

# Keeping the Elderly Safe

By Lara Johnson

William James' died at a local nursing home after months of substandard care and physical and emotional abuse by one of his caretakers. No one deserved the treatment he received.

William James had been a teacher. He taught social studies and history at a local high school and junior high. By all accounts, he was a good man. Photographs of him show a grandfather gently holding his granddaughter's doll, a father leading his stepdaughter down the aisle in the dress he had made for her and a man posing proudly on the day he was made a deacon in his church.

After James retired, he started to have difficulty remembering things and became agitated, even violent. His family decided to place him in a local nursing home where they felt they could trust the staff and management. Some of the caregivers were exceptional. They knew about his schoolteacher past so they told him to keep an eye out on "the class" (the assembled residents) and to hand out reading materials. Other caregivers were not as skilled and one, a Certified Nursing Assistant (CNA) assigned to him, was violent.

James began to sustain multiple injuries—bruises, skin tears, skin breakdowns, fractured vertebrae and a broken hip. Witnesses saw a CNA pushing and hitting James (and others). These witnesses reported some incidents to the management of the facility. Nothing was done. The CNA continued to provide direct "care." Oregon Senior and Disabled Services was not notified about this CNA.

After James was diagnosed with a broken back and probable hip fracture, his condition deteriorated. No physical therapy was provided. No orthopedist came to examine him. No one told the family about the fractures. He was simply medicated. The last month of his life the facility's records document day after day of moans, grimaces and pain. James died 15 months after being admitted into the facility of complications from a bleeding ulcer.

One of the first calls we received from one of the defense lawyers was related to their evaluation of the case. The lawyer compared this case to a modest motor vehicle collision and said the injuries were not that serious.

The traditional view of nursing home cases is that they have modest value—the nursing home resident has a very limited life expectancy, already has

a reduced quality of life and has little or no economic loss resulting from the injury. There may also be difficulty separating out the new injury from the medical conditions already suffered by the resident.

Juries around the country, however, have been returning substantial verdicts against nursing homes. The general aging of the American population is one reason for this trend. More Americans have loved ones in nursing homes and will some day live in a facility themselves. Nearly half of all Americans will become residents of nursing homes at one point in their lives. Another reason is that nursing home cases are not traditional tort cases. Nursing home residents are generally extremely vulnerable. They rely on others to care for their basic needs. The nursing home then fails to provide the basic care it has promised the resident.<sup>2</sup> The failure to provide for basic needs is about human dignity—it is about William James, our parents and our grandparents. That is what can outrage a jury.

## Breach of Contract

Aside from the standard common-law negligence claims against the facility, it is possible to assert a variety of other claims in a nursing home case. A

facility should have a signed admission agreement on file for each resident along with proof of payments received by or on behalf of the resident. The admission agreement may contain promises about the type and quality of services that the nursing home has agreed to provide in exchange for a monthly fee. To maximize recovery, evidence of the facility's breach should be continuous from the date of admission.

#### A Survival Action Under ORS 30.075

ORS 30.075(1) provides:

Causes of action arising out of injuries to a person, caused by the wrongful act or omission of another, shall not abate upon the death of the injured person, and the personal representative of the decedent may maintain an action against the wrongdoer, if the decedent might have maintained an action, had the decedent lived, against the same act or omission. The action shall be commenced within the limitations established in ORS 12.110 by the injured person and continued by the personal representatives under this section, or within three years by the personal representative if not commenced prior to death.

The prevailing party on a claim may be awarded attorney fees. ORS 30.075(2)

#### Negligence Per Se

Most injury claims for nursing home residents relate to a breach of statutory or regulatory requirements. Oregon law recognizes that when the Legislature, or an agency delegated by the Legislature, enacts rules governing conduct and when the rule is intended to protect a certain class of person from harm, the rule establishes the standard of care. Noncompliance with the rule is negligence as a matter of law. *Shahtout v.*

*Emco Garbage Co.*, 298 Or. 598, 601 (1985). A defendant may avoid liability for violating such a rule only if it can be proved that he or she acted reasonably in doing so. *Barnum v. Williams*, 264 Or. 71, 78-9 (1972).

The Nursing Home Reform Act of 1987, 42 USC § 1819 *et seq.* and 42 CFR § 483.1 *et seq.* The Nursing Home Reform Act of 1987 (also referred to as the Omnibus Budget Reconciliation Act of 1987, or OBRA) and related regulations address the minimum requirements for care provided at nursing homes that participate in the Medicare and/or Medicaid programs. To obtain federal payments, participating nursing homes must meet the statutory and regulatory requirements. These requirements are the same for Medicare/Medicaid and private-pay residents.

The Act defines a nursing home's obligations broadly: "A nursing facility must care for its residents in such a manner and in such an environment as will promote maintenance or enhancement of the quality of life of each resident." The statute requires nursing homes to "provide services and activities to attain or maintain the highest practical physical, mental and psychosocial well-being of each resident."

The provisions of the Nursing Home Reform Act and its corresponding regulations relate to resident assessment, individualized care planning, staffing standards, physician oversight, provision of care, services, quality of life and investigations of injuries and/or abuse.

ORS Chapter 441 and OAR 411-085-0005 *et seq.* Oregon law requires the licensing of all nursing homes in Oregon. ORS 441.055(2) gives rule-making authority to Oregon's Health Division and Senior and Disabled Services to adopt rules regarding standards of patient care and safety, standards of staff certification and training in the nursing homes.

These rules deserve careful study because they can assist in drafting pleadings and discovery requests and in preparing for depositions. For example, OAR 411-085-0005 *et seq.*:

These regulations:

- Set out the license requirements for a nursing home, including proof of financial responsibility.
- Provide that the facility must adopt written policies in numerous areas, including nursing services, clinical record keeping, accident reporting and prevention, abuse reporting and employee orientation. These policies are to be reviewed annually by a Quality Assessment and Assurance Committee. The Committee must conduct an annual review that includes an audit of a sample resident population and review of clinical

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records and care plans. Written records of these meetings are to be maintained.

- Set out the nursing home resident's Bill of Rights, including freedom from retaliation for making a complaint and the right to photocopies of records pertaining to the resident.
- Set out the nursing home's obligations regarding resident abuse. All physical injury of unknown cause shall be reported to Senior & Disabled Services Division as suspected abuse, unless an immediate facility investigation reasonably concludes the physical injury is not the result of abuse. Abuse is defined in ORS 441.630 to include nonaccidental physical injury, failure to provide basic care, unwanted sexual contact, verbal or mental abuse, corporal punishment and involuntary seclusion for discipline or convenience.

OAR 411-086-0010 *et seq.* These regulations:

- Set out the responsibilities of the facility's administration, including the Nursing Home Administrator, the Director of Nursing Services and the Resident Care Manager.
- Provide that a facility shall not admit a resident whose care needs cannot be met.
- Provide that a comprehensive care plan is to be developed for each resident within 14 days of admission and details the necessary elements of that care plan.
- Set out minimum staffing requirements. (In the case of CNAs, the ratio of 1 CNA per 10 residents on day shift, 1 CNA per 15 residents on evening shift, and 1 CNA per 25 residents on night shift.)

Set out nursing standards of care by reference to the Oregon Nurse Practice Act.

- List medical conditions to be prevented and reasonable measures to prevent the development of those conditions. "All preventative measures taken by the facility staff shall be clearly documented. Such documentation shall include assessment of resident(s) at risk, preventative measures taken, results and evaluation of measures taken and revisions of measures as appropriate." OAR 411-86-140(4).

OAR 411-089-010 *et seq.* These regulations:

- Set out how complaints are investigated, what is involved in a nursing home inspection, when penalties are assessed for regulatory violations, and what rights a facility has to contest the penalties.

#### Statutory Claim for Abuse of Elderly, ORS 124.100 (Elder Abuse Act)

ORS 124.100 allows an elderly or incapacitated person or that person's guardian *ad litem* or guardian to bring a civil action for damages arising from physical abuse or fiduciary abuse. The claim may be brought against the person directly responsible for the physical or fiduciary abuse and any person who permitted the abuse to occur. Businesses, such as nursing homes and financial institutions, are exempt from coverage absent criminal convictions for abuse.

Physical abuse is defined in ORS 124.105 to include (1) conduct that would constitute assault, menacing, reckless endangerment, criminal mistreatment, rape, sodomy, unlawful sexual penetration and sexual abuse as defined in the criminal statutes; (2) the use of unreasonable physical constraint or the prolonged or continued deprivation of food and (3) the use of a physical or chemical restraint or psychotropic medication without a physician's order under certain circumstances.

A plaintiff who prevails on an ORS 124.100 claim is entitled to economic

damages, noneconomic damages, reasonable attorney fees and guardian *ad litem* or conservator fees related to the litigation.

#### Noneconomic Damages

The conventional wisdom is that juries will not award large noneconomic damages to an elderly claimant who does not see the direct benefit of the money and who is unable to testify. However, a survey of jury verdicts and focus groups suggests that juries are awarding larger verdicts. Jury Verdict Research, for example, reported that the mean verdict award for nursing home negligence doubled between 1987 and 1994.

There are several suggestions for evaluating noneconomic damages. First, consider whether the physical injury speaks for itself. Look at the chart notes. Often, nurses will record grimaces, moans and other indications of pain experienced by the resident. They may also record diminished appetite or reduced function.

Expert witnesses can assist the case. A physician can speak about the injuries and the pain limitations associated with those injuries. An expert witness can testify that dementia does not reduce pain sensation, but probably increases the pain and mental anguish. A resident only knows that he or she is in pain but does not know why the pain exists, if it is going to stop or what to do to make it stop. The patient is trapped in the moment, unable to do anything about it.

Directly respond to the defense argument that the resident's injury is less serious than a similar injury to a younger person. An older person may have more difficulty healing and more pain associated with a similar injury. If the resident is not active, he or she does not have activities to distract from the pain. And finally, individual days may be more precious to a person with a limited number of days to live. The fact

that those days are filled with pain is more of a hardship.

And don't forget that the jury's attention should be directed to the type of care that the resident had the right to expect and demand, and compare this to the "care" that they actually received.

Nursing home cases, of course, can involve difficult issues similar to other cases: discovery battle, liens and other post-settlement matters, and problems with clients or clients' representatives. Almost without exception, the person prosecuting the claim is not the injured party but a family member of an extremely disabled person.

There are numerous resources available to an attorney prosecuting these cases. ATLA has a nursing home litigation group and there are several public interest groups that provide information on nursing home care.

Nursing home cases can also be

extremely rewarding. Private litigation holds out the possibility of improving nursing home care and reducing negligent care. At this time and place, it is necessary work.

1 In deference to his family, the pseudonym William James has been used.

2 A 2001 House Committee found that one in three U.S. nursing homes had been cited for abuse over a two-year period. "Government Report Finds Unconscionable Abuses of Nursing Home Residents," *Trial*, October 2001. A U.S. Government Accounting Office study concluded that more than half of the suspicious deaths studied in Californian nursing

homes were probably due to neglect, including malnutrition and dehydration and that nearly 1 in 3 nursing homes had been cited by state inspectors for "serious or potentially life-threatening care problems." Thompson, "Shining a Light on Abuse," *Time*, August 3, 1998.

3 Belsenthal, "Jury Awards Rise for Improper Care of Elderly," *Wall Street Journal*, September 5, 1995, p. B1