

Nursing Home Abuse Resource

Nursing Home Litigation

I. INTRODUCTION

Personal injury claims against nursing homes over the years have been greatly undervalued by attorneys. The abuse and neglect may be clear, but most attorneys do not recognize the extent of damages. It is very important to be selective in these cases because liability may be present, but the extent of damages may be limited. In most cases there will not be a claim for lost income, and the resident has a limited life expectancy, as well as numerous health problems prior to being placed in the nursing home. However, juries in many cases have been very sympathetic and recognize the substandard care in most nursing homes.

With the aging of the Baby Boomers, there has been an increased demand for nursing home services, as well as assisted living facilities and personal care homes.

One of the problems that exists in nursing home litigation is the number of homes and insurance companies that have gone into bankruptcy. A post-petition nursing home bankruptcy case should be protected by the trustee having insurance coverage.

In Texas, nursing home facilities are regulated by the State (*see* TEX. HEALTH & SAFETY CODE ANN., ' ' 242, *et seq.* (1992)), and must be licensed in order to operate. Nursing homes are also subject to all of the provisions of TEX. REV. CIV. STAT. ANN., Art. 4590i. Section 1.03(a)(3) provides in part that Ahealth care provider@ specifically includes Aany person, partnership, professional association, corporation, facility or institution duly licensed or chartered by the State of Texas to provide health care (such) as a . . nursing home, or an officer, employee, or agent thereof acting in the course and scope of his employment.@ State regulations regarding nursing homes are found at 40 T.A.C., ' ' 19.101, *et seq.* Assisted living facilities are regulated under TEX. HEALTH & SAFETY CODE, ' ' 247.001, *et seq.*, and Regulations at 40 T.A.C., ' ' 92.41, *et seq.* Personal care homes are regulated under ' ' 250.001, *et seq.*, TEX. HEALTH & SAFETY CODE. Controlling federal statutes are found at 42 U.S.C.A., ' 1395i-3, *et seq.*

II. EVALUATING NURSING HOME CASES

A. Bankruptcy of Nursing Home or Management Company.

It is estimated that approximately 25% of nursing homes have filed for bankruptcy. If the injury, abuse or neglect occurred prior to the bankruptcy, damages will be limited and claims will be transferred to the Bankruptcy Court. In some instances, the Bankruptcy Court will grant relief from the stay and allow a case to proceed to trial. If the injury, abuse or neglect occurred after bankruptcy was filed, it is a post-petition case and the trustee in bankruptcy will generally have insurance.

B. Bankruptcy of Insurance Company Insuring Nursing Home.

Numerous insurance companies have filed for bankruptcy. This will delay proceedings and may cause rethinking as to whether to proceed at all. One may not be aware of this situation until already involved in the litigation process.

C. Damages.

Liability may exist, but the foreseeable damage model may not warrant the cost of litigation. Not every instance of abuse or neglect will result in sufficient damages to warrant the expense involved. The cost of prosecuting a nursing home case is expensive. Amongst other issues to be considered are:

1. Is there a wrongful death claim?

2. What interest have family members taken in their loved one?
3. Are there family problems that may reduce the damage model?

III. PARTIES TO BE SUED

In addition to suing the nursing home, other parties should be sued, including the management company, the administrator, the director of nursing, and any nurse that would be responsible (for example, if there is a claim of failure to give medication, one might sue the medication aide). In addition, quite often either there is a medical director who is on contract with the nursing home or there is a particular doctor who has been assigned the responsibility of taking care of the resident. In most cases, the family is not given an opportunity to make an independent selection of a doctor. In many instances they are automatically assigned or the family may be told that there are only two or three doctors who come to the nursing home and that they need to use one of those doctors. By suing the doctor independently, damages can be enhanced.

The medical treatment is basically the treatment of the physician. There often are communication problems wherein the doctor does not communicate with the nursing home or is not responsive to the nursing home.

IV. PROBLEMS WITH CERTAIN CAUSES OF ACTION

A. Securing Records.

There is often a delay in the family contacting an attorney. A notice letter should be given under Art. 4590i, ' 4.01(c) of the TEX. REV. CIV. STAT. [see Appendix A] which will toll the statute of limitations for 75 days. In many cases the nursing home is very resistant to making the records available and may cause a delay. At times we have had to file suit to require the production of the nursing home records so that we can determine whether or not there is a case.

The Texas Department of Human Services Regulations, ' 19.403(e)(1), requires that the nursing home produce the records for inspection within 24 hours of request and, pursuant to ' 19.403(e)(2), is required to make a copy available within 48 hours. Often the nursing home does not comply with this request, and we have to send a letter threatening to report their failure to the Texas Department of Human Services [see Appendix C and Appendix D].

Obtaining complete medical records and nursing home records of the resident in question may also be a significant problem. Sometimes there has been actual intentional destruction of some of the records which the nursing home is required by regulation to keep and produce to the resident or his representative. The Texas Supreme Court has addressed the issue of destruction (spoliation) in *Trevino, M.D. v. Ortega*, 969 S.W.2d 950 (Tex. 1998, reh. overruled).

In the majority opinion in *Trevino*, the Court expressed concern that when spoliation occurs, adequate measures must be taken to ensure that it does not improperly impair another litigant=s rights. The *Trevino* case involved the doctor=s failure to maintain the patient=s medical records as required by ' 241.103(b), TEX. HEALTH & SAFETY CODE. The Court observed that, AIt is simpler, more practical, and more logical to rectify the improper conduct within the context of the lawsuit@, noting that trial judges have broad discretion to take measures ranging from jury instructions on spoliation to sanctions. Spoliation, however, does not give rise to a separate cause of action.

The concurring opinion of Justice Baker outlined the following considerations when the issue of spoliation is raised:

Duty to Preserve Evidence.

(1) First, the Court must determine if there is a duty to preserve the evidence. In the case of nursing homes, there is a specific duty to preserve the evidence under nursing home regulations.

(2) In addition to the regulatory duty, the Court also recognized a common law duty to preserve documents, tangible items and information that are relevant to litigation or potential litigation or are reasonably calculated to lead to discovery of admissible evidence. The Court observed that a party should not be able to subvert the discovery process and the fair administration of justice simply by destroying evidence before a claim is actually filed. The common law duty arises when the parties actually anticipated litigation or a reasonable person in the party's position would have anticipated litigation.

Evidence that a Party Must Preserve. In this case, the Regulations specifically require that the following records be preserved: residents' nursing home patient records. The common law duty also requires that documents which are relevant to the potential lawsuit or reasonably likely to be requested during discovery be preserved.

Under the common law, spoliation occurs whether the documents are negligently or intentionally not preserved or are destroyed.

Remedies. The remedies for improper spoliation of evidence should be designed to remedy the harm to the opposing party resulting from the spoliation. The following principles apply:

a. The more relevant the destroyed evidence, the more harm the non-spoliating party will suffer. Deference should be given to the non-spoliating party's assertions about relevancy if intentional spoliation occurred. Absent evidence to the contrary, the trial court can find relevancy based solely on that fact.

b. If negligent spoliation has occurred, the non-spoliating party may be able to show what the typical record would contain if that removed the prejudice.

c. If the spoliating party destroys evidence and the non-spoliating party is prejudiced by the spoliation, the Court has broad discretion in choosing the appropriate sanction.

d. The *Trevino* Court specifically approved submitting a spoliation instruction presuming what the missing documents would have shown. See also, *Watson v. Brazos Electric Power Co-op, Inc.*, 918 S.W.2d 639 (Tex.App.-Waco 1996, writ denied).

e. Justice Baker suggested that, as a result of spoliation, the trial court should begin by instructing the jury that the spoliating party has either negligently or intentionally destroyed evidence and, therefore, the jury should presume that the destroyed evidence was unfavorable to the spoliating party on the particular fact. . .@. 969 S.W.2d at 960.

In *Lively v. Blackwell*, 51 S.W.3d 637 (Tex.App.-Tyler 2001), the Court refused to give a spoliation instruction under Rule 403, T.R.Ev., holding that the prejudicial effect of the evidence of spoliation outweighed the probative value of the evidence.

B. Limitations.

Nursing homes are health care providers subject to the provisions of the Medical Liability and Insurance Improvement Act, Art. 4590i, V.A.T.S.

The limitations provisions contained in § 10.01 of Art. 4590i were intended to substantially limit claims; however, they have created thorny issues for the Courts. The statute provides:

Sec. 10.01. Notwithstanding any other law, no health care liability claim may be commenced unless the action is filed within two years from the occurrence of the breach or tort or from the date the medical or health care treatment that is the subject of the claim or the hospitalization for which the claim is made is completed; provided that, minors under the age of 12 years shall have until their 14th birthday in which to file, or have filed on their behalf, the claim. Except as herein provided, this subchapter applies to all persons regardless of minority or other legal disability. [emphasis added]

Minors. The provision cutting off the right to sue at 14 years was declared unconstitutional as a violation of the open courts provision of the Texas Constitution. See, *Weiner v. Wasson*, 900 S.W.2d 316 (Tex. 1995).

Accrual of the Cause of Action. The discovery rule does not apply. The typical problem in nursing home cases is that the damage is not caused by one instance of negligence, but by a number of incidents B ten falls, multiple hospitalizations for infected pressure sores, along with poor nutrition and hydration. In those cases, what is the meaning of the language, Atwo years from the occurrence. . .or from the date of the medical health care treatment. . .or the hospitalization. . .is completed@? The Courts appear to agree that a plaintiff cannot just choose the date from the various options. It is the nature of the claim which determines whether the date of accrual of the cause of action is a specific date (of surgery, for instance) or the last day of treatment in the nursing home. The Texas Supreme Court=s decision in *Shah v. Moss*, 67 S.W.3d 836 (Tex. 2001), reflects these difficulties. The Court stated that, if the physician committed the tort on a certain date, limitations runs from that date. The *Shah* case involved eye surgery requiring specific follow-up visits. The claim in the case was for both negligent surgery and negligent follow-up treatment. Ultimately, the majority held that limitations on the claim of negligent surgery began to run on the date of surgery. Otherwise, limitations would run from the last date of the follow-up treatment.

The majority did recognize that fraudulent concealment could toll the statute.

As with the previous limitations statute, the Courts have held that ' 10.01 of the Medical Liability and Insurance Improvement Act establishes an absolute two-year statute of limitations for medical malpractice claims, regardless of when the injured party learns of his injuries. They have also held that the statute controls, regardless of unsound mind or other disability. See, *Diaz v. Westphal*, 941 S.W.2d 96, 98 (Tex. 1997); *Morrison v. Chan*, 699 S.W.2d 205, 208 (Tex. 1985); *West v. Moore*, 2002 W.L. 122147 (Tex.App.-Houston [14th Dist.] 2002); *Simmons v. Healthcare Centers of Texas, Inc.*, 55 S.W.3d 674 (Tex.App.-Texarkana 2001, no writ).

C. Expert Reports.

Under Art. 4590i, ' 13.01, V.A.T.S., it is required that, in a medical malpractice case, the plaintiff produce an expert report within 180 days of filing suit. When the injury is caused by a nursing care problem rather than a physician care problem, the question of whether a registered nurse is competent to provide the report has been a concern.

The requirement of the expert reports poses a special problem in nursing home cases as the patient may be still trying to obtain copies of complete nursing home records.

Recently, in an unreported decision, *Fisher v. Tenet Hospitals*, 2002 W.L. 59349 (Tex.App.-Dallas, Jan. 17, 2002), the Court held that a registered nurse could qualify as an expert in meeting this requirement when the negligence in question was not that of a physician.

See Appendix F (report of a doctor), Appendix G (report of a nurse) and Appendix H (report of an administrator expert).

D. Other Negligence Issues.

Common problems presented in nursing homes include patients wandering off and patients wandering into other patients' rooms, sometimes harming the other patients. In *Sisters of Charity of the Incarnate Word, Houston, Texas, d/b/a St. Joseph Hospital v. Gobert*, 1997 W.L. 746032 (Houston [1st Dist.], Nov. 26, 1997), the case was treated as a simple negligence case rather than a medical malpractice case. The Court held that the hospital had the duty to exercise reasonable care to safeguard its patients from either known or reasonably known danger.

Restraints or failure to apply restraints may give rise to tort liability, but unless there is a specific prescription and order for restraints, restraints may not be used. In addition, there must be family consent to the usage of restraints.

V. CAUSES OF ACTION AND REMEDIES

- A. Negligence.
- B. Negligence *per se*.
- C. Wrongful death.
- D. Intentional tort.
- E. Negligent hiring and supervision.
- F. Abuse of the elderly (Penal Code provision).
- G. Loss of consortium claim.
- H. Third party responsibility claim.
- I. Miscellaneous additional issues to consider.
- J. Exemplary damages.

A sample petition is attached as Appendix E.

A. Negligence.

Negligence requires:

- (1) A duty;
- (2) Violation of that duty;
- (3) Proximate cause; and
- (4) Damages.

Proximate Cause. Proximate cause has two elements: (1) cause in fact and (2) foreseeability. *Wal-Mart Stores, Inc. v. Berry*, 833 S.W.2d 587 (Tex.App.-Texarkana 1992, writ denied). The Acause in fact@ element of Aproximate cause@ means that the act or omission complained of was a Asubstantial factor@ in bringing about the injury and without which no harm would have occurred. *Doe v. Boys Club of Greater Dallas, Inc.*, 907 S.W.2d 472 (Tex. 1995); *Kramer v. Lewisville Memorial Hospital*, 858 S.W.2d 397 (Tex. 1993); *Havner v. E-Z Mart Stores, Inc.*, 825 S.W.2d 456 (Tex. 1992); *Brown v. Edwards Transfer, Inc.*, 764 S.W.2d 220 (Tex. 1988). *See also*, Restatement (Second) of Torts, ' 432 (1965). In other words, a plaintiff=s evidence must show that the defendant=s actions were a substantial factor in bringing about plaintiff=s damages.

As the Court stated in *Berry Property Management v. Bliskey*, 850 S.W.2d 644 (Tex.App.-Corpus Christi 1993, writ dism'd by agreement):

All persons who contribute to an injury are liable; the negligence of one does not excuse the negligence of another. *Poole*, 732 S.W.2d at 313 (citing *Strakos v. Gehring*, 360 S.W.2d 787, 794 (Tex. 1962)).

The Court in *Pack v. Crossroads, Inc.*, 53 S.W.3d 492 (Tex.App.-Ft. Worth 2001), specifically stated that lay evidence of proximate cause has no probative force in a medical malpractice case.

Some examples of causes held to be proximate causes or that at least created a fact issue on proximate cause are as follows:

- (1) In *City of Lancaster v. Chambers*, 883 S.W.2d 650 (Tex. 1994), the Court reversed in part the granting of a summary judgment to defendant. Plaintiff was a motorcycle passenger injured in a crash following a high speed chase of the motorcycle by police. The Court held a fact issue existed regarding if the police officer=s actions were a substantial factor in bringing about the injury.
- (2) The failure of the ambulance personnel to suction the accident victim was a proximate cause of plaintiff=s injury and death in *Townsend v. Catalina Ambulance Co., Inc.*, 857 S.W.2d 791 (Tex.App.-Corpus Christi 1993, no writ), even though they did not cause the initial accident.
- (3) The property manager=s mismanagement of the keys and information about apartments and tenants was a proximate cause of plaintiff=s injuries, even though the criminal activity of the intruder intervened in *Berry Property Management*, 850 S.W.2d 644.
- (4) Houston Lighting & Power Company=s severing of an underground gas line while drilling a hole was a proximate cause of the Entex employee=s injuries. The employee, while repairing the gas line, responded to a shout of Afire@, jumping out of the hole and hitting a utility pole as he ran through the smoke. Actually, the smoke was fog from a fogger which was inadvertently turned on. *Henry v. Houston Lighting & Power Co.*, 934 S.W.2d 748 (Tex.App.-Houston [1st Dist.] 1996, writ denied).

The Standard of Care for Negligence Claims in General. Patients are placed in nursing homes because they have physical, mental and medical problems. The standard of care is determined in light of the patient=s condition and needs, rather than as if the patient were healthy. *Convalescent Services, Inc. v. Schulz*, 921 S.W.2d 731 (Tex.App.-Houston [14th Dist.] 1996, writ denied).

B. Negligence *Per Se*.

The nursing home industry is heavily regulated by both state and federal regulations. These regulations are found in the Long Term Care Facility Requirements for Licensure and Medicaid Certification of the Texas Department of Human Services. Standards are also set for certification of nurse aides by the Texas Department of Human Services. The standards stated in these regulations vary from very vaguely stated regulations to very specific regulations. Examples:

Vague B

1. A nursing home must provide the necessary care and services to attain or maintain the highest practicable physical, mental, and psychosocial well-being, as defined by and in accordance with the comprehensive assessment and plan of care. (' 19.901, Texas Dept. of Human Services Regulations)

Specific B

2. A nursing home must ensure that:
 - (A) the resident environment remains as free of accident hazards as possible; and
 - (B) each resident receives adequate supervision and assistive devices to prevent accidents.

(' 19.901, Texas Dept. of Human Services Regulations)

3. A nursing home must ensure that a resident maintains acceptable parameters of nutritional status, such as body weight and protein levels, unless his clinical condition demonstrates that this is not possible. (' 19.901, Texas Dept. of Human Services Regulations)

Negligence *per se* is a very important cause of action in nursing home cases. The theory of negligence *per se* is based on the reasoning that the statute or regulation sets the standard of care. The unexcused violation of a legislative enactment or administrative regulation is therefore negligence in itself. *Southern Pacific Co. v. Castro*, 493 S.W.2d 491, 497 (Tex. 1973) (citing Restatement (Second) of Torts ' 288B (1965)).

Texas has consistently held that the unexcused violation of a statute, ordinance or regulation constitutes negligence as a matter of law if the statute, ordinance or regulation was designed to prevent injuries to a class of persons to which the injured party belongs. The nursing home regulations meet that criteria. See, *El Chico Corp. v. Poole*, 732 S.W.2d 306 (Tex. 1987); *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546 (Tex. 1985); *Moughon v. Wolf*, 576 S.W.2d 603 (Tex. 1978).

Texas Courts apply the law regarding negligence *per se* to statutes and regulations alike. The Texas Supreme Court in *Perry v. SN*, 973 S.W.2d 301 (Tex. 1998), Footnote 4, states:

At times, our opinions have included language suggesting that any statutory violation is automatically negligence per se. See, e.g., Southern Pac. Co. v. Castro, 493 S.W.2d 491, 497 (Tex.1973) (stating that to prove negligence per se, one must prove the unexcused violation of a penal standard). Yet these same opinions recognize the Restatement of Torts as the law of Texas on negligence per se, and the Restatement expressly states that the adoption of criminal statutes into tort law is a matter of judicial discretion: AThe correct rule is. . . : >The unexcused violation of a legislative enactment or an administrative regulation which is adopted by the court as defining the standard of conduct of the reasonable man, is negligence in itself.=@ Southern Pac., 493 S.W.2d at 497 (emphasis added) (quoting RESTATEMENT (SECOND) OF TORTS s 288B (1965)); see also RESTATEMENT (SECOND) OF TORTS s 286 (1965) (AThe court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment. . . .@) (emphasis added).

See also, *Gem Homes, Inc. v. Contreras*, 861 S.W.2d 449 (Tex.App.-El Paso 1993, writ denied).

The Texas Supreme Court in *Perry*, 973 S.W.2d 301, stated the following considerations to be used in determining if a Court should apply the negligence *per se* doctrine to a given statute or regulation:

1. If the defendant already owes a pre-existing common law duty to act as a reasonably prudent person, then adopting the statute or regulation to define the standard of care causes no great change in the law.
2. Whether the statute clearly defines the prohibited or required conduct. This is the problem with vague regulations.
3. Whether the statute would create liability without fault.
4. Whether applying negligence *per se* would impose ruinous liability disproportionate to the seriousness of the defendant=s conduct.
5. Whether injury results directly or indirectly from the violation of the statute.

Applying those facts, the Fort Worth Court of Appeals in *Pack v. Crossroads, Inc.* 53 S.W.3d 492 (Tex.App.-Ft. Worth 2001), has recently affirmed the Trial Court=s striking of the negligence *per se* claim. The Trial Court held that the regulations would not support a negligence *per se* claim because they were not penal in nature. APenal in nature@ was not stated as a requirement in *Perry v. SN*. It will be interesting to see how other Texas Courts deal with this important issue.

The negligence *per se* rule in Texas is generally stated in the following manner:

. . . *Negligence per se* is a tort concept whereby the civil courts adopt a legislatively imposed standard of conduct as defining the conduct of a reasonably prudent person. The unexcused violation of a statute constitutes negligence as a matter of law if the statute was designed to prevent injury to the class of persons to which the injured party belongs. *El Chico Corp. v. Poole*, 732 S.W.2d 306, 312 (Tex.1987); *Missouri Pac. R. Co. v. American Stateman*, 552 S.W.2d 99, 102-03 (Tex. 1977).

Drennan v. Community Health Inv. Corp., 905 S.W.2d 811, 825 (Tex.App.-Amarillo 1995, writ denied); *Golden Spread Council, Inc. No. 562 of Boy Scouts of America v. Akins*, 926 S.W.2d 287 (Tex. 1996). The only exception may be a regulation which sets a standard in such vague terms that it cannot be used in that manner.

There is no question that ' ' 242.001, *et seq.*, TEX. HEALTH & SAFETY CODE, and the regulations adopted under that act define the standard of care for nursing homes and that nursing home residents are the very persons the statutes and regulations are designed to protect, although no Court other than the Court in *Pack*, 53 S.W.3d 492, has specifically addressed that issue to date. The fact that the state in ' ' 242.001, *et seq.*, and the regulations under it, establish a standard of care or conduct could not be clearer. The intent of the Legislature in passing these statutes is expressly stated in ' 242.001, TEX. HEALTH & SAFETY CODE.

Under the longstanding test for application of the negligence *per se* doctrine, violation of the regulations issued under ' ' 242.001, *et seq.*, should form the basis for a negligence *per se* cause of action if they are sufficiently specific: (1) the statutes and regulations state a standard of conduct, (2) the statutes and regulations were designed to protect nursing home residents.

Under Texas case law regarding negligence *per se*, if a Court has not previously specifically recognized that the specific statute and regulation form the basis for *per se* negligence, then the Court must determine as a judicial question whether a negligence action can be found upon a violation of a statutory duty. *See, El Chico*, 732 S.W.2d 306, 312; *Nixon*, 690 S.W.2d 546, 549.

Nursing homes certainly have notice of the statutes contained in ' ' 242.001, *et seq.*, TEX. HEALTH & SAFETY CODE, and the regulations issued under those provisions. Many statutes and regulations are not obscure, but set specific standards. The regulations are not minor as they involve people=s lives.

Recognizing that the statute and regulations in question set the standard of care for nursing homes is consistent with the statutory intent stated above and is consistent with Texas case law. *See also, Southern Pacific Co. v. Castro*, 493 S.W.2d 491 (Tex. 1973); *Knighten v. Louisiana Pacific Corp.*, 946 S.W.2d 638 (Tex.App.-Beaumont 1997, rev. denied).

C. Wrongful Death.

Wrongful death claims are controlled by ' ' 71.001, *et seq.*, TEX. CIV. PRAC. & REM. CODE. Wrongful death claims should be made in a large percentage of nursing home cases. However, the availability of wrongful death claims is limited to the spouse, children and parents of the deceased.

The cause of death must be the misconduct of the defendant. In many nursing home cases, statements of the cause of death are indicated on the medical or other records.

Because of the importance of this cause of action in nursing home cases, attorneys need to clarify their thinking about wrongful death claims to properly evaluate a case.

Although causes of action for negligence, etc. seek damages for the injury to the decedent, wrongful death cases involve a claim for the injury to the loved one which results from the death, such as loss of consortium, loss of services, loss of support, etc.

The claim for wrongful death is a purely statutory claim available to only the spouse, children and parents of the deceased.

Often grandchildren and others are directly involved in the care of the deceased. Wrongful death is not a claim that can be made by these individuals. In such cases, if they were present when maltreatment or injury occurred, they may be able to make a claim as a bystander.

D. Intentional Tort.

There may be intentional tort actions brought against a nursing home, such as rape, other sexual assault, fraud, assault and battery. The intentional tort may be committed by a stranger, an employee of the nursing home or by another resident. The nursing home is responsible for employees pursuant to *respondeat superior*. Suing the actual perpetrator and their administrator, director of nursing and medical director may be warranted. The doctor who treated the resident may also be responsible.

E. Negligent Hiring and Supervision.

An ongoing problem in nursing home cases is that, despite specified regulations to the contrary, nursing homes remain understaffed as to all employees and particularly understaffed in the more expensive positions, such as Registered Nurses and LVN=s. Nurse aides with poor salaries, too little training and little experience provide almost all of the care.

Therefore, negligent hiring and supervision of personnel is an ongoing problem. An example of this type of claim in a hospital is found in *St. Paul Medical Center v. Cucil*, 842, S.W.2d 808 (Tex.App.-Dallas 1992, no writ).

The suit was against a hospital and others regarding damages to a baby because delivery by caesarean section was delayed. The jury found that the hospital was negligent in assigning the nurse to labor and delivery on the night shift when it knew or should have known that the nurse was not qualified to perform the tasks required. In addition, previous evaluations of the nurse, three and one-half months before the birth, rated the nurse as an unsatisfactory employee. The nurse sometimes fell asleep while on duty and she had trouble using EFM. She was reluctant to seek guidance from her supervisor concerning maternal-child care and problems in labor and delivery.

In *Wilson N. Jones Memorial Hospital v. Davis*, 553 S.W.2d 180, 183 (Tex.Civ.App.-Waco 1997, writ ref=d, n.r.e.), a jury found the hospital to be reckless in hiring a certain orderly and awarded exemplary damages. The act of negligence was attempting to remove a Foley catheter from the plaintiff. The Court stated:

Had the Defendant Hospital followed this procedure [checking his references and investigating his work background] and made the reference check with the Navy, they would have learned that [the employee] had been expelled from the Navy Medical Corps School after only one month=s training, that he had a serious drug problem, and a criminal record.

In other words, if the employer hired an incompetent and reckless employee without proper investigation or assigned the employee for tasks for which he was not qualified, and the negligence of that employee in furtherance of the employee=s duties causes injury to another, then the employer can be found negligent in hiring or assigning the employee. *See also, Wilson v. Jones Memorial Hospital*, 553 S.W.2d 180, 183; and *Airington=s Estate v. Fields*, 578 S.W.2d 173, 178 (Tex.App.-Tyler 1979, writ ref=d, n.r.e.), where an armed guard=s prior criminal record was admitted as evidence that the employer failed to exercise reasonable care in employing the guard.

Failure to obtain a criminal history record of any applicant for employment that has direct contact with a resident may result in a finding of negligence. A nursing home can obtain from the Department of Public Safety a criminal history record of any applicant for employment that has direct contact with a consumer in a

nursing home. TEX. HEALTH & SAFETY CODE ' 250.001-002. If an applicant has been convicted of one of the following offenses, the facility may not employ such person in a position with direct contact with a patient, unless the registry of nurse aides indicates that the applicant is not designated as having a finding entered into the registry concerning abuse, neglect or mistreatment:

- Criminal homicide
- Kidnapping and false imprisonment
- Indecency with a child
- Agreement to abduct from custody
- Sale or purchase of a child
- Arson
- Robbery
- Aggravated robbery

If an applicant or employee is determined to be ineligible for the position, the facility must notify the applicant or employee. The Department of Public Safety must permit the applicant or employee to be heard with respect to any inaccuracies in the criminal history record information. TEX. HEALTH & SAFETY CODE ' 250.005-006. Criminal history records are for the exclusive use of the facility and the employee or applicant and are considered privileged information. The criminal records and reports may not be released to anyone else absent court order or consent of the applicant or employee. TEX. HEALTH & SAFETY CODE ' 250.007-008. If a facility makes a good faith effort to comply with the criminal history checks of nurse aides, the facility is not liable for failure to comply. TEX. HEALTH & SAFETY CODE ' 250.009(a).

F. Abuse of the Elderly (Penal Code Provision).

A nursing home assumes the care, custody and control of the resident who is an elderly person. The nursing home assumes responsibility for protection, food, shelter and medical care of the resident. The nursing home violates TEXAS PENAL CODE ' 22.04 if, by omission, the nursing home intentionally, recklessly, or negligently causes bodily injury to the resident. Section 22.04 bases liability, among other things, on the fact that the nursing home assumed the care of the resident. It provides:

(a) A person commits an offense if he intentionally, knowingly, recklessly, or with criminal negligence, by act or intentionally, knowingly, or recklessly by omission, causes to a child, elderly individual, or disabled individual:

- (1) serious bodily injury;*
- (2) serious mental deficiency, impairment, or injury; or*
- (3) bodily injury.*

(b) An omission that causes a condition described by Subsections (a)(1) through (a)(3) is conduct constituting an offense under this section if:

- (1) the actor has a legal or statutory duty to act; or*
- (2) the actor has assumed care, custody, or control of a child, elderly individual, or disabled individual.*

(c) In this section:

- (1) AChild@ means a person 14 years of age or younger.*
- (2) AElderly individual@ means a person 65 years of age or older.*
- (3) ADisabled individual@ means a person older than 14 years of age who by reason of age or physical or mental disease, defect, or injury is substantially unable to protect himself from harm or to provide food, shelter, or medical care for himself.*

(d) *The actor has assumed care, custody, or control if he has by act, words, or course of conduct acted so as to cause a reasonable person to conclude that he has accepted responsibility for protection, food, shelter, and medical care for a child, elderly individual, or disabled individual.*

G. Loss of Consortium Claim.

A loss of consortium claim can be made for the damages of the spouse or child caused by the condition of the patient and abuse of the patient. The elements of damages include loss of companionship and society, and mental anguish, past and future.

H. Third Party Responsibility Claim.

Liability of a nursing home occurs quite often because of acts of a third party when the nursing home fails to protect residents or patients from other residents and others. A resident may be injured, assaulted or sexually assaulted by another resident.

In a recent unreported case, *Healthcare Centers of Texas, Inc., d/b/a The LaPorte Healthcare Center vs Virginia Martine Rigby, Individually and as Administratrix of the Estate of Jewell Underwood, Deceased*, 2002 W.L. 369960 (Tex.App.-Houston [14th Dist.] March 7, 2002), the Court of Appeals held that the award of exemplary damages against the defendant was barred because of the criminal conduct of the perpetrator. The case involved a resident who was sexually assaulted by a male resident in the La Porte nursing home. The jury had awarded \$2.5 million in actual damages and \$50 million in punitive damages against the nursing home.

While in another nursing home owned by the defendant, the offending resident had been observed behaving in a sexually inappropriate manner that was considered *Avery dangerous*. The nursing home determined that he needed to be placed in a more secure facility. After he was committed to a psychiatric unit at San Jacinto Hospital and subsequently released, the La Porte nursing home accepted him as a resident. The Court of Appeals held that exemplary damages could not be awarded against the nursing home because of the criminal act of the patient. The Court applied ' 41.005, TEX. CIV. PRAC. & REM. CODE, which specifically limits the instances in which exemplary damages could be awarded. The Court reasoned that, since the defendant corporation could not be held criminally responsible, it could also not be held liable for exemplary damages.

The Court also held that a bystander could not recover exemplary damages for medical malpractice following the Texas Supreme Court decision in *Edinburg Hospital Authority v. Trevino*, 941 S.W.2d 76, 81 (Tex. 1997).

I. Exemplary Damages.

As part of the Tort Reform Act of 1995, the Texas Legislature changed the standard for recovery of exemplary damages. *See*, ' 41.003, TEX. CIV. PRAC. & REM. CODE.

...exemplary damages may be awarded only if the claimant proves by clear and convincing evidence that the harm with respect to which the claimant seeks recovery of exemplary damages results from:

(1) *fraud;*

(2) *malice; or*

(3) *wilful act or omission or gross neglect in wrongful death actions brought by or on behalf of a surviving spouse or heirs of the decedent=s body. . . In such cases, the definition of *A*gross neglect@ in the instruction submitted to the jury shall be the definition stated in Section 41.001(7)(B).*

Section 41.007(7)(B) defines *A*gross neglect@ as an act

(i) *which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and*

(ii) *of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.*

Section 41.005 further limits exemplary damages in actions arising from harm resulting from an assault, theft, or other criminal act. A court may not award exemplary damages against a defendant because of the criminal act of another.

That exemption does not apply if:

- (1) the criminal act was committed by an employee of the defendant;
- (2) the defendant is criminally responsible as a party to the criminal act under the provisions of Chapter 7, Penal Code;
- (3) the criminal act occurred at a location where, at the time of the criminal act, the defendant was maintaining a common nuisance; or
- (4) the criminal act resulted from the defendant's intentional or knowing violation of a statutory duty under Subchapter D, Chapter 92, Property Code.

The employer is liable for exemplary damages because of an act of an employee if:

- (1) the principal authorized the doing and the manner of the act;
- (2) the agent was unfit and the principal acted with malice in employing or retaining him;
- (3) the agent was employed in a managerial capacity and was acting in the scope of employment; or
- (4) the employer or a manager of the employer ratified or approved the act.

J. Liability to Third Parties.

In *Golden Villa Nursing Homes v. Smith*, 674 S.W.2d 343 (Tex.App.-Houston [14th Dist.] 1984, writ ref=d, n.r.e.), a nursing home was held liable in tort to a third party because a nursing home resident who suffered from senility and was known to wander was not closely supervised and was left unattended. While unsupervised, the resident wandered onto a highway and was struck by a motorcycle. The driver of the motorcycle was injured and sued the nursing home, alleging her injuries were caused by failure of the nursing home to provide proper care and supervision. It was found that the nursing home did owe a duty to the third party.

K. Miscellaneous Additional Issues to Consider.

There may be rare cases where there may be a claim for breach of contract, Deceptive Trade Practices Act violations, premises liability, unjust enrichment, or violation of the Texas Finance Code. Experience has shown that these claims are usually not applicable or involve such barriers that they are really not worth the time expended. *See*, Art. 4590i, ' 12.01(a), TEX. STAT. ANN.

VI. ENHANCEMENT OF THE CASE

It is important to have an expert review the records as early as possible. If we are alleging substandard care by a nursing home, we find most often that a nurse who is familiar with the nursing home regulations, both state and federal, affords us the guidance on those violations. If we are alleging negligence of the doctor or the nursing home as far as medical care is concerned, it is essential to have a medical expert in this regard.

There are regulations and standards that are established by federal statute, as well as federal and state regulations. *See*, Omnibus Budget Reconciliation Act (OBRA) Code; *Golden Villa Nursing Home, Inc. v. Smith*, 674 S.W.2d at 348. [See Appendix D and Appendix E.]

VII. CHECKLIST FOR NURSING HOME CASES

A. Clinical Records from the Nursing Home.

The Texas Department of Human Services Regulations, Section 19.403(e)(1) provides for access to all records pertaining to the resident, including clinical records, within 24 hours of the request. Section 19.403(e)(2) provides that, after receipt of records for inspection, photocopies may be purchased of all or any portion of the records upon request and two work days= advance notice to the facility. The request for records should include all administrative records, medical treatment records, incident reports, business and accounting records, and other records, as well as any contract and billings between the resident (or resident representative) and the nursing home. A form letter is attached [see Appendix F].

B. Photographs and Video of Resident and Conditions.

A picture is worth a thousand words, whether it depicts a dirty room or a wound or injury. Bruises, bedsores and other examples of poor care should be photographed immediately.

C. Names and Telephone Numbers of Employees Who are No Longer Employed at the Home.

These ex-employees frequently are upset and willing to talk. They can be an invaluable source of information.

D. Names and Telephone Numbers of Helpful Nurse Aides, Nurses.

Nurse aides and nurses frequently befriend family members who show concern for the well-being of loved ones.

E. Report to TDHS.

The family should notify the Texas Department of Human Services, both orally and in writing, of their complaints about the nursing home.

F. Autopsy.

The family of a nursing home resident who is suspected of having died from neglect or abuse should be encouraged to request an autopsy or have a private autopsy performed.

G. Records of EMS or Ambulance.

The records of the EMS or ambulance service quite often give valuable information about the condition of the resident. In addition, EMS and ambulance attendants may have excellent information about the resident transported to the hospital, as well as the nursing home.

H. Hospital Records.

The condition of the resident upon admission to the hospital is another valuable source of information.

I. Records from the Succeeding Nursing Home.

If the resident is transferred to another nursing home, records of condition upon admission to the nursing home can offer excellent information as to the condition of the resident upon arrival.

J. Funeral Home.

It may be beneficial to have the funeral home photograph the body.

K. Contact a Lawyer who Litigates Nursing Home Cases.

It would be very helpful if a lawyer who litigates nursing home cases is contacted as early as possible. Quite often the family delays making such contact, and many valuable opportunities for discovery and enhancing the case are lost.

VIII. WEBSITES FOR INFORMATION

You can check various websites for information about nursing homes and whether they have been cited. These websites include www.medicare.gov, www.healthgrades.com, www.carescout.com, www.usa2k.org and www.memberofthefamily.net.

IX. SPECIAL ISSUES IN NURSING HOME CASES

A. Introduction of TDHS Survey Reports.

Survey reports of the Texas Department of Human Services (ATDHS@) are required as well as periodic inspection reports, deficiency reports, sheets and summaries, and nursing home plans of correction. Nursing homes have consistently resisted the introduction of these reports.

The Texas Supreme Court has recently held in *Horizon/CMS Health Care Corp. v. Auld*, 34 S.W.3d 887 (Tex. 2000), that the reports are discoverable. The reports are not admissible if offered to prove that the nursing home committed a violation. However, the reports may be offered to establish warnings or notice to the institution of a relevant finding and deficiency. (In *Auld*, the nursing home opened the door to the admissibility of the reports by its own questions.) See also, *In re Peck*, 996 S.W.2d 4 (Tex.App.-Ft. Worth 1999, orig. proceeding), where the Court also held that taking the deposition of the state surveyor was permissible. However, the Court in *Pack*, 53 S.W.3d 492, held that the reports were not admissible, applying Rule 403, T.R.Ev. The prejudicial effect outweighed the probative value.

X. LIMITS ON RECOVERY

The most significant recent decision involving nursing homes is *Horizon/CMS Health Care Corp. v. Auld*, 34 S.W.3d 887 (Tex. 2000). The jury in that decision had awarded \$2.371 million in actual damages and \$90 million in punitive damages. The Trial Court reduced those awards to \$1,541,203.13 as actual damages and \$9,483,766.92 in punitive damages, applying the damages caps of Art. 4590i, V.A.T.S., ' 11.01.2 - ' 11.05, and the punitive damage limits of ' 41.007, TEX. CIV. PRAC. & REM. CODE. The nursing home appealed, asserting that punitive damages and pre-judgment interest were included in the statutory cap of Acivil liability for damages@.¹

The Supreme Court held that punitive damages are not included in the Medical Liability and Insurance Improvement Act cap, but are subject to the Civil Practice & Remedies Code cap. Pre-judgment interest is subject to the Medical Liability and Insurance Improvement Act statutory cap. The damages cap of the Medical Liability and Insurance Improvement Act were held constitutional.

¹Art. 4590i, ' 11.02 limits civil liability for damages Ato \$500,000/provider + consumer price index adjustment@.

ENDNOTES

Section 242.001, Texas Health & Safety Code, states in part:

• **242.001. Scope, Purpose, and Implementation.**

(a) *It is the goal of this chapter to ensure that institutions in this state deliver the highest possible quality of care. This chapter, and the rules and standards adopted under this chapter, establish minimum acceptable levels of care. A violation of a minimum acceptable level of care established under this chapter or a rule or standard adopted under this chapter is forbidden by law. Each institution licensed under this chapter shall, at a minimum, provide quality care in accordance with this chapter and the rules and standards. Components of quality of care addressed by these rules and standards include: . . . [emphasis added]*

The statutory provision authorizing promulgation of regulations also reflected the legislative intent that the regulations establish standards of care for nursing homes in their care of residents.

The current statute provides:

• **242.403. Standards for Quality of Life and Quality of Care**

(a) *The department shall adopt standards to implement Sections 242.401 and 242.402. Those standards must, at a minimum, address:*

- (1) *admission of residents;*
- (2) *care of residents younger than 18 years of age;*
- (3) *an initial assessment and comprehensive plan of care for residents;*
- (4) *transfer or discharge of residents;*
- (5) *clinical records;*
- (6) *infection control at the institution;*
- (7) *rehabilitative services;*
- (8) *food services;*
- (9) *nutrition services provided by a director of food services who is licensed by the Texas State Board of Examiners of Dietitians or, if not so licensed, who is in scheduled consultation with a person who is so licensed as frequently and for such time as the department shall determine necessary to assure each resident a diet that meets the daily nutritional and special dietary needs of each resident;*
- (10) *social services and activities;*
- (11) *prevention of pressure sores;*
- (12) *bladder and bowel retraining programs for residents;*
- (13) *prevention of complications from nasogastric or gastrostomy tube feedings;*
- (14) *relocation of residents within an institution;*
- (15) *postmortem procedures; and*

(16) appropriate use of chemical and physical restraints.

(b) The department may adopt standards in addition to those required by Subsection (a) to implement Sections 242.401 and 242.402. [emphasis added]