

J NAELA JOURNAL

National Academy of Elder Law Attorneys • Volume 14 • e-Issue • Fall 2018

**The Intersection of Tort Law and
Nursing Home Abuse and Neglect Litigation**
By David J. Hoey, Esq.

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NAELA Journal (ISSN 1553-1686) is published annually by the National Academy of Elder Law Attorneys, Inc., 1577 Spring Hill Road, Suite 310, Vienna, VA 22182, and distributed to members of the Academy and to law libraries throughout the country. Two e-Issues are published — one in Spring and one in Fall.

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The Intersection of Tort Law and Nursing Home Abuse and Neglect Litigation

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I. Introduction	2
II. Overview	2
III. For What Purposes Does Tort Law Exist?	4
IV. A Changed Landscape	5
V. Nursing Home Malpractice Is Not Medical Malpractice.....	6
VI. Untangling the Corporate Web: Identifying the Defendants and a Theory of Liability	7
VII. What Is a Nursing Home’s Duty of Care and How Is It Breached?	10
VIII. Damages.....	13
IX. Mandatory Predispute Arbitration Clauses in Nursing Home Admission Agreements	14

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I. Introduction

The abuse and neglect of residents in nursing homes across the United States has gained a significant amount of attention recently. For-profit corporate networks own and operate dozens, even hundreds, of skilled nursing facilities. As the corporate model has gained traction in the nursing home industry, individual facilities and residents of those facilities have experienced the effects of systemic failures historically seen in many other industries in which large corporations are the norm. In the past, litigation of personal injury claims arising in institutional settings — including nursing homes and assisted living facilities — typically involved discrete negligent acts by an identifiable person, whereas today the abuse and neglect suffered by elderly and disabled nursing home residents are frequently the result of systemic acts of corporate negligence such as understaffing, underfunding, and the undertraining of employees. This article identifies and describes some of the lesser-known aspects associated with litigating personal injury claims against nursing homes in the current industry climate.

II. Overview

A 90-year-old nursing home resident suffered fecal impaction, urosepsis, and a decubitus ulcer (bed sore) with purulent foul-smelling drainage. The untreated horrific medical conditions led to the resident's renal failure and ultimately her death. Her skilled nursing facility was responsible for her safety, care, and well-being. In fact, as is true in almost all cases, the nursing home assured her and her family that it could, and would, provide the level of care she needed. Instead, she was neglected, day after day, over a period of several months. She endured extreme, unnecessary, and inhumane agony and

humiliation during the final months of her life and died prematurely.

Nursing home management and staff failed to develop and implement an individual care plan, follow physician orders, promptly notify the physician of the resident's changing condition, involve the nursing home's medical director in the resident's treatment, and transfer the resident to a hospital when her condition worsened significantly. Cases such as this one, in which I represented the estate in a wrongful death and negligence action against the nursing home, provide frightening examples of the extreme dangers and risks to residents resulting from a nursing home's pervasive neglect of its residents. Yet it is rare for a facility or care providers to accept any level of responsibility for injuries or deaths caused by systemic failures in a nursing home's operation, care, or management. Complex litigation is often the only avenue available for victims and their families to pursue justice. Whether the root of the neglect observed in a nursing home can be pinpointed to the facility's understaffing, underfunding, or inadequate training of employees, these cases differ from traditional medical malpractice actions and present unique challenges.¹

Our nation's elders, people with disabilities, and their families increasingly rely on long-term care facilities to provide shelter, other basic necessities, and compassionate quality care in a dignified manner. According to data published in 2015, 15,583 nursing homes existed throughout the United States, which were responsible for ensuring the safety and well-being of

¹ See generally Dan B. Dobbs et al., *Dobbs' Law of Torts* § 320 (2d ed., West Academic Publishing 2011).

approximately 1.3 million Americans.² It is predicted that nearly 40 percent of all adults will enter a nursing home at some point in their lives.³ These numbers are sure to grow as the life expectancy of Americans steadily climbs and as baby boomers, who represent one of the largest portions of our country's population, continue to advance past the age of retirement.⁴ In fact, the Population Reference Bureau predicts that the demand for nursing home care could skyrocket from 1.3 million residents in 2010 to 2.3 million or more in 2030 as a result of the expected number of Americans soon to be age 65 and older.⁵

Many readers of this article, if not all, likely have a family member or know someone else who lives or lived in a nursing home. Even those who do not can easily imagine how residents depend on the cleanliness, safety, and adequacy of nursing home facilities and grounds. That is the reality. Those who live in nursing homes rely immensely on a variety of employees and staff at these facilities to provide them with the care and assistance they require on a daily basis, often including assistance with the most basic of human functions such as eating, bathing, and using the restroom.⁶

Although nursing homes that maintain adequate, safe, and abuse-free environments for their residents do exist, many facilities remain woefully deficient in a number of respects, often resulting in serious injury and death to our nation's elderly and disabled. In 2014, approximately 69.8 percent of nursing homes operated as for-profit entities, a source of disconnection from good care.⁷ Over 20 years, I have litigated several types of personal injury actions against nursing homes on behalf of clients, including wrongful death, a variety of negligence claims, and intentional torts. A large percentage of the injuries suffered by nursing home residents can be attributed to systemic operational problems, which have become increasingly present in the corporate-run nursing homes of today. From understaffing to chronic underfunding,⁸ a wide range of corporate neglect correlates with a dramatic increase in occurrences of abuse, neglect, and injuries to residents. The precise nature of damages that may be recoverable against a nursing home, its operator/manager, and its employees or agents depends on the circumstances of each case, and punitive damages may also be available in addition to a range of compensatory damages that are generally available to a plaintiff.⁹

2 Statista, *Nursing Homes in the U.S. — Statistics & Facts*, <http://www.statista.com/topics/3982/nursing-homes-in-the-us> (accessed July 8, 2018).

3 NursingHomeAbuseGuide.org, *Nursing Home Abuse Guide*, nursinghomeabuseguide.org (accessed July 8, 2018).

4 Mark Mather, *Fact Sheet: Aging in the United States*, PRB (Population Ref. Bureau), <http://www.prb.org/Publications/Media-Guides/2016/aging-unitedstates-fact-sheet.aspx> (Jan. 13, 2016).

5 *Id.*

6 Thomas Day, *Guide to Long Term Care Planning: About Nursing Homes*, Natl. Care Plan.

Council, www.longtermcarelink.net/eldercare/nursing_home.htm (accessed July 9, 2018).

7 Ctrs. for Disease Control & Prevention, Natl. Ctr. for Health Statistics, *Nursing Home Care*, <http://www.cdc.gov/nchs/fastats/nursing-home-care.htm> (last updated May 3, 2017).

8 Approximately 90 percent of nursing homes are understaffed. NursingHomeAbuseGuide.org, *Nursing Home Understaffing*, nursinghomeabuseguide.org/neglect/understaffing (accessed July 9, 2018).

9 Mark R. Kosieradzki & Joel E. Smith, *Nursing Home Litigation*, in *Litigating Tort Cases* vol. 5, 49 (Roxanne Conlin & Gregory Cusimano

The many challenges an advocate faces when litigating any personal injury case are exacerbated when litigating against nursing homes, which are often owned and/or controlled by giant and powerful corporate conglomerates and represented by skilled and seasoned defense firms with significant resources. The challenges are surmountable, and the battles are not unwinnable, but they do require proper knowledge and preparation.

III. For What Purposes Does Tort Law Exist?

Torts are civil wrongs, conduct, or the absence of conduct that falls below a level that society considers reasonable under the circumstances.¹⁰ Torts encompass acts of negligence and several types of volitional conduct that intentionally cause harm to another.¹¹ One is negligent when he or she acts in a way that falls below what a reasonable person would expect in a similar position and when that failure is a factual and foreseeable cause of injury to another.¹²

Over the generations, a body of ever-changing tort law, which defines the boundaries of conduct that is considered reasonable and acceptable, and now is considered unacceptable according to modern standards, has developed.

The purposes of tort law, however, have remained consistent since its inception. Tort law exists to (1) provide a peaceful method for people to resolve their disputes, who might otherwise be inclined to take the law into their own hands;

(2) deter conduct that society deems unacceptable;¹³ (3) encourage and facilitate socially responsible behavior; and (4) provide compensation and restore injured parties as nearly as possible to the same condition they enjoyed prior to the wrongful conduct of another.¹⁴ Though these goals may at times be overlooked, it is important that we do not lose sight of why tort law was created.

These goals are met when a nursing home is held accountable for resident abuse and neglect. Tragic incidents involving nursing home residents are often the result of what is nothing more than a conscious business decision, a trade-off to cut costs in the long run. Until quite recently, tort law was not effectively used to influence change in the business model of skilled nursing facilities and, for a variety of reasons, plaintiffs' counsel largely shied away from injury litigation in the context of nursing homes. But sufficient verdicts against nursing homes and their corporate parents, especially those that award punitive damages to a plaintiff, enhance legal and regulatory effectiveness by letting operators know that the public will not tolerate neglect and abuse of elders and the disabled in their communities. Advocacy for each and every victim is critical for protecting the quality of life of our nation's seniors and for ensuring that they retain the dignity they deserve both now and in the future.

When an attorney represents a client

eds., Thomson Reuters 2017).

10 Stuart M. Speiser et al., 1 *American Law of Torts* § 1:1 (Thomson Reuters March 2018 update).

11 *Restatement (Second) of Torts* § 6 (Thomson Reuters June 2018 update).

12 *Id.*

13 Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him or her for outrageous conduct and to deter him or her and others from similar conduct in the future. *Restatement (Second) of Torts* § 908.

14 Victor E. Schwartz et al., *Prosser, Wade & Schwartz's Torts* (10th ed., Foundation Press 2000).

in a case against a nursing home, he or she also indirectly represents all nursing home residents whose care is influenced by adequate tort remedies. Punitive damages, where available and justified by the conduct, are especially effective for making nursing homes consider the delivery of adequate care less in terms of dollars and cents, and more in terms of the consequences of providing insufficient or inadequate care to those who enter their facilities. In the nursing home context, “The threat of sizeable punitive damage awards creates a strong incentive for nursing homes to develop new protocols and practices designed to improve the care of elderly residents.”¹⁵

IV. A Changed Landscape

Many elder law practitioners can recall a time not long ago when it was rare for any suit to be brought against a nursing home. Litigating claims against nursing home administrators or owners and operators for injuries that occurred in them was still less common. Little tort law scrutiny existed regarding the quality of care provided to residents. Even when injuries or death did occur, there was typically little reason to suspect misfeasance or the existence of causes that were not simply part of growing old. Much like the home where my own mother worked for many years (first as a registered nurse and then as an administrator), the facilities that housed and provided care for our nation’s elders were most often mom-and-pop or stand-alone establishments. The owners of these establishments were at the facilities daily, tirelessly caring for residents they knew on

a first-name basis. As the landscape of the nursing home industry has changed dramatically in recent times, so has the need for effective advocacy on behalf of elderly nursing home residents, along with the methods through which justice is.

Although it simply should be *inconceivable* for such vulnerable persons to be treated with anything other than the utmost respect, compassion, and dignity or receive anything less than adequate care and attention, reality reveals a different story. Studies show that 90 percent of skilled nursing facilities are routinely understaffed,¹⁶ which has a direct correlation with resident neglect, and surveys of residents reveal that up to a shocking 44 percent have been victims of a wide range of abuses.¹⁷ Much of this decline in care stems originally from the corporatization of the industry, a market now driven largely by big players ultimately focused on reducing costs wherever possible and delivering profits to their shareholders.

Regardless of what causes actually underlie nursing home abuse and neglect, both have been astonishingly prevalent in recent times and cannot be ignored. And in a world where it is now all too common for nursing homes (or their insurers) to deny responsibility outright for injuries suffered by residents or to go to extraordinary lengths to minimize culpability (I have seen several instances in which key evidence was hidden or withheld), litigation is often the only effective method of recovery available to victims and their families.

15 Kevin B. Dreher, *Enforcement of Standards of Care in the Long-Term Care Industry: How Far Have We Come and Where Do We Go From Here?* 10 Elder L.J. 119 (2002).

16 [NursingHomeAbuseGuide.org/neglect/understaffing](https://www.NursingHomeAbuseGuide.org/neglect/understaffing), *Nursing Home Abuse Guide*, [nursinghomeabuseguide.org](https://www.nursinghomeabuseguide.org) (accessed August 21, 2018).

17 [NursingHomeAbuseGuide.org/physical-abuse/effects](https://www.NursingHomeAbuseGuide.org/physical-abuse/effects), *Nursing Home Abuse Guide*, [nursinghomeabuseguide.org](https://www.nursinghomeabuseguide.org) (accessed August 21, 2018).

V. Nursing Home Malpractice Is Not Medical Malpractice

Although a traditional medical or nursing malpractice claim may be included in the broader term “malpractice,” I think of the term “nursing home malpractice” as encompassing *any* injury a resident suffers as a result of (a) a nursing home’s failure in its policies or practices or by its employees or agents to provide adequate care or (b) a nursing home’s failure to act as a reasonable nursing home would in similar circumstances. Some attorneys erroneously confuse medical malpractice and nursing home malpractice as being one in the same. Regardless of whether a doctor or nurse is a named defendant in a suit, some defense attorneys *purposely* refer to nursing home negligence actions as medical malpractice. Such attempts are intended to confuse the judge and/or jury and divert the claim to the medical malpractice screening process with the hope that the factfinder might apply an incorrect standard to the case.

Nursing home malpractice generally involves a form of negligence, which in all cases can be boiled down to the well-known elements of duty, breach, causation, and damages. This is true regardless of whether a resident’s injuries were caused by a certified nursing assistant (CNA), the facility’s administrator or management company, a nurse, a doctor, or even the owner of the nursing home. Stated another way, someone who either is under the nursing home’s control or controls the nursing home’s operation in some material respect acted or failed to act in a manner that is considered reasonable in the industry, thereby causing harm to a resident.¹⁸ Even more generally, a nursing

home owes its residents a duty of reasonable care to prevent and protect against foreseeable injury and must consider what it knows or should reasonably know about a resident’s age and physical and mental condition.

Depending on the circumstances of the case, a nursing home malpractice suit may be brought against the nursing home itself, a corporate parent or partner, the facility’s management company, and in some cases the doctors or nurses who were responsible for treating a resident. Even if the conduct of a professional care provider such as a doctor or nurse is involved, viable claims against the nursing home’s operators and management for failures over a period of time invariably also exist, whether the failures are systemic or involve the injured resident specifically.

Typical medical malpractice actions involve discrete instances of care that fall below standards that are commonly accepted by medical practitioners in the same field. In contrast to the reasonable care standard that is used to evaluate the negligence of a nursing home, the standard of care applied to a general physician in Massachusetts is whether the physician exercised the degree of care and skill of the average qualified practitioner, taking into account the advances in the profession.¹⁹ Medical malpractice cases usually involve an identifiable discrete point when a doctor or nurse made a mistake or error in judgment, whereas the injuries resulting from nursing home abuse and neglect typically occur over a period of time, often involving repeated patterns of negligent conduct and care. Consequently,

in *American Jurisprudence Trials* vol. 110, 1 (Thomson Reuters August 2018 update) (originally published in 2008).

18 Daniel J. Penofsky, J.D., *Litigating Nursing Home Negligence and Wrongful Death Cases*,

19 *Brune v. Belinkoff*, 354 Mass. 102, 235 N.E.2d 793 (1968).

nursing home malpractice cases require considerably more discovery than medical malpractice cases. It is crucial for the advocate of a nursing home malpractice plaintiff to examine thoroughly not only the victim's medical history from both before and after the victim became a resident but also the history of similar incidents at the defendant nursing home and in facilities that are managed or operated by its corporate parent.

It is also important to understand the differences between assisted living facilities and skilled nursing facilities. Assisted living facilities provide housing for elders who do not require extensive ongoing services for medical conditions but may need assistance with the functions of daily life. In contrast, skilled nursing facilities, or nursing homes, provide 24-hour skilled nursing care to residents who do require some type of consistent medical attention. Although the two are similar in some respects, residents of skilled nursing facilities require more attention and care and are often considered to be more vulnerable than those who reside in assisted living facilities.

Assisted living facilities are not governed by federal law.²⁰ Moreover, the definition of these types of facilities vary by state.²¹ This lack of uniformity makes it extremely difficult to understand the nature of such facilities and their problems on a national level. Assisted living facilities are subject to and must comply with regulations set forth by the state where they are located, but a wider range of regulations

apply to skilled nursing facilities, most of which accept Medicare and Medicaid payments and therefore must adhere to additional requirements imposed by the federal agencies responsible for the oversight of the Medicare and Medicaid programs.

Lawsuits against nursing homes, and hence the presence of elder law attorneys in the courtroom, were once nearly nonexistent and perhaps largely unnecessary. However, an acute and ever-growing need now exists for litigators capable of representing nursing home residents and their families in court for claims involving many types of nursing home malpractice, including resident neglect and abuse, wrongful death, and corporate neglect. In some cases it may be apparent that a resident suffered significant injuries and that the injuries clearly would not have occurred but for the negligence of someone at the nursing home. Nonetheless, it is often a daunting task for advocates to identify not only the point at and manner in which a duty was breached but also how that breakdown caused or otherwise contributed to the injuries the resident suffered. One of the first questions to be answered is, "Who does my client sue?"

VI. Untangling the Corporate Web: Identifying the Defendants and a Theory of Liability

When a resident of a nursing home is neglected or abused over a period of time, who should be held responsible? Who are the proper defendants to name in a lawsuit? Practically speaking, under what legal theories can your client hold those parties accountable? These are just a few of the numerous difficult questions that must be answered prior to litigation. More often than not, in sharp contrast with the previous customary mode of mom-and-pop nursing home ownership and operation,

20 Jennifer Rae Fleming, *The Blurred Line Between Nursing Homes & Assisted Living Facilities: How Limited Medicaid Funding of Assisted Living Facilities Can Save Tax Dollars While Improving the Quality of Life of the Elderly*, 15 U. Miami Bus. L. Rev. 245 (2007).

21 *Id.*

the nursing home itself, its owner, and its operator appear (on the surface) to be three separate legal entities. This presents a perplexing and tangled web of interrelated corporate entities, all of which are likely backed by some of the biggest players in the insurance industry and high-priced legal defense teams. This has become the norm over the past couple of decades and is perhaps another reason many attorneys have viewed lawsuits against nursing homes as too complex, lengthy, and cost prohibitive to pursue. With the correct knowledge and planning, however, justice can be achieved for residents of nursing homes who become victims.

If a resident's injuries appear to be the result of an isolated incident caused by clearly negligent actions of just one or a couple of employees, one of the defendants to the action usually is the facility itself, which faces vicarious liability for the actions of the negligent employee(s) (as long as the employee conduct did not fall far enough outside employee responsibilities or scope of employment, to such an extent that the facility could not rationally be held accountable). If the negligent employee is a nurse covered by malpractice insurance, or perhaps a doctor with whom the facility has an agency relationship, it often makes sense to also name that person individually as a defendant. If a resident is injured as a result of what a facility's medical director did or did not do, investigation is often necessary to determine whether the doctor was somehow acting as an agent of the nursing home or was providing services as an independent contractor.

In situations of systemic neglect over time, such as a resident suffering from a decubitus ulcer, fecal impaction, or an undiagnosed infection, the resident's injuries typically resulted from a failure of a group

of employees or staff or a breakdown in an internal policy or procedure. Situations such as these often indicate the existence of corporate neglect, including neglect of residents caused by having too few employees to care for too many patients or by employees not given the proper training to identify and prevent problems. Identifying defendants in these scenarios becomes more complicated. Oftentimes, a nursing home's corporate parent is the source of a policy or procedure that is implemented in the facility or the corporate parent made budgeting decisions or exerted other forms of operational control over the nursing home, thus exposing it to liability. The identity of what or who is responsible for the resident's injuries should be fleshed out thoroughly during discovery.

A corporate parent or management company, which is usually much wealthier than a nursing home licensee, is frequently identified as having directly or indirectly caused a resident's injuries. Corporations often attempt to implement layers of protection against liability claims that arise from a lack of care their nursing homes provide. It may be a complicated task to determine if claims against the corporate parent are even viable and how to prove its connection to and liability for a resident's injuries.

The laws of the state in which a claim is being brought must be researched to determine what theories of liability exist against a corporate parent or management company. These likely include direct liability (including liability that arises from corporate negligence), joint venture liability, agency vicarious liability, and alter ego indirect liability. Even in the same suit, different theories of liability may be advanced against each defendant.

Direct liability of a nursing home's cor-

porate parent exists if the corporation's actions or decisions can be directly traced to the harm the resident suffered. If the corporate parent, not its subsidiary — in this case, the nursing home — controls the day-to-day operation of the nursing home, the corporate parent is held directly liable for the harms that result from those actions or decisions. For example, if the corporate parent provides specific mandates regarding staffing levels, direct liability lies against it for a resident's injuries caused by understaffing.

A corporate parent may also be held directly liable for other types of budgetary and procedural decisions that directly affect the operation of its nursing homes or the quality of care they provide. For example, if the corporate parent sets training guidelines for the CNAs working in its nursing homes and the training is inadequate or deficient in another respect and a resident becomes injured as a result, the corporate parent is subject to direct liability.

Frequently, case facts overlap and support both direct and indirect theories of liability. Indirect liability may exist if the actions of a nursing home's corporate parent cannot be directly tied to a resident's injuries but evidence shows that the corporate parent has otherwise disregarded the nature of its subsidiary, the nursing home, as being a separate entity. Although the structure of corporations in general is intended to shield the assets of a corporate parent and protect it from liability, courts will allow a plaintiff to pierce the corporate veil and hold the corporate parent liable even if the subsidiary is merely the corporate parent's alter ego or a mere extension of the upstream entity.

Massachusetts courts and many federal courts weigh a variety of factors when evaluating whether a corporate parent

should be held indirectly liable for harms that directly result from an action taken by its subsidiary.²² Though no one factor is dispositive, the presence of one of the factors may be so significant that the court will allow the corporate veil to be pierced. In general, a plaintiff must show that the corporate parent has exercised some form of control over, or the right to control, the subsidiary's activities and there was a fraudulent or injurious consequence as a result.²³ Or a plaintiff may be allowed to proceed on a veil-piercing theory based on a confused intermingling of corporate activity between the two entities that evinces a disregard of formal corporate separation.²⁴

To begin to build the corporate case, nursing home cost reports must be analyzed, preferably by an expert well versed in the administration of nursing homes. In addition to being able to determine the propriety of any amounts paid by the nursing home to any management or consulting companies, the expert should be able to identify whether the wages and salaries paid to the nursing home's employees are consonant with what is expected among the industry in terms of providing proper

22 See *Lipsitt v. Plaud*, 466 Mass. 240, 994 N.E.2d 777, 778 (2013). Such actions are “(1) common ownership; (2) pervasive control; (3) confused intermingling of business assets; (4) thin capitalization; (5) nonobservance of corporate formalities; (6) absence of corporate records; (7) no payment of dividends; (8) insolvency at the time of the litigated transaction; (9) siphoning away of corporation's funds by dominant shareholders; (10) nonfunctioning of officers and directors; (11) use of the corporation for transactions of the dominant shareholders; and (12) use of the corporation in promoting fraud.”

23 *Kraft Power Corp. v. Merrill*, 464 Mass. 145, 981 N.E.2d 671, 681 (2013).

24 *Commonwealth v. Springfield Terminal Ry. Co.*, 80 Mass. App. 22, 37 (2011).

care to residents.

In addition to deficiencies found in nursing home cost reports, inadequately low resident-to-staff ratios often indicate that a nursing home is understaffed. For nursing homes to be eligible to receive funds from Medicare and Medicaid as payment for portions of its residents' care (which includes nearly all skilled nursing facilities), they are required by law to provide the federal government with up-to-date cost reports and other information on a regular basis. This data is available to the public at cms.gov.

Data compiled by the Government Accountability Office, the investigative arm of Congress, reveals that many nursing home residents are at "great risk of harm due to woefully deficient care."²⁵ The Department of Health and Human Services has also determined that more than 90 percent of nursing homes are routinely understaffed.²⁶

VII. What Is a Nursing Home's Duty of Care and How Is It Breached?

The guidelines for what is considered to be reasonable care, and thus the appropriate standard of care, come from a variety of sources. The starting point for litigators unfamiliar with nursing home claims is the federal and state regulations governing the operation of nursing homes. Many states' laws of evidence, including those of Massachusetts, provide that violations of these regulations or other applicable statutes are prima facie evidence of the nursing home's negligence. Federal and state nursing home regulations cover a wide range of topics and in some instances may

overlap; however, nearly all of these regulations are in place to promote the safety and protection of nursing home residents.

Legal counsel for nursing homes (and their insurers) fight relentlessly against the admission of these regulations into evidence. In fact, I cannot remember a single case that I have tried recently in which there was not significant motion practice by the defense trying to exclude both state and federal regulations altogether. Although these attempts are normally unsuccessful, gaining familiarity with the rules of evidence and case law in your own jurisdiction will help prevent you from being blindsided. This is especially true considering that plaintiff's counsel in nursing home cases can almost surely expect having to respond to an onslaught of dozens of motions in limine as the trial date nears.

Although cases exist in which neglect or abuse are so obvious that a judge may allow the plaintiff's claims to proceed to the jury without support from expert testimony to establish breach of the standard of care and causation, more often than not expert opinion is necessary. Expert testimony is required if the conduct of a nurse or doctor is involved or if theories of corporate neglect are advanced. I frequently have cases in my own practice that involve pervasive understaffing and inadequate training perpetrated by the same corporate nursing home chains. It makes sense for me to maintain a continued relationship with an expert on nursing home administration. The familiarity my expert has gained through repeatedly working on cases against certain corporate-parent defendants has led to a more efficient working relationship between us.

In addition to the state and federal government regulations and the testimony of experts, a nursing home defendant

25 Andrea Billups, *Deadly Neglect: The Shocking Truth About What's Going On in America's Nursing Homes*, Reader's Dig. (Dec. 2006).

26 *Id.*

often helps establish the standard of care to which it and its employees are held accountable through the promulgation of internal policies and procedures. In many states, including Massachusetts, an employee's violation of his or her employer's rules regarding the safety of third persons is admissible as evidence of the employer's negligence, though not alone dispositive. In the common corporate structure of nursing homes today, a vast assortment of internal written policies and procedures dictate how employees at all levels are expected to go about their work. And it is easy to imagine just how many of a skilled nursing facility's policies and procedures are related to the safety of others.

Some federal and state regulations even require nursing homes to implement policies and procedures regarding some aspects of their operation. Nursing homes comply with such regulations both to maintain their compliance with Medicare and Medicaid requirements and to maintain their licenses to operate, but other reasons exist as well. Although the motivations for why nursing homes adopt such policies and procedures is subject to debate, common sense tells us that in addition to increasing the safety of residents and staff, these policies and procedures perhaps exist so that the governing corporate bodies of nursing homes have some assurance that their employees will all act uniformly in certain situations.

Potential exists for human error, and therefore injury, in just about every industry, but it is heightened in nursing homes and other health care settings, where employees face situations in which they must react and make decisions regarding the care of others. Logic tells us that the chance of human error should decline as the amount and adequacy of employee training increases. Employees are often

trained by being presented with a wide variety of situations similar to those they might encounter on the job, then being shown what the employer considers to be appropriate responses to those situations. As an employee's province to make subjective decisions decreases through this type of training, an employer can have greater confidence that the employee will react consistently in a predetermined manner. This thereby reduces the chances of costly or dangerous mistakes and thus the employer's liability. To achieve these ends, nursing homes, especially those owned or operated by corporations with numerous facilities, frequently promulgate voluminous policies and procedures on an incredibly wide range of topics.

Another reason for these internal policies and procedures might be that they provide management and ownership with perceived escape routes. I have seen numerous situations in which nursing homes manipulated such policies and procedures in order to use their own employees as scapegoats. Instead of admitting *any* responsibility of its own following an incident resulting in injury to a resident, the nursing home attributes the incident to being a failure by one or more of its employees to follow the facility's policies and procedures. The defense uses this type of blame game in an attempt to mitigate the facility's culpability by portraying a resident's tragic injuries as being unforeseeably caused by the actions of a rogue employee. This is especially sad in instances in which problems inherent in the corporate method of operation placed the low-level employee (now terminated former employee) in a position to fail in the first place. Regardless of how well or carefully a policy or procedure is drafted, it is inevitable that the health and safety of residents are at risk when a nursing home

is chronically understaffed. Whatever the actual reasons behind the creation of such policies and procedures, they do very little in the way of protecting or promoting safety when a nursing home's employees are either inadequately trained or simply not trained at all.

These scenarios are illustrated by a case that I recently resolved on behalf of an estate's decedent. The case arose from the injuries and ultimately the death of a disabled nursing home resident who was dropped while CNAs were attempting to transfer him using a Hoyer lift. A Hoyer lift, a device on small wheels that functions similar to a crane, has a pivoting arm and a sling for hoisting and transferring a person from place to place such as from a chair to a bed. Although these devices typically use electric power and hydraulics to perform the actual lifting of the person, they also require the use of human operators. At the time this incident occurred, two CNAs were attempting to perform the transfer. Evidence suggested that one of the CNAs may have been distracted while she attempted to move the electrical cord and the other might not have secured the grommets of the sling correctly onto the hooks of the lift.

Through discovery, it was learned that the nursing home's policies and procedures required that transfers with that type of Hoyer lift were at all times to be performed by not less than three persons. Subsequent to its own internal investigation, after the nursing home concluded that it could not shift blame onto the lift's manufacturer or vendor on a products liability theory,²⁷ it swiftly terminated the

two CNAs for what it stated to be the CNAs' willful departure from the facility's policies and procedures and protocol. In essence, the nursing home tried to play off the resident's injuries and death as attributable to an unpredictable and unfortunate occurrence caused by the decisions of two rogue CNAs to take it upon themselves and do exactly what they were told not to do.

Despite the fact that written nursing home policies and procedures existed that called for three persons to perform Hoyer lift transfers, and the fact that the CNAs' actions were clearly contrary to those policies procedures, it was further discovered that the nursing home's corporate parent and manager chronically understaffed their facilities. Not only were the fired CNAs routinely overworked, but because the defendant facility routinely lacked the proper number of staff members, it was a common (and quite frankly, perhaps even a necessary) practice for just two CNAs to perform Hoyer lift transfers in the facility. In support of its attack against the former CNAs, the defendants²⁸ also asserted that it was their customary practice to provide formal training to all CNAs in accordance with their policies and procedures. These claims, however, were also refuted by the evidence; testimony revealed that because the facility had an insufficient amount of staff, the limited training actually given to the CNAs was at best informal and more accurately described as being "trial by fire."

As frequently occurs when litigating claims against nursing homes in general, the defendants in the Hoyer lift case strenuously sought to preclude their own policies and procedures from being admitted

27 It became clear that the instructions the manufacturer provided to the nursing facility regarding the lift's use also expressly called for three persons to operate it. Furthermore, a post-incident inspection revealed no defects in

the lift's manufacture or design.

28 The facility itself, its corporate parent, and its management company.

into evidence against them. It is extremely powerful to provide a jury with evidence of a defendant's failure to follow its own rules that clearly relate to the safety of its residents. Likely recognizing the fact that the admission of such evidence is virtually inevitable, it is common for a nursing home to point the finger at a hapless employee in hopes of minimizing its own responsibility and protecting its reputation.

The tragic accident underlying this litigation likely could have been prevented had the facility's own rules been followed. That, however, would have first entailed remedying the systemic failures in the defendant nursing home's operations. And fixing problems that exist across dozens (or even hundreds) of nursing homes from years of corporate neglect likely will require enormous capital expenditures that will undoubtedly have a significant impact on corporations' bottom lines. Therefore, it is likely that we will continue to see the same approach commonly used by nursing homes of trying to put out small fires one at a time.

VIII. Damages

Though the precise nature of damages that may be recoverable against a nursing home, its operator/manager, and employees or agents depends on the circumstances of each case, punitive damages in addition to a range of compensatory damages are possible. Although the common law of many states allows for the imposition of punitive damages, Massachusetts only recognizes statutory punitive damages, which arise specifically in relation to the wrongful death statute. Just as deterrence is one of the purposes of tort law in general, punitive damages punish wrongdoers for egregious conduct and are intended to act as a specific deterrent to individual defendants as well as a general deterrent to

other potential wrongdoers.

Even though evidence of a defendant's assets and wealth is not normally admissible in negligence cases, barring unique circumstances, the defendant's assets and wealth are factors to be considered by the factfinders when determining a punitive damages award. During the punitive damages phase of the trial, the jury (or judge) will consider closely the nature and egregiousness of the defendant's conduct, the value to be gained by society by punishing the defendant, and the deterrent effects that punitive damages are likely to have on the defendant and similarly situated would-be defendants.

Loss of dignity²⁹ and pain and suffering³⁰ represent two common types of compensatory damages that may be recovered in many nursing home cases. In every single nursing home wrongful death case I have tried, the defense has attempted to reduce the level of damages that should be awarded to the plaintiff by arguing both that the resident-victim had few years of life remaining and that the resident's poor medical condition or frailty was the true cause of his or her death. In other words, the defense tried to convince the jury that

29 Among the standards of conduct applicable to nursing home administrators pursuant to 245 Code of Massachusetts Regulations 5.02 (current through Register No. 1371, dated August 10, 2018): "(13) Resident Dignity and Privacy. A Nursing Home Administrator shall safeguard a resident's dignity and right to privacy."

30 In Massachusetts, common law pain and suffering damages are recoverable in bodily injury cases. See *doCanto v. Ametek Inc.*, 367 Mass. 776, 328 N.E.2d 873 (1975). Under the Massachusetts wrongful death statute, conscious pain and suffering damages arising from the decedent's wrongful death are expressly available to the appropriate beneficiaries. Mass. Gen. Laws ch. 229, §§ 1–11.

the value of the decedent's remaining life was just not high enough to warrant substantial damages because the decedent was going to die soon regardless. This type of strategy simply cannot be tolerated; the fact that a resident of a nursing home is old, sick, or even dying does not, and cannot, shield the defendants' conduct, which often is abhorrent behavior or inexcusable neglect. The quality of life of *all* individuals is important.³¹ If nursing home abuse and neglect cause a resident's premature death, excruciating pain, or humiliation and embarrassment, significant damages are more than proper. Advocates must not lose sight of these considerations.

IX. Mandatory Predispute Arbitration Clauses in Nursing Home Admission Agreements

Mandatory predispute arbitration clauses often bar a resident from bringing lawsuits against a nursing home and litigating claims in court.³² It is essential

for advocates to be educated about the use and limitations of these clauses in the contracts commonly utilized for nursing home admissions.

I have found alternative dispute resolution to be an extremely useful and effective tool on numerous occasions. For instance, once litigation has commenced against a defendant, voluntary mediation between the parties to a lawsuit and a neutral third party is often a useful method to settle cases at an early stage, thereby quickly providing compensation to an aggrieved party and reducing the significant costs and expenses of going to trial.

It has also been my experience that mandatory predispute arbitration clauses in nursing home contracts with residents raise serious concerns because the nature and effects of those clauses may not be entirely understood by those agreeing to them. Persons entering nursing homes are often elderly or disabled and may be in a vulnerable state mentally or emotionally.³³ Furthermore, if health care is involved, there is always a chance that catastrophic injuries might occur, including death.

Similar to many other rights that may be freely contracted away among parties, agreements to arbitrate future disputes are enforceable if both parties to the contract are of legal capacity, consideration is exchanged, and both parties waive their rights freely and knowingly.³⁴ With re-

31 42 C.F.R. 483.10 (Current through Aug. 17, 2018; 83 FR 41784):

“(a) Residents rights. *The resident has a right to a dignified existence, self-determination, and communication with and access to persons and services inside and outside the facility, including those specified in this section.*

(1) A facility must treat each resident with respect and dignity and care for each resident in a manner and in an environment that promotes maintenance or enhancement of his or her quality of life, recognizing each resident's individuality. *The facility must protect and promote the rights of the resident.*

(2) *The facility must provide equal access to quality care regardless of diagnosis, severity of condition, or payment source.* A facility must establish and maintain identical policies and practices regarding transfer, discharge, and the provision of services under the State plan for all residents regardless of payment source.” (emphasis added)

32 Jessica Fargen, *Nursing Home Residents Often*

Sign Away Rights to Sue, Boston Herald (Mar. 8, 2010).

33 See Dreher, *supra* n. 15. “Nursing home residents are among the most vulnerable groups in American society due to their age, physical and mental ability, financial status, and medical conditions. The impact of physical, psychological, and financial mistreatment against the elderly by caretakers is much greater than upon most other segments of society.”

34 See generally, *Walker v. Ryan's Family Steak Houses, Inc.*, 400 F.3d 370 (6th Cir. 2005).

spect to nursing home agreements, advocates, at a minimum, must be aware of the implications of mandatory predispute arbitration clauses to enable them to educate their clients and help protect their rights.

After choosing a nursing home, a prospective resident is presented with a dizzying array of documents during the admission process, including an agreement between him or her and the nursing home. When a person is not physically or mentally able to review and sign the documents, someone else, usually a family member, who may be an agent such as a health care proxy or one who has power of attorney, is called on to complete the documents on behalf of that person. Typically, the contract presented, which must be signed before a person is admitted, is a lengthy document that includes a clause providing for mandatory arbitration of any disputes between the parties in lieu of traditional litigation. However, some nursing home contracts may not even contain an arbitration clause and others may provide for arbitration only if voluntarily agreed to by the parties after a dispute arises.

Mandatory predispute arbitration clauses have become commonplace in all industries, including in nursing home admission agreements. “[M]ore than 100 wrongful death, medical malpractice, and elder abuse cases against nursing homes were sent into arbitration between 2010 and 2014. The ... amount of lawsuits forced into arbitration across all industries has been on a steady rise over the past decade, going from less than 100 cases in 2005 to more than 250 in 2014. In total, 1,704 federal class actions filed between 2005 and 2014 included a motion to

compel arbitration.”³⁵

Nursing homes benefit from mandatory predispute arbitration clauses not only in lower transaction costs but also in lower award amounts.³⁶ Though it may not always be practical to do so, before signing an agreement for admission into a skilled nursing facility, a prospective resident can benefit greatly from the advice of an attorney who is knowledgeable on nursing home law in the state where the home is located. If a mandatory pre-dispute arbitration clause in a nursing home agreement cannot be avoided, legal advice, at a minimum, can ensure that a prospective resident is of sound legal capacity and fully understands the effects of waiving his or her right to litigate claims against the nursing home in the future. I have seen clients who either did not know that they had given up their right to sue or lacked a true understanding of what such a clause actually meant. As mentioned previously, additional concerns are presented when someone is responsible for acting on behalf of a prospective resident.

In a case I litigated on behalf of a nursing home resident’s estate, *Johnson v. Kindred*,³⁷ the Massachusetts Supreme Judicial Court ultimately decided that the decedent’s health care proxy was without authority to bind the resident to arbitration when he signed the agreement with the nursing home on the resident’s behalf.³⁸ The estate sought to bring a wrongful death suit against the nursing home

35 Emily Mongan, *Investigation Slams Arbitration Agreements*, McKnight’s Long-Term Care News (Nov. 2, 2015).

36 Am. Health Care Assn., *Special Study on Arbitration in the Long Term Care Industry* (June 16, 2009).

37 *Est. of Dalton Johnson v. Kindred Healthcare*, 446 Mass. 779 (2014).

38 *Id.*

where the resident resided as well as the facility's corporate parent and management company. Upon the defendants' motion, a judge in the Massachusetts Superior Court ordered the representative of the resident's estate to participate in binding arbitration pursuant to the admission agreement.³⁹ In overturning that judge's decision, the Massachusetts Supreme Judicial Court agreed with my client's position that agreeing to arbitration was not a "health care decision" and therefore waiving the right to litigation was not in the power the resident had given to the health care proxy.⁴⁰ Because he had not given his agent the authority to bind him to arbitration, the clause in the admission agreement providing for binding arbitration was invalid and could not preclude the wrongful death suit against the nursing home.

However, if a resident has vested power of attorney in another to act on his behalf and that agent signs an agreement to arbitrate, courts are less likely to find such an agreement to be invalid. In *Miller v. Cotter*,⁴¹ the Massachusetts Supreme Judicial Court enforced an agreement to submit to binding arbitration, signed on behalf of a resident by his power of attorney. There, it was found that the deceased former resident's power of attorney who had signed the contract was himself familiar, through his own employment, with arbitration and arbitration agreements.⁴² The *Cotter* Court held that the parties were required to resolve the dispute through binding arbitration as they had agreed.⁴³

In May 2017, the U.S. Supreme Court

decided *Kindred v. Clark*,⁴⁴ a case regarding the enforceability of nursing home arbitration agreements signed by agents acting on behalf of others as powers of attorney. That opinion involved two consolidated cases arising out of Kentucky, where a nursing home, Kindred, unsuccessfully attempted to force two separate plaintiffs into arbitration as called for by the admission contracts. The resident in each case had given a broad power of attorney.⁴⁵ After an appellate court affirmed the trial court's denial of Kindred's motion to compel arbitration, the Kentucky Supreme Court held that the arbitration agreements were invalid despite the broad powers of attorney in which the residents had not expressly given specific authority to waive the right to a jury trial. The Kentucky Court's reasoning in that opinion cited the sacredness of the constitutional right to jury trial in the United States.

The U.S. Supreme Court overturned the Kentucky Supreme Court's decision, concluding that Kentucky had improperly placed a condition on the ability to contract regarding arbitration.⁴⁶ The Court held that the Federal Arbitration Act preempts any such state restrictions on contracting rights related solely to arbitration.⁴⁷ The Court did comment, however, that it may not be improper for a state to make rules generally pertaining to all contracts as long as those rules are equally applied irrespective of the contract's subject matter.

Because those who require the care provided by skilled nursing facilities are often the most vulnerable and in poor health, significant potential exists for nursing

39 *Id.*

40 *Id.*

41 *Charles Miller Jr., personal rep., v. Eric Cotter*, 448 Mass. 671 (2007).

42 *Id.*

43 *Id.*

44 *Kindred Nursing Ctrs. L.P. v. Clark*, 137 S. Ct. 1421 (2017).

45 *Id.*

46 *Id.*

47 *Id.*

homes to take advantage of prospective residents by requiring them to accept arbitration clauses as a requirement for admission. Even those with legal capacity and awareness of mandatory take-it-or-leave-it arbitration clauses may believe that they have no practical choice — because of serious health conditions or other limitations — but to accept such contractual provisions and hope that they will receive the medical and personal care they so desperately need. For others it may simply be unthinkable to imagine that they could be at risk of being abused or neglected at the very hands of caregivers in a facility that has promised to provide them with adequate and compassionate care.

In all cases that involve nursing homes and arbitration agreements, advocates must examine the circumstances surrounding the resident's admission. Attorneys must know who signed the agreement, whether that person had the legal capacity to do so, and whether there existed any type of coercion, fraud, misrepresentation, or duress related to the transaction. The bottom line is that mandatory

predispute arbitration clauses in nursing home admission agreements raise several serious concerns regarding fairness and their appropriateness in such solemn settings and must be carefully scrutinized.

In television commercials and brochures, nursing homes are often depicted as being safe, well-staffed facilities with lush green landscapes, capable and friendly nurses and other caregivers, and endless amenities and modern-day comforts. While these might be accurate portrayals of some of the skilled nursing facilities in the United States, darker realities exist in many nursing homes. As the corporatization of the industry persists and the epidemic of nursing home neglect and abuse shows no signs of slowing down, the need for advocates to litigate injury and wrongful death claims on behalf of nursing home residents and their families will continue. And although regulatory legislation and administrative oversight have been helpful, more will need to be done to combat the many systemic failures that continue to affect the health and well-being of our nation's elders.