NURSING HOME LITIGATION: CASE SELECTION AND LITIGATION ISSUES-A WEBINAR

Alexis Aloi Graziano, Esq.
Buchanan Ingersoll & Rooney PC
(Princeton)

Victoria A. Schall, Esq.
Law Offices of Adam Kotlar
(Cherry Hill)

WELD002517
Thank you for logging in. We will begin shortly.

NURSING HOME LITIGATION: CASE SELECTION AND LITIGATION ISSUES
Using The Online Classroom

1. All Attendee phone lines are muted.
2. Questions may be submitted
   - Via Chat on the right hand side of your screen.
   - Questions will be answered periodically during the presentation

Note: Attendees with dial up connections will see a slower response.
Asking Questions – Easy as 1,2,3

1. Type your question here.

2. Send

3. See your messages here.
Technical Difficulties??

If you experience technical difficulties during today’s webinar, please hit *0 and an operator will assist you.
ATTENDANCE VERIFICATION

+ PLEASE FAX OR E-MAIL YOUR ATTENDANCE VERIFICATION FORM TO NJICLE

+ FAX: 732-249-1428

+ E-MAIL: smilek@njsba.com
SEMINAR MATERIALS AND CLE FORMS

TO ACCESS SEMINAR MATERIALS, ATTENDANCE VERIFICATION AND CLE FORMS PLEASE GO TO THE LINK THAT WAS E-MAILED TO YOU TODAY.
Nursing Home Litigation: Case Selection & Litigation Issues

VICTORIA A. SCHALL, ESQ.
LAW OFFICE OF ADAM M KOTLAR

ALEXIS ALOI GRAZIANO, ESQ.
BUCHANAN INGERSOLL & ROONEY
Overview

“It was the hardest decision I ever had to make.”

- **65.7 million** informal and family caregivers provide care to someone who is ill, disabled or aged in the U.S. [Updated February 2015] National Alliance for Caregiving and AARP (2009) Caregiving in the U.S, National Alliance for Caregiving, Washington D.C.

The Misconception:

- “These cases have little to no economic damages. It is a bad case.”

- Age of Resident

- Pre-existing conditions

- Low Medical Expenses
Pre-Suit Considerations

- Medical Records
- Surveys
- Licensure File
- Cost Reports
- Former Employees
- Family
- Damages
- Liens
Case Selection: Pressure Ulcers

42 CFR 483.25

(c) **Pressure sores.** Based on the comprehensive assessment of a resident the facility must ensure that

A resident who enters the facility without pressure sores does not develop pressure sores unless the individual’s clinical condition demonstrates that they were unavoidable.

A resident having pressure sores receives necessary treatment and services to promote healing, prevent infection and prevent new sores from developing.
# Case Selection: Pressure Ulcers

## INTERDISCIPLINARY PLAN OF CARE

### RISK FOR PRESSURE ULCERS

**Resident:** [Redacted]

**Start Date:** 5/25/12

<table>
<thead>
<tr>
<th>Problem/Strength</th>
<th>Goal</th>
<th>Interventions/Approaches</th>
</tr>
</thead>
<tbody>
<tr>
<td>Risk for impaired skin integrity related to:</td>
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<tr>
<td>Inhibited mobility</td>
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<td>Inhibited continence</td>
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<td>Diminished sensation to pain and pressure</td>
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<td>Malnutrition</td>
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<tr>
<td>Chronic debilitation</td>
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<tr>
<td>Other, specify:</td>
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</tbody>
</table>

**Interventions/Approaches:**

- **Provide pressure relief cushion to wheelchair:**
  - Nsg, Rehab
- **Provide pressure relief bed mattress:**
  - Nsg
- **Turn and reposition every 2 hours:**
  - Nsg
- **Wash, rinse, dry skin after each incontinent episode:**
  - Nsg
- **Apply moisture barrier:**
  - Nsg
- **Inspect for signs of Impairment with each skin care:**
  - Nsg
- **Refer to a Podiatrist as needed:**
  - Nsg
- **Use turn sheet to avoid shearing on skin:**
  - Nsg
- **Consult Dietary:**
  - Nsg
- **Offload heels:**
  - Nsg
- **Others, specify:**
  - Nsg
- **Instruct: ADULT, SENIOR, SENIOR WITH EMED:**
  - Nsg, Diet

**Disc:**

**Review/Update Dates & Signature:**

- SKR 11/5/12
- SKR 11/5/12
Case Selection: Pressure Ulcers
Case Selection: Pressure Ulcers

CHART #2

CHART #3
Case Selection: Pressure Ulcers

CHART #2

Calmodozopine cream to sacral & groin area Q5s

CHART #3

Calmodozopine cream to sacral & groin area Q5s
Case Selection: Pressure Ulcers
Case Selection: Pressure Ulcers

CHART #2

<table>
<thead>
<tr>
<th>Date</th>
<th>Weekly Weights</th>
<th>7-3</th>
<th>110.4</th>
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<tbody>
<tr>
<td>9/26/12</td>
<td>weekly weights</td>
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CHART #3

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110.4
Case Selection: Pressure Ulcers

PAIN EVALUATION

- Grimacing/distorted face ✓
- Moaning
- Frequent Position Changes

Medication

Date: 11/12
Pressure Ulcers – Defense Perspective

Avoidable v. unavoidable
- Co-morbidities
- Prior skin breakdown
- Non-compliance

Interventions
- What is documented?
- What is done in usual course and practice?

Treatment
- Following physician’s orders
Case Selection: Elopement

- The resident is an elopement risk r/t impaired safety awareness, history of attempts to leave facility unattended.
  
  Date Initiated: 10/08/2015
  Revision on: 10/08/2015

- The resident’s safety will be maintained through the review date.
  
  Date Initiated: 10/08/2015
  Target Date: 03/05/2016

- Distract resident from wandering by offering pleasant diversions, structured activities, food, conversation, television, book. Resident prefers:
  
  Date Initiated: 10/08/2015

- Provide structured activities: toileting, walking inside and outside, reorientation strategies including signs, pictures and memory boxes.
  
  Date Initiated: 10/08/2015
Case Selection: Elopement
Elopement – Defense Perspective

- Notice
  - Prior behaviors
- “Supervision”
  - Staffing
- Facility response
  - Survey activity
Case Selection: Asphyxiation/Choking

• Accidents: The facility must ensure that –

  (1) The resident environment remains as free of accident hazards as is possible, and

  (2) Each resident receives adequate supervision and assistance devices to prevent accidents.
Case Selection: Asphyxiation/Choking, Wound Care & Medication Errors

- Assessment
- Care Plan
- Reviewed & Revised Care Plan with Changes in Resident Status
- Speech Therapy & Swallow Studies OR Outside Companies/Doctors - Communication
- Emergency Assistance
- Autopsy
- WHY???
  - Understaffing
  - Undertraining
  - Error
- Survey says!!!
Case Selection: Falls

Self care deficit, requires assistance with:
- eating
- bed mobility
- ambulation/locomotion
- transfers
- toileting
- personal hygiene

Related to:
- poor balance
- poor coordination
- muscle weakness

Related to:
- bed mobility
- ambulation/locomotion
- transfers
- toileting
- personal hygiene
- 
- other, specify:

INTERDISCIPLINARY PLAN OF CARE
ADL FUNCTIONAL/REHAB POTENTIAL

<table>
<thead>
<tr>
<th>RESIDENT</th>
<th>START DATE:</th>
<th>DISC.</th>
<th>REVIEW/UPDATE DATES &amp; SIGNATURE</th>
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Related to:
- poor balance
- poor coordination
- muscle weakness
- 
- other, specify:

Other, specify:

Inter/Intravenous administration
- 
- other, specify:

Medications
- 
- other, specify:

Laboratory & procedures
- 
- other, specify:

Surgical procedures
- 
- other, specify:

Laboratory & radiological studies
- 
- other, specify:

Pathology & Biopsy reports
- 
- other, specify:

Referral to other departments/services
- 
- other, specify:

Other, specify:

Transfer assist:
- 1 person assist

Other assistance to toilet/commode/urinal/bedpan
- 
- other, specify:

Assist with ADL needs
- 
- other, specify:

Other, specify:

Proposal transfer care of
- person assist
- 1 person manual assist
- 
- other, specify:

Final disposition
- 
- other, specify:

Signature: 

Date: 8/5/12

Provide transfer assist of
- 1 person assist

Offer assistance to toilet/commode/urinal/bedpan

Determine final location
- 
- other, specify:

Discharge
- 
- other, specify:

Signature: 

Date: 8/5/12
Case Selection Falls:
Case Selection: Falls
Case Selection: Falls

water to its right temp I heard a sound and when I turned I saw the pt leaning forward with his head resting against the edge of the wall. I pull him back in a sitting position and saw that he had a bruising by his eye.
Case Selection: Falls

(Document interventions here and on Care Plan) 

Position of patient: 30 degrees in recumbent position at all times

9/12/12
Case Selection: Falls - Damages

1. Incision and exposure
2. Burrning of skull
3. Removal of dura
4. Removal of clot and subdural hematoma
5. Dural graft created and placed
6. Graft sutured and drain placed
7. Bone flap replaced
8. Closure
Case Selection: Falls

**SYSTOLIC BLOOD PRESSURE**
- 0. NO NOTED DRUGS - between lying and standing - Score 0
- 2. DRUG LESS THAN 20 mm Hg between lying and standing - Score 2
- 4. Drop MORE THAN 20 mm Hg between lying and standing - Score 4

**HISTORY OF FALLS**
- 0. NO FALLS in past 3 months - Score 0
- 2. 1 - 2 FALLS in past 3 months - Score 2
- 4. 3 OR MORE FALLS in past 3 months - Score 4

**PREDISPOSING DISEASES**
- 0. NONE PRESENT - Score 0
- 2. 1 - 2 PRESENT - Score 2
- 4. 3 OR MORE PRESENT - Score 4

**TOTAL SCORE**
- 7

Respond based on the following predisposing conditions: Hypotension, Vertigo, CVA, Parkinson's disease, Loss of limb(s), Seizures, Arthritis, Osteoporosis, Fractures.

**LEVEL OF CONSCIOUSNESS / MENTAL STATUS**
- 0. Alert - (oriented x 3) OR COMATOSE - Score 0
- 2. DISORIENTED - Score 2
- 4. INTERMITTENT CONFUSION - Score 4

**AMBULATORY / ELIMINATION STATUS**
- 0. AMBULATORY/CONTINENT - Score 0
- 2. CHAIR BOUND - Score 2
- 4. AMBULATORY/CONTINENT - Score 4

**VISION STATUS**
- 0. ADEQUATE (with or without glasses) - Score 0
- 2. POOR (with or without glasses) - Score 2
- 4. LEGALLY BLIND - Score 4

**CAIT / BALANCE**
- 0. WALKS without assistance - Score 0
- 2. WALKS with assistance - Score 2
- 4. WALKS without assistance - Score 4

**TOTAL score of 10 or above represents HIGH RISK.**
<table>
<thead>
<tr>
<th>Focus</th>
<th>Goal</th>
<th>Interventions</th>
<th>Position</th>
<th>Fred/Rec'd</th>
</tr>
</thead>
<tbody>
<tr>
<td>• The resident is at risk for falls r/t dementia, incontinence, history of falls, psychotropic medication.</td>
<td>• The resident will be free of injury r/t falls through the review date.</td>
<td>• 2/8/16 at 10:00 pm pt. was found on the floor in her room. ER evaluation noted fracture requiring hospitalization and surgical intervention. Upon return to facility - interventions will include bed in lowest position with addition of bed against wall and mat to floor. PAD alarm to bed and w/c when OOB. ST evaluation for cognitive and treatment if recommended. Continuation of OT and PT as recommended. Room close to Nurses’ Station for increased observation. Date Initiated: 02/11/2016</td>
<td>mat</td>
<td>OT PT STO</td>
</tr>
<tr>
<td>Created by: [Redacted] (Registered Nurse)</td>
<td>Date Initiated: 02/13/2016</td>
<td>Created by: [Redacted] (Registered Nurse)</td>
<td>Created by: [Redacted]</td>
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<td>• Anticipate and meet the resident’s needs</td>
<td>• All light is within reach and encourage the resident to use it. The resident needs prompt response to all requests for</td>
<td></td>
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<td>ordered or PRN</td>
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<tr>
<td>Created by: [Redacted]</td>
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<tr>
<td>• The resident needs a safe environment with: even floors free from spills and/or clutter; adequate, glare-free light; a working and reachable call light, the bed in low position at night; Side rails as ordered, handrails on walls, personal items within reach. Date Initiated: 02/06/2016</td>
<td>• The resident needs to be evaluated for, and supplied appropriate adaptive equipment or devices as needed. Re-evaluate as needed for continued appropriateness and to ensure least restrictive device or restraint. Date Initiated: 02/06/2016</td>
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<td>NA</td>
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<td>Revision on: 02/10/2016</td>
<td>Target Date: 02/11/2016</td>
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</tbody>
</table>
Falls – Defense Perspective

- Status on admission
  - History of prior falls?
  - Ambulation
  - Level of assistance required for ADLs
  - Cognition

- Interventions
  - Care Plan (and updates for repeated falls)
Damages – Defense Perspective

Injury $\neq$ Negligence
MCLE CODE

Please record this code on your affirmation forms:

elder267
Litigation Issues: Tampering w/Records

CHART #2

CHART #3

foley cath care as a PRN
Record output

foley cath care as a PRN
Record output
Litigation Issues: Tampering with Records

### (Facility) MDS ADL Data Tracking Tool by Shift

#### Month/Year: Aug 2014

<table>
<thead>
<tr>
<th>Bed Mobility</th>
<th>Self Perform</th>
<th>Support Provided</th>
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<tbody>
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<td>N 3 D 3 E 2</td>
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Note: The data tracking tool is used to monitor and report on the activities of residents, including their mobility and transfers, to ensure compliance and transparency in care settings.
Litigation Issues: Tampering with Records
Discovery Issues:

- Production of Documents
  - Electronic Issues
  - Policies and Procedures
  - Corporate Designee Deposition
- Production of Witnesses/Employees vs. Litigation Control Group
- Privileged Information?
  - Other Residents’ Records
  - Incident Reports
Settlement and Mediation v. Trial

- Discussion by Speakers from both sides of the fence.
Thank you

Thanks to our speakers for presenting today’s program.

Please remember to sign your affirmation form and either fax or e-mail it to ICLE:

Fax: 732-249-1428

E-Mail: smilek@njsba.com
Alexis A. Graziano concentrates her practice on representation of long-term care, sub-acute rehabilitation, assisted living, home health and hospice care corporations in New Jersey and Pennsylvania. As a member of a high-volume litigation team, Alexis utilizes her own experience in collaboration with her colleagues to provide quality litigation defense services to clients.

In Alexis, clients can expect a creative, energetic advocate both in the courtroom and out in the field. Alexis connects with clients on a professional and personal level, guiding and advising them through the challenges of litigation and ensuring that clients understand the strengths and weaknesses of each case.

On a regular basis, Alexis prepares witnesses for depositions and litigation-related appearances. These witnesses come from a variety of educational and cultural background. Alexis strives to demystify the litigation process and give her witnesses the confidence to present their best self.

“Developing a meaningful connection with another human being is rooted in meeting that person where they are - both professionally and personally.”
Outside the Office
Alexis lives in Fairmount – a neighborhood in Philadelphia, PA – with her husband, Charlie. She loves music (including but certainly not limited to Bruce Springsteen), art in all its forms, running outside, OrangeTheory and hiking. Alexis was born and raised in Philadelphia and South Jersey. Having studied abroad in both Australia and Italy, Alexis loves to travel.

Proof Points
- Taken over 75 depositions
- Defended over 90 depositions, a majority of which involved extensive preparation with facility/company witnesses, and several of which involved preparation of expert witnesses
- Negotiated settlements in over 15 high-exposure matters
- Successfully enforced signed arbitration agreements in over 10 cases via both motion practice and negotiations with opposing counsel
- Secured dismissal of over 10 matters via motion practice and/or substantive discussions with opposing counsel following internal investigations

Civic & Charitable
- Philadelphia Volunteer Lawyers for the Arts – Volunteer Attorney (2010 – present)
- Villanova Law Alumni Clerkship Guidance Committee (August 2012 – August 2014)
- American Heart Association, My Heart My Life Committee Chairperson (2012-2014)
- Camden County Mock Trial Coach, Bishop Eustace Preparatory School (2011-2014)
- Cape May County Mock Trial Coach, Ocean City High School (2010-2011)
- 11th Hour Musical Theatre Company, Board of Directors (June 2016 - present, following graduation from the Arts & Business Council of Greater Philadelphia’s Business on Board program)
Victoria A. Schall focuses her practice on Nursing Home Neglect and Personal Injury. She has an extensive background working in the long-term care industry, including public policy for nursing home reform and as an elder law attorney. Her long-term care experience combined with practice as a nursing home abuse trial attorney at preeminent New Jersey firms enables her to aggressively advocate for quality of care for the elderly and disabled in complex litigation matters.

Victoria is a frequent lecturer and author on nursing home issues. She is also a member of and leader within a number of state and national organizations dedicated to the protection of the rights of those injured by the negligence of others.

Legal Areas:

- Nursing Home Abuse and Neglect litigation
- Personal Injury litigation

Experience:

- Nursing Home and Personal Injury Attorney, The Law Office of Adam M. Kotlar 2015 – present
- Nursing Home Abuse Trial Attorney, Javerbaum Wurgaft Hicks Kahn Wikstrom & Sinins, P.C. 2015
- Elder Law Staff Attorney, Legal Services of Northern Virginia 2007 – 2010
- Public Policy Intern & Private Research Consultant, NCCNHR (Consumer Voice) 2005-2006

Education:

- Appalachian School of Law, J.D. 2007
- Loyola College in Maryland, B.A. 2002
- Pennsylvania State University, Certificate Adult Development & Aging 2001
Bar Admissions:

- District of New Jersey 2014
- State of New Jersey 2010
- Pennsylvania 2010
- Virginia 2008
- District of Columbia 2008

Honors:

- Top 40 Under 40, National Trial Lawyers 2012-2015
- Awesome Attorneys, South Jersey Magazine 2014

Member:

- American Association for Justice
- New Jersey Association for Justice
- New Jersey State Bar Association
- Burlington County Bar Association
- Camden County Bar Association
- Virginia Trial Lawyers Association (Long Term Care Litigation Section)
- National Consumer Voice for Quality Long-Term Care (formerly NCCNHR)

Publications:

- The New Extreme Makeover: The Medical Malpractice Crisis, Non-Economic Damages, the Elderly and the Courts, 5 Appalachian J. L. 151 (2006)
- What if the Nursing Home Asks You to Leave, Fairfax County Golden Gazette (2008)
- ‘Leaning In’ and the Young Female Trial Lawyer, Trial Magazine (March 2014)
- Nursing Home Litigation and New Jersey, New Jersey Lawyer, (August 2014) co-authored