

WHY NURSING HOME AND ASSISTED LIVING CASES ARE NOT THE SAME AS MEDICAL MALPRACTICE CASES

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I. The Basics About Nursing Home/ALF Cases and Medical Malpractice Cases

- A. It is important to know what sort of case you are dealing with, how to assess the case, and how to decide whether you want to take it.
- B. I am going to assume that most of you know *something*, even if only a little about medical malpractice and nursing home matters. I am also going to assume that most of you have either handled none or very few of these types of cases.

II. Medical Malpractice Cases

- A. These are cases which focus upon allegations that a physician or nurse (or other healthcare provider) was negligent in connection with their provision of *professional* services. In legal jargon - the defendant "failed to exercise that degree of care and skill exercised by physicians [*or insert other type of provider*] generally under like conditions and similar surrounding circumstances." (See. e.g., West v. Breast Care Specialists, LLC, 290 GA. App. 521 (2008)).

O.C.G.A. §51-1-27 (Malpractice of surgery and medicine)

- B. In order to file a case, the plaintiff must attach to the Complaint an Affidavit, per O.C.G.A. § 9-11-9.1, which sets forth at least one act of negligence (and the

factual basis for such claim) and the affiant must be qualified as noted in O.C.G.A. § 24-9-67.1. The affidavit does not have to spell out all negligent acts or address damages.

Be very careful about the Daubert / O.C.G.A. § 24-9-67.1 requirements. (See, e.g., Pendley v. Southern Regional Health System, Inc., 307 Ga. App. 82 (2010)).

C. Simple / Ordinary v. Professional Negligence (Malpractice)

Doctor swinging a golf club in his office and hits a patient in the face, breaking his jaw = not medical malpractice just because it happened in a doctor's office.

“Whether a complaint alleges ordinary negligence or professional malpractice is a question of law for the court, regardless of how the plaintiff categorizes it. Although complaints against professionals may state claims based on ordinary as well as professional negligence, where the allegations of negligence against a professional involve the exercise of professional skill and judgment within the professional's area of expertise, the action states professional negligence. If a claim of negligence goes to the propriety of a professional decision rather than to the efficacy of conduct in the carrying out of a decision previously made, the claim sounds in professional malpractice. However, administrative, clerical, or routine acts demanding no special expertise fall in the realm of simple negligence.”

Pattman v. Mann 307 Ga. App. 413, 415-416 (2010) (internal quotes omitted).

Beware of "fall" cases = for example, a patient falls out of bed or is dropped from a stretcher. You might assume not medical malpractice = may very well be.

D. Georgia Composite State Medical Board - regulations physicians, PAs, respiratory care etc. – (Other Boards for other professions – Georgia Board of Nursing, Georgia Board of Chiropractic Examiners, etc.)

E. “Tort Reform”

1. Emergency Medical Care – “clear and convincing evidence of gross negligence” - § O.C.G.A. 51-1-29.5 (emergency room, surgical suite, obstetrical suite).
2. Vanishing Venue –O.C.G.A. § 9-10-31(d)

F. Pre-Suit and Discovery Strategy

1. Complete copy of the records at issue and all possibly pertinent records.

2. Meet with non-party treating witnesses as soon as you can and, if possible before suit.
3. File well before the statute of limitations (in case you need to add a party).
4. Consider all venue options very carefully.
5. Be ready for any (and crazy) causation arguments by the defense.

G. Trial Strategy

1. Beware of vanishing venue in Georgia law – are you confident about getting a verdict against the resident defendant?
2. Keep it simple. (If you can't explain it—easily—to your spouse or grandmother, do you really want this case?)
3. Keep it simple (yes, again).
4. Local v. out of state experts

H. Favorable aspects of medical malpractice cases - Almost always substantial damages (or you shouldn't be pursuing it); almost always ample insurance; generally, a good medical malpractice bar in Georgia.

I. Unfavorable aspects - Often very complicated; often very expensive (many depositions; multiple experts); time consuming; doctors usually must consent to settle; doctors/nurses are sympathetic defendants (juries like them); treating physicians will often try to help defendants.

J. Final Thoughts About Medical Malpractice - Be very (very, very, very) careful, about the medical malpractice cases you consider taking.

* Clear violation of the standard of care, causation, and substantial damages should be present. If any one of these elements is missing, pass on the case.

* Consider - Violation of the standard of care and causation are clear; but, damages are fairly minor. Do you really want this case? What is your client's "best day" for this case and is it worth the risk?

III. Nursing Home / Long-Term Care Cases

- A. These are cases which focus on allegations that employees of a nursing home (registered nurses, licensed practical nurses, or certified nursing assistants) were negligent in providing care to a resident (also, sometimes a physician who cares for a patient at a nursing home).
- B. Often, just as in medical malpractice cases, you need an affidavit as mandated by O.C.G.A. § 9-11-9.1 (and qualified as mandated by O.C.G.A. § 24-9-67.1) because you are alleging negligence by a healthcare provider within the course and scope of her employment. Just because the negligence happens at a nursing home or ALF (instead of a hospital or physician's office), don't assume that it is not "medical malpractice." It probably is.
- C. Long-term care issues are becoming more frequent across the country (insurance, Medicare, patient population). As the baby boomers (whose parents are already in long-term care facilities) enter the long-term care system, this area of the law is likely to grow.
- D. Frequent types of cases are: pressure ulcer (bed sore) claims; falls; malnourishment/dehydration. (Be on the lookout for, and ask about, these areas when people call in or are referred to you). Frequently, potential clients say "my father was abused in the nursing home" – what does that really mean?
- E. Specific laws apply to long-term care facilities which accept Medicare - OBRA (42 C.F.R. 483.1 *et seq.*) / Georgia Bill of Rights for residents of long-term care facilities (O.C.G.A. 31-8-100 *et seq.*)
 - 1. Long-term care litigation is driven by an enormous amount of state and federal regulation. Facilities frequently fail to comply with these onerous regulations and that failure can be fertile ground for discovery and cross-examination.
 - * remember negligence per se - McLain v. Mariner Health Care, Inc., 279 Ga. App. 410 (2006)
 - 2. Get to know Rule 6.4.
 - 3. Many causes of action, including but not limited to: breach of contract, negligent hiring, retention, and/or supervision, Unfair or Deceptive Practices Toward the Elderly.
 - 4. Learn punitive damage law.

5. Statutory Penalties - OCGA § 31-8-136(a).
 6. Arbitrations agreements
- F. Georgia Dept of Community Health regulates nursing homes - investigations, citations. This is an excellent source for information on facilities. Send an Open Records Requests to secure documents related to investigations of the facility.
- G. Be aware that an Assisted Living Facility (ALF) is not a nursing home (but, new law draws them closer together).
1. Definition of **Nursing Home** – “Any facility which provides skilled nursing care and related service to residents who require medical or nursing care or rehabilitation services on a regular basis....” (Georgia Department of Community Health, Healthcare Facility Regulation).
 2. Definition of **Personal Care Home (ALF)** – “Any dwelling, whether operated for profit or not, which undertakes through its ownership or management to provide or arrange for the provision of housing, food service, and one or more *personal services* for two or more adults who are not related to the owner or administrator by blood or marriage.” O.C.G.A. § 31-7-12(a)(1). Generally, ALFs/Personal Care Homes = don't administer medical care, don't provide medication, etc. / Think dormitory vs. hospital
- What *is* an ALF? – A place which provides supervision or assistance with activities of daily living; coordination of services by outside healthcare providers; monitoring of resident activities to help ensure well-being.
 - What *isn't* an ALF? – A nursing home. In other words, it is not a place to receive skilled nursing care provided by the facility; not a place to receive around-the-clock care.
 - How does an ALF differ from a Nursing Home? Many ways – No Director of Nursing; no skilled nursing service provided by the facility; no around-the-clock care; less frequent monitoring; less frequent charting; medication administration; no physical restraints; different regulations; often, different types of people/family – positive & negative for Plaintiffs.

H. Discovery Strategy

1. ALF usually not subject to O.C.G.A. § 9-11-9.1 (but be careful.)
 - a. Be careful who you are suing, what allegations you make, where your causation evidence is, etc.
2. Chart – both nursing home and ALF
3. Facility Info / Documents
4. Past Employees
5. Open Records Requests
6. Apple Inv. Properties, Inc. v. Watts, 220 Ga. App. 226 (1996)

I. Trial Strategy

1. Nursing Home / ALF v. Medical Care Providers
2. Profit Motive for: staffing levels (nursing home) / keeping resident (ALF)
3. Focus on facility / bad acts vs. declining health of resident
4. Conservative values – accept responsibility, treat elders with dignity

J. Common Defenses

- a. Sorry, she was old; we did the best we could.
- b. Hotel Defense for ALF
- c. Family involvement
- d. Blame the primary care provider
- e. Outside therapy/wound care provider
- f. Bad things happen to elderly people

K. Favorable aspects of Nursing Home cases - many out there; people don't like nursing homes (i.e., not a sympathetic defendant); many disgruntled former employees of nursing homes; often good evidence (pictures, documents); regulations which are very difficult for nursing homes to fully follow; treating physicians don't rush to defend defendants.

L. Unfavorable aspects of Nursing Home cases - very expensive (multiple depositions, multiple experts); often document intensive; lengthy litigation; sometimes there are insurance issues.