nurse and is their manager – responsibility that patients are cared for**
- **Nurses or caretakers must be doing what they are supposed to be doing – false charting where charts say that they have done things that they have not done**
- **Whether medicare or Medicaid is paying the bill and audits would determine whether facility maintains license when there are services billed but not received by patient**
- **No security cameras to maintain a level of care because of HIPAA laws**
- **Families put cameras in rooms when believe there is abuse**
- **Families often want a trial because it exposes liability of the facility**

V. Typical types of abuse in cases

- **Bedsores**
- **Falls**
- **How do you define abuse?**

- **Physical abuse – punching, cutting, do not clean incontinent patients ("dignity issue")**
- **Verbal abuse**
- **Problem with underpaid CNAs**
- **Difficult work environment – challenge and hard work**
- **Corporations that run nursing homes are looking at making a profit**

VI. Regulatory oversight/inspections

- **Under federal regulations**
- **Implemented at state level – Department of Health – conduct 1 annual survey which is mandatory; conduct surveys when notified of a problem**
- **State employees will review records and speak with staff and administration and investigate complaint**
- **If violation occurs, then facility is cited for violation**
- **No regulation for specific ratio of staff to patient**
- **Regulation is vague – how do you meet the patient's need**
- **Every state has a patient per day ratio calculated through a formula but needs of residents change – some need more care and some need less care – difficult to legislate that specific issue**
- **The state can only do so much – highly regulated area**
- **If it were more regulated, that would be good – but unlikely to happen – more regulation does not solve the problem – sometimes need more litigation**
- **Sometimes not enough inspectors to go around to enforce the regulations**
- **Unless there is a complaint – unlikely to go to a facility to just check it out because lack of resources**
- **Part of the problem is the quality of the staff – difficult work therefore difficult to find quality staff**
- **Nursing homes must keep beds filled to make money – requires more staff**

VII. Life Cycle of a case

- **Clients come to firm through advertising on the internet, billboards, referrals – mostly through website**
- **New clients think that something is going on and they need help – these are the clients that are targeted by the firm**

- **Must make initial evaluation to determine if sufficient evidence to investigate further, i.e. what is the injury**
- **Sometimes clients call because there may be issues but it does not amount to a cause of action**
- **Complexity of medical issues may tend to cause "injuries" as opposed to actual neglect or abuse by the facility and staff**
- **Falls can be challenging – look at assessment done when patient entered the facility – all new patients are assessed for fall risk – if risk of fall is high at initial assessment, then care plan must be drafted with that assessment and proper precautions must be taken and implemented**
- **Nurses rely on care plan from shift to shift**
- **Need care plan especially for those suffering from dementia**
- **Proving causation comes from the records – look at what the caretakers were doing, was there a care plan – the records will tell you the story**
- **Dignity injury can be from any type of case**
- **Usually eyewitness accounts, usually family members are witnesses to incidents**
- **Former employees can be very helpful witnesses**
- **Use investigators to locate past employees and interview them**
- **Records are sometimes difficult to obtain – requested from facility but what you get pre-suit is different from what you receive after the filing suit**
- **At any time you can negotiate a case**
- **Some advantages and disadvantages of waiting to file a law suit – Medicare will only lien for the injury suing for but medicare will impose a superlien where they want everything that they paid out if the patient dies – so waiting may not be a good option**
- **Typically many clients have passed away before litigation has started; while other times the client remains in the facility during the litigation**
- **Once you get to the point where attorneys are involved, the facility typically do not want to make a bad situation worse so there is a heightened level of care**
- **Homicides – where there is a death and counsel feels that it is related to abuse or neglect – how can establish causation?**
- **Clients have come in and inquired about autopsies – but mostly going off death certificate and hospital records – in**

most cases don't have autopsies available – no private autopsies

- **Depends on what death certificate says – sometimes it mentions certain injuries, i.e bedsores – coroner's report may say cause of death**
- **Most causes of death in cases are related to abuse and neglect, i.e. bedsore, fall – primary cause of death is normally pulmonary issues**
- **Pneumonia may be a basis – how individual contracted would be a basis for a claim, untreated, how long suffering from illness**
- **Radiologist is just looking at a picture and saying what it shows – not giving treatment options – someone needs to take reading and go to treatment**
- **Other neglect: oral hygiene, people not getting type of care that they were promised by nursing home**
- **Corporate greed to detriment of the patients – at the root of the issues**
- **Bed sores are not a one incident issue – happens over time with various different nurses and aides which equates to training not being present**
- **Experts: who will be able to testify as to standard of care and causation**
  - **Nurses will testify as to standard of care – involved and active in a nursing home – will discuss federal regulations**
  - **Gerontologist for causation – all MDs, speak specifically to causation**
  - **Nursing experts are the first ones to look at the case – can tell the jury that medical records were evaluated by nursing expert – first step before hiring gerontologist**
- **Local statute: NJSA 30:13 Nursing Home Responsibilities of Residents, specifically NJSA 30:13-5(a-m) (Rights of Residents) – incorporates federal regulations; speaks to residents' rights (communication, clothing, safe environment)**
- **Federal regulations speak to standard of care that nurses must abide by**

VIII. How to Value Cases

- **Pain and suffering**

- **Use all dignity issues to show those embarrassing acts that have occurred at nursing home**
- **How to value a case when the client had dementia**
- **Rarely have client testify – usually already passed or has dementia**
- **Gerontologist speaks to development of the wound**
- **Just because client cannot speak does not mean cannot feel pain**
- **Establish levels of pain through doctor – can see medications given to patient to comfort them – are they giving heavy medication to ease pain – evidence that everyone is in pain**
- **Describe what a bed sore is – jury can infer pain**
- **Sympathy on the side of the patient/client**
- **There is a value to someone's life**
- **Appeal to the jury to value the client's life – what if this was my loved one? What if this was me?**
- **Don't sue for any amount of money – do not tell jury what fair verdict would be – cannot use numbers**
- **Appeal to jury's emotion – this person suffered for x number of days for x hours each day**
- **Jurors may say "things happen" and "client was old and going to die"**
- **Added value because fall down in a nursing home because someone was supposed to be taking care of this person – cases are valued differently than a normal slip and fall**
- **Punitive damages – blend into pain and suffering but ask for separate verdicts on each**
- **Failure to manage**

IX. Selecting a jury

- **Need fair-minded group of jurors**
- **Case by case analysis of type of jury**
- **Look for people in mid 50s and up because need someone to relate to the patient or has a parent/grandparent in a nursing home**
- **Do not want someone too young on the jury because they cannot identify with client/victim**
- **Try to look for a leader in the jury – instinctive – see how the person presents themselves – someone who is going to take charge**

- **Success of case is based on jury selection**
- **Extremely nuanced case – lots of money at stake – need jurors who will do what is fair and what is right**
- **Evaluate injury and then can assess what the general value is and then look at each individual case and how much is there to generate risk**
- **Insurance companies know what their exposure is**
- **Stage 4 bed sore case or hygiene issues are good cases to go to trial**
- **Former employee who comes forward and testifies as to problematic facility – willing to try this case**
- **Ultimately family's choice to decide to go to trial**
- **In most cases there is not a will – less frequently there is a spouse**

X. Advice to young attorneys

- **Hyper technical type of case**
- **Many years to get comfortable with the issues and medical jargon**
- **Must learn the regulations**
- **Too much going on to evaluate the case without some experience dealing with these cases – may not be trained enough to know what you don't know – reach out to experienced attorneys**
- **New attorneys should have a mentor**
- **Kcrlawfirm.com**