

## Five Essential Differences Between Medical Malpractice and Nursing Home Neglect Cases

By Matthew Heimlich

The litigation of nursing home abuse and neglect cases has increased dramatically in recent years. The most recent statistics from the Center for Disease Control show that as of 2015 more than 1.3 million people reside in nursing homes in the United States.<sup>1</sup> According to the American Health Care Association, over the next three decades the United States will see unprecedented growth in its senior population as the “baby boomer” generation ages, with increases in healthcare demands across the industry, including nursing homes.<sup>2</sup>

In addition to having more people enter nursing homes, the role of the nursing home has changed within the context of our overall healthcare system. Nursing homes are no longer simply residential facilities for relatively stable elderly patients. Nursing homes are increasingly taking on patients with more complex medical issues, including patients who require dialysis, tracheostomy and cardiac care.<sup>3</sup> This increase in the acuity of the nursing home resident population has placed additional, and more consequential, responsibilities on the nurses and certified nursing assistants charged with ensuring the safety of these residents.

When injuries do occur in a nursing home setting, it is important to understand the differences between the laws and regulations governing skilled nursing facilities and those applicable to hospitals or other medical providers. This article will serve to highlight five major differences in the legal framework for claims of neglect or abuse in a nursing home, as opposed to claims for injury occurring in a hospital or other medical setting.

### **Nursing Home Care Act v. Healing Arts Malpractice Act**

The Nursing Home Care Act (“NHCA”)<sup>4</sup> is a comprehensive statute that regulates nursing homes in Illinois. The General Assembly enacted the NHCA amid concern over “inadequate, improper and degrading treatment of patients in nursing homes.”<sup>5</sup> It was described by one of its main sponsors as a “full reform of the nursing home industry.”<sup>6</sup> A principal component

1. <https://www.cdc.gov/nchs/fastats/nursing-home-care.htm>

2. [https://www.ahcancal.org/research\\_data/Pages/LTC-Patient-Projections.aspx](https://www.ahcancal.org/research_data/Pages/LTC-Patient-Projections.aspx)

3. <https://skillednursingnews.com/2019/09/why-hard-to-place-patients-are-a-challenge-and-an-opportunity-for-snfs/>

4. 210 ILCS 45/1, *et. seq.*

5. *Harris v. Manor Healthcare Corp.*, 111 Ill.2d 350, 357-58, 489 N.E.2d 1374, 1377 (1986)

6. *Harris*, 111 2d. at 358, 489 N.E.2d at 1377.

of the NHCA is the residents' "bill of rights", under which nursing home residents are guaranteed certain rights, *inter alia*, the right to be free from abuse and neglect by nursing home personnel.<sup>7</sup>

On the other hand, claims of malpractice against physicians, hospitals and other medical providers are governed by the Healing Arts Malpractice Act ("HAMA").<sup>8</sup> The HAMA was enacted in an attempt to "reduce the burdens existing in the health professions as a result of the perceived malpractice crisis."<sup>9</sup>

It does not appear that our legislature intended for negligence occurring at nursing homes to be encompassed by HAMA, because by the time the HAMA was enacted in 1985, the NHCA had already been in effect for approximately five (5) years. While there are many reasons why hospitals and nursing homes operate under different regulatory schemes, the Illinois Supreme Court pointed out that "persons usually are hospitalized for only brief periods of time, whereas nursing home residents may be dependent upon the facility operator for a period of years. Thus, the potential for long-term abuse and neglect is far greater for nursing home residents than it is for hospital patients."<sup>10</sup>

### State and Federal Regulations

In addition to the NHCA, nursing homes in Illinois must also maintain compliance with other applicable state and federal regulations. Additional state regulations pertaining to nursing homes are found within the Illinois Administrative Code.<sup>11</sup> While many of these mirror NHCA provisions, there are additional and more specific requirements within the code.

The federal regulations pertaining to nursing homes were enacted by the Omnibus Budget Reconciliation Act of 1987 ("OBRA").<sup>12</sup> These regulations created a set of minimum standards of care and rights for nursing home residents. The OBRA regulations do not contain a private right of action, and therefore violating these regulations is not *per se* evidence of

neglect. However, these regulations are national standards that need to be met in order for facilities to receive Medicare benefits. In addition, if a facility is found by the Illinois Department of Public Health ("IDPH") to be noncompliant with OBRA, the facility can be fined, have their license to operate censured or suspended, or both. Therefore, facilities will generally acknowledge that they are required to operate in accordance with the OBRA regulations.

On the other hand, hospitals are not subject to a comparable set of state or federal regulations. To show negligence, injury cases in medical settings usually require expert testimony that the individual medical provider at issue fell below the applicable standard of care. In addition, pursuing an institutional negligence case against a hospital or other medical facility generally requires separate allegations and additional expert testimony.<sup>13</sup> These separately pleaded allegations must implicate the hospital's failure to meet its duty in performing its managerial and administrative roles, along with the enforcement of its rules and regulations.<sup>14</sup>

### Physician Reports

Under the HAMA, medical malpractice plaintiffs must file with their complaint a written report certifying the merits of their claim.<sup>15</sup> This report ("a 2-622 report") must be authored by a licensed physician, knowledgeable about the issues involved in the case, who has practiced or taught within the last six years in the same area of medicine, and is qualified by experience or demonstrated competence in the subject matter of the case.<sup>16</sup>

The NHCA has no such requirement. Our Supreme Court identified the inherent inconsistency of imposing HAMA requirements on a case brought pursuant the NHCA. "If a

7. 210 ILCS 45/2-101 through 2-113; *Eads v. Heritage Enterprises, Inc.*, 204 Ill.2d 92, 97, 787 N.E.2d 771, 774 (2003); *Harris*, 111 Ill.2d at 358, 489 N.E.2d at 1377

8. 735 ILCS 5/2-622

9. *Bernier v. Burris*, 113 Ill.2d 219, 252, 497 N.E.2d 769, 779 (1986)

10. *Harris*, 111 Ill.2d at 372, 489 N.E.2d at 1384

11. 77 Ill. Admin. Code 300.110, *et. seq.*

12. 42 C.F.R. § 483

13. *Darling v. Charleston Community Memorial Hospital*, 33 Ill.2d 326, 211 N.E.2d 253 (1965).

14. *Frigo v. Silver Cross Hosp. and Medical Center*, 377 Ill.App.3d 43, 876 N.E.2d 697 (1st Dist. 2007)

15. 735 ILCS 5/2-622(a)

16. 735 ILCS 5/2-622(a)(1)

## About the Author



Matthew Heimlich represents victims and their families in nursing home negligence and other personal injury cases. His extensive knowledge of nursing home regulations and the long-term care industry has resulted in numerous settlements in the six and seven-figure range for his clients. He is currently at the law firm of Walsh, Knippen & Cetina, Chtd. in Wheaton.

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plaintiff's private right of action for damages were bound by the terms of section 2-622, it would likewise be bound by the other statutes directed at medical malpractice which were inserted into the Code of Civil Procedure by the legislature when it adopted section 2-622, there would be no principled way to differentiate between the various statutory restrictions... Core provisions of the Nursing Home Care Act would be rendered inoperable.”<sup>17</sup> The court continued, “Had the General Assembly wished to subject claims against nursing home owners and licensees to section 2-622's requirements, it could easily have included them in the statute's provisions, just as it did with hospitals. It did not.”<sup>18</sup>

The Supreme Court has also noted that while claims under the NHCA may sometimes involve a resident's medical care, they do not directly implicate individual health-care providers. The only defendants liable for damages, costs and attorneys' fees under the NHCA are the owners and licensees of the nursing home.<sup>19</sup>

However, complaints made against nursing homes that fall outside of the NHCA (i.e. Wrongful Death Act) may require a 2-622 report. Whether or not a 2-622 report would be required is dependent upon the nature of the allegations against the facility. If the allegations only involve the failure to provide personal care and services, a physician's report may not be required. Alternatively, if the allegations involved failures in nursing or medical care, a physician's report would likely be required.

### Attorneys' Fees and Costs Shifting

Like most causes of action, cases brought pursuant to the HAMA require each side to bear its own attorneys' fees and costs. The NHCA is notable because it has a fees and costs shifting provision, awarding “actual damages and costs and attorneys' fees” to a prevailing plaintiff in the event of a judgment.<sup>20</sup> However, the NHCA is silent as to how fees are to be calculated. There are several cases where the court has approved an hourly calculation pursuant to the *Lodestar* method.<sup>21</sup> These attorney fee awards do not necessarily have

to be proportionate to the recovery achieved. In one case, the appellate court affirmed a trial court's award of \$85,000.00 in attorney fees, even though the verdict obtained by the resident was only \$7,478.96, less a reduction of 50% for the resident's comparative fault.<sup>22</sup> Recently, in the *Grauer v. Clare Oaks* case, the First District appellate court awarded attorneys' fees in excess of \$1 million in a NHCA case pursuant to a 1/3 contingent fee agreement.<sup>23</sup> The court reasoned that under a fee-shifting statute, the objective is to award plaintiff's counsel the market rate for the services reasonably required to produce the victory, and determined that a 1/3 contingency fee was a reasonable award for attorneys' fees pursuant to the NHCA under the circumstances.<sup>24</sup>

The court in *Grauer* also clarified the issue of what costs could be recovered pursuant to the NHCA. The court awarded costs of \$147,471.55 to the prevailing plaintiff, including reimbursement for testifying experts' fees, trial exhibits, trial technology and video editing, obtaining medical records, court costs, fees of court reporters and videographers for depositions, fees of court reporters at the trial, production expenses for a day-in-the life video and expenses of travel for an out-of-state expert deposition.<sup>25</sup>

### Punitive Damages

Under HAMA, punitive damages are expressly prohibited by statute.<sup>26</sup> By contrast, punitive damages may be available in certain circumstances in nursing home cases. Our Supreme Court has held that Plaintiffs may recover common-law punitive damages upon a showing of willful and wanton misconduct by the Defendant.<sup>27</sup> However, claims for punitive damages do not survive the death of the nursing home resident on whose behalf the cause of action was brought.<sup>28</sup>

### CAUTION – Limits of the Nursing Home Care Act

The Nursing Home Care Act applies to skilled nursing facility “owners and licensees” ONLY. Negligence allegations against an individual healthcare provider or facility administrator for acts or omissions at a nursing home would fall outside the scope of the NHCA and may be subject to the HAMA.

17. *Eads*, 204 Ill.2d at 105, 787 N.E.2d at 778

18. *Eads*, 204 Ill.2d at 107-08, 787 N.E.2d at 779-80.

19. 210 ILCS 45/3-601, 3-602

20. 210 ILCS 45/3-602

21. *Berlak v. Villa Scalabrini Home for the Aged, Inc.*, 284 Ill.App.3d 231, 671 N.E.2d 768, 776 (1st Dist. 1996)

22. *Berlak*, 284 Ill.App.3d at 244, 671 N.E.2d at 776

23. *Grauer v. Clare Oaks*, 434 Ill. Dec. 375, 418, 136 N.E.2d 123, 166 (1st Dist. 2019).

24. *Grauer* 434 Ill. Dec. at 414-17, 136 N.E.2d at 162-66.

25. *Grauer*, 434 Ill. Dec. at 419, 136 N.E.2d at 167.

26. 735 ILCS 5/2-1115

27. *Dardeen v. Heartland Manor, Inc.*, 186 Ill.2d 291, 300, 710 N.E.2d 827, 832-33 (1999)

28. *Vincent v. Alden-Park Strathmoor, Inc.*, 241 Ill.2d 495, 506, 948 N.E.2d 610, 616 (2011)

**“ it is important to understand the differences between the laws and regulations governing skilled nursing facilities and those applicable to hospitals or other medical providers.**

Similarly, allegations of wrongdoing by a corporate management company, pharmacy or vendor would not be governed by the NHCA.

#### **Conclusion**

Nursing home facilities have a unique position within our healthcare industry. As such, they operate within a specific legal and regulatory framework, which is substantially different from those applicable to hospitals and other medical providers. It is essential for attorneys representing abused or neglected nursing home residents to have a thorough understanding of these essential differences. Fully asserting all of the rights that have been endowed by law to nursing home residents will serve to further their interests and hold the facility accountable for abuse or neglect. □



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