NURSING HOMES: STANDARDS OF CARE, SOURCES OF POTENTIAL LIABILITY, DEFENSES TO SUIT, AND REFORM

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I. INTRODUCTION

Today approximately twenty-six million Americans are more than sixty-five years old.[1] Within the next fifteen years there will be thirty-five million senior citizens.[2] Surprisingly, "while only five percent of America's elderly reside in nursing homes at any time, research indicates that a much higher percentage of Americans, at least twenty percent, can expect to spend some time in a nursing home before death."[3] In 1976 there were approximately twenty thousand nursing homes in the United States.[4] Approximately one million, three hundred thousand people live in nursing homes.[5]

In addition to this increase in demand for their services, nursing homes today face a greater likelihood of being sued by their residents or third par-

1. Gershuny, *Transfer and Discharge of Nursing Home Residents: Consequences and Rights*, 29 MED. TRIAL TECH. Q. 477, 477 (1982-83) [hereinafter Gershuny].
2. *Id.*
3. Jost, *The Problem of Consent for Placement, Care and Treatment of the Incompetent Nursing Home Resident*, 26 ST. LOUIS U.L.J. 63, 63 (1981-82).
4. Gershuny, *supra* note 1, at 477.
5. *Id.*

ties than they did thirty years ago. Although the nursing home's exposure to tort liability was recognized as early as the 1950s,[6] there has been relatively little litigation in this field of tort liability. Within the last two decades, however, litigation against nursing homes has increased. A strong probability exists that lawsuits filed against long-term facilities will continue to increase in number, "creating a serious threat to the financial and legal well-being of those facilities and individuals who are accused of wrongdoing towards their residents."[7]

One reason for the increase in litigation is that federal regulations, with which nursing homes must comply, do not provide any *legal* guidelines which the administrator of the facility can follow.[8] Consequently, to protect themselves from future litigation, nursing homes must take preventive steps. First, the home must comply with the standard of care which is imposed by state and federal regulations.[9] Virtually every state has some type of statute concerning patients' rights which dictates the standard of care owed to the patient by the nursing facility.[10] Second, nursing homes should make themselves aware of the types of acts which could lead to liability.

This paper will discuss lawsuits brought against nursing facilities which provide the highest levels of nursing care. These facilities, described as "skilled nursing facilities" and "intermediate care facilities," provide

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6. Facey v. Merkle, 146 Conn. 129, 148 A.2d 261 (1959).

7. M. KAPP, PREVENTING MALPRACTICE IN LONG-TERM CARE 4 (1987) [hereinafter KAPP].

8. E. BERNZWEIG, THE NURSE'S LIABILITY FOR MALPRACTICE 70 (4th ed. 1987) [hereinafter BERNZWEIG]. General principles helpful to the nursing profession are:

> 1. Tort law is that branch of civil law that deals with legal wrongs committed by one person against the person or property of another.
> 2. Torts (legal wrongs) may be intentional or unintentional.
> 3. Negligence is an unintentional tort that involves harm resulting from failure of persons to conduct themselves in a reasonable and prudent manner.
> 4. Negligence and carelessness are not synonymous. One can be careful and yet be considered legally negligent for failure to act as other reasonably prudent persons would have acted in the particular circumstances.
> 5. Malpractice refers to the negligent acts of persons with specialized professional training and education.
> 6. An act constituting malpractice necessarily reflects negligence, but not all negligent acts constitute malpractice.
> 7. When persons are held legally responsible for their negligent conduct, we say they are legally liable.
> 8. A person held legally liable in a civil suit for harm caused another is required to pay money damages to the latter.
> 9. Medical malpractice refers to the negligent acts of health professionals in carrying out their professional responsibilities.

Id. at 30.

9. "All nursing homes and other licensed facilities caring for the infirm receive written notification of the state's law, minimum standards, rules, regulations and orders with which they are expected to comply." State v. Brenner, 486 So. 2d 101, 105 (La. 1986).

10. *See, e.g.*, WIS. ADMIN. CODE § HSS 132.31(1)(k); ILL. ADMIN. CODE tit. 77, § 300.30(c) (1987).

"twenty-four hour skilled nursing care and treatment services."[11]

This note will focus on the standard of care owed by the nursing home to the patient, acts which expose the home to potential liability, defenses to civil and criminal actions brought against nursing homes and their administrators, and recent nursing home reform. The note discusses representative cases from various jurisdictions, but it does not attempt to deal with every reported decision.

II. Tort Actions

Actions brought against nursing homes may be based on theories of intentional or unintentional torts. Fraud, assault, and battery are common types of intentional torts which a nursing home may be alleged to have committed.[12] The majority of claims against nursing homes, however, are based on actions which are clearly unintentional.[13] In order to succeed in a suit

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11. Stiffelman v. Abrams, 655 S.W.2d 522, 529 (Mo. 1983). There are four types of health care facilities. They are: adult boarding facility, residential care facility, intermediate care facility, and skilled nursing facility. *Id.* at 528-29. "Intermediate care facility" is defined at 42 U.S.C. §§ 1395x(i) and 1396d(c) (1983). Residents who require maintenance services rather than skilled nursing care are placed in nursing homes which provide intermediate care. Note, *Involuntary Relocation of Nursing Home Residents and Transfer Trauma*, 24 St. Louis U.L.J. 758, 761 (1979-81). "Skilled nursing facilities and intermediate care facilities are regulated by the states and by the United States Department of Health and Human Services to the extent of participation in Medicare and Medicaid Programs." Gershuny, *supra* note 1, at 477.

12. Kapp, *supra* note 7, at 4.

13. *Id.* One unintentional tort which creates nursing home liability is transfer trauma, which has been defined as "the adverse effect on physical and mental health suffered by an elderly or chronically ill individual who is moved from one setting or institution to another." Levitan, *Nursing Home Dilemma? Transfer Trauma and the Noninstitutional Options: A Review of the Literature*, 13 Clearinghouse Rev. 653, 653 (1979-80). Transfer trauma is associated with an increase in the death rate of those transferred. Killian, *Effect of Geriatric Transfers on Mortality Rates*, 15 Soc. Work 19 (1970). Nursing home advocates and supporters have used the theory of transfer trauma to help prevent sudden mass transfers of residents and patients whose institution has been threatened by decertification. *See* O'Bannon v. Town Court Nursing Center, 447 U.S. 773 (1980); Klein v. Califano, 586 F.2d 250 (3d Cir. 1978); Bracco v. Lackner, 462 F. Supp. 436 (N.D. Cal. 1978). The theory has also been used to prevent individual residents from being transferred without full consideration of the effect that the transfer would have on the health of the resident. *See* Roberson v. Wood, 464 F. Supp. 983 (E.D. Ill. 1979). One study showed that "the emotional shock created by [the] precipitous change in environment [which accompanies transfer] often causes death of the transferee, and almost always causes depression and/or regressive behavior." Note, *O'Bannon v. Town Court Nursing Center:* Patients' Right to Participate in Nursing Home Decertification, 7 Am. J.L. & Med. 469, 481-82 (1981-82). There are various methods of mitigating the adverse effects of involuntary transfer: 1. allowing the resident to voice an opinion in the transfer decision; 2. allowing the resident to choose the facility to which he or she is to be transferred; 3. allowing the resident to make choices—*e.g.*, those concerning the resident's room or roommate—once the transfer has been made; 4. transferring the individual to a facility whose policies on independence, responsibility, and control meet the individual's needs. Note, *Involuntary Relocation of Nursing Home Residents and Transfer Trauma*, 24 St. Louis U.L.J. 758, 760-61 (1979-81).

involving an unintentional or negligent act, a plaintiff must plead and prove the traditional elements of negligence.[14] In the nursing home context, these elements are: the duty of care owed by the nurse or employee to the patient; a breach or violation of that duty; a causal connection between the conduct and the resulting injury; and actual injury or death.[15]

Civil lawsuits brought against nursing homes can be predicated on theories of breach of contract, misrepresentation, fraud, and absence of informed consent.[16] Most prevalent, however, are those actions having as their basis a wrongful death or negligence claim.[17] Before suit can be brought against a nursing home, there must first be a patient-nurse relationship.[18] Next, the plaintiff must allege that the nurse or employee of the home owed some type of duty of care to the resident and that this duty was somehow violated.[19] This breach of duty can be committed by an employee of the nursing home or by a third party. The following section will present different methods of defining the standard or duty of care.

III. The Standard of Care

A. *Standards Established by Case Law*

It is generally accepted in most jurisdictions that "[a] nursing home is not the insurer of the safety of its patients."[20] A nursing home does, however, have a duty to provide a reasonable level of care.[21] This duty does not require that a nurse or nurse's aid provide constant supervision.[22]

In defining this duty the mental and physical condition of the patient must be taken into consideration.[23] One court described the standard of care as "ordinary care to protect [the patients] from any danger or injury which

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14. W. Keeton, Prosser and Keeton on Torts, § 30 at 164-65 (5th ed. 1984) [hereinafter Keeton].

15. *Id.*

16. Kapp, *supra* note 7, at 6.

17. Bernzweig, *supra* note 8, at 238.

18. *Id.*

19. Kapp, *supra* note 7, at 4.

20. Nichols v. Green Acres Rest Home, 245 So. 2d 544, 545 (La. Ct. App. 1971). *See, e.g.*, Bezark v. Kostner Manor, 29 Ill. App. 2d 106, ___, 172 N.E.2d 424, 426 (1961); Juhnke v. Evangelical Lutheran Good Samaritan Soc'y, 6 Kan. App. 744, ___, 634 P.2d 1132, 1136 (1981); McGillivray v. Rapides Iberia Management Enter., 493 So. 2d 819, 821-22 (La. Ct. App. 1986); Oswald v. Rapides Iberia Management Enter., 452 So. 2d 1258, 1262 (La. Ct. App. 1984); Collier v. Ami, Inc., 254 So. 2d 170, 173-74 (La. Ct. App. 1971). A Texas court has recognized that it "is the duty of a hospital to provide for the care and protection of its patients, and in the exercise of this duty the hospital is required to provide such reasonable care as the patient's known condition requires." Golden Villa Nursing Home v. Smith, 674 S.W.2d 343, 348 (Tex. Ct. App. 1984).

21. Nichols v. Green Acres Rest Home, 245 So. 2d at 545.

22. *Id.*

23. *Id.*

might be reasonably anticipated."[24] Another court described the appropriate standard of care as one which derived from the degree of care owed by a hospital to the patient.[25] That standard is defined as "that degree of care, skill, and diligence used by hospitals generally in that community . . . ."[26] The same court, in common with several other courts which have decided the issue of duty of care, also mentioned that a private hospital is not the insurer of the patient.[27] Thus, the duty of care owed to the patient is defined not only by state administrative codes and federal regulations, but also by the patient's physical and mental condition.

The home also owes the patient a duty to protect him against the possibility of harm caused by third persons. This is the logical extension of the District of Columbia Court of Appeals holding in *Kline v. 1500 Massachusetts Avenue Apartment Corp.*[28] In that case, the plaintiff was attacked in a common hallway of an apartment building.[29] The entrances to the building were usually guarded, but on the occasion in question they were left unguarded, despite the fact that defendants had notice that tenants were increasingly "being subject to crime against their persons."[30] The court viewed the case as presenting the issue whether a landlord has a duty to protect tenants against foreseeable criminal acts committed by third parties.[31] Although the case dealt with criminal attacks in an apartment building, the rationale applies to predictable acts by third parties against residents of a nursing home. The court held, first, that because the premises were under defendant's exclusive control, it was only logical to impose on defendant the duty to take those steps necessary to minimize the possibility of harm to the tenants.[32] Second, because the premises had been protected in the past, the plaintiff had been led to expect a continuance of the protection previously afforded; therefore the defendant had a duty to continue to furnish that protection.[33] This standard of care—that which is reasonable care in all of the circumstances—can be applied in the nursing home context, especially

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24. Bezark v. Kostner Manor, 29 Ill. App. 2d 106, ____, 172 N.E.2d 424, 426 (1961). The court also noted that "as to dangers reasonably to be anticipated from acts of other persons under the hospitals' control, reasonable care and attention must be exercised for the safety and well being of their patients, in proportion to the circumstances and their ability to look after their own safety." *Id.* at ____, 172 N.E.2d at 426. With regard to the condition of the premises, *see, e.g.*, Facey v. Merkle, 146 Conn. 129, ____, 148 A.2d 261, 264 (1959).

25. Collier v. Ami, Inc., 254 So. 2d 170, 173 (La. Ct. App. 1971).

26. *Id.* at 173-74, citing 41 C.J.S. *Hospitals* § 8 (1944).

27. *Id.* at 173.

28. Kline v. 1500 Mass. Ave. Apt. Corp., 439 F.2d 477 (D.C. Cir. 1970).

29. *Id.* at 480.

30. *Id.* at 477.

31. *Id.* at 478.

32. *Id.* at 481. The court notes other relationships in which this standard applies: "landowner-invitee, businessman-patron, employer-employee, school district-pupil, hospital-patient and carrier-passenger." *Id.* at 482-83.

33. *Id.* at 485.

in light of the fact that the home has undertaken to render services. For instance, if the home had a policy of locking all doors on the east side of the building because a creek ran along that side of the building, the home would be expected to continue that policy. If a patient inadvertently wandered through an east door which was unlocked, the home would have breached its duty of care and could face a lawsuit. The Restatement (Second) of Torts imposes liability for the negligent performance of an undertaking thus:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking if
> (a) his failure to exercise reasonable care increases the risk of such harm, or
> (b) he has undertaken to perform a duty owed by the other to the third person, or
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.[34]

B. *Standards Established by Statute or Contract*

Several states have established the standard of care by requiring that statutory standards be included in nursing homes' contracts with incoming residents.[35] If a nursing home violates a federal or state regulation or deviates from statute, this is prima facie evidence of negligence.

In *Stiffelman v. Abrams* the Missouri Supreme Court held that plaintiffs as executors of decedent's estate properly stated a cause of action under section 198.088.1(6)(g) and (i), known as the "Residents Bill of Rights."[36] This statute defines the standard of care owed as follows:

> 1. Every facility, in accordance with the rules applying to each particular type of facility, shall insure that:
> . . . .
> (6) Each resident admitted to the facility:
> . . . .
> (g) Is free from mental and physical abuse, and free from chemical and physical restraints . . .
> . . . .
> (i) Is treated with consideration, respect, and full recognition of his dignity and individuality . . . .[37]

The court reasoned that the purpose of the statute "is to protect the

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34. RESTATEMENT (SECOND) OF TORTS § 324A (1965).
35. Stiffelman v. Abrams, 655 S.W.2d 522, 525 (Mo. 1983).
36. *Id.* at 527.
37. MO. ANN. STAT. § 198.088 (Vernon 1983).

health and safety of citizens who are unable fully to take care of themselves, particularly the more elderly persons . . . ."[38]

An analogous statute was scrutinized by the Wisconsin Supreme Court in *Kujawski v. Arbor View Health Care Center*.[39] The plaintiff had fallen out of her wheelchair while she was being pushed to the dining room.[40] In order to decide whether the plaintiff should have been required to wear a safety belt, the court looked to the Wisconsin Administrative Code to determine a resident's right to be free from restraints.[41] Although Wisconsin recognized the general standard of care created by case law,[42] the court relied on the statute in holding the home not liable.

In *Begandy v. Richardson*[43] the plaintiff, who had fallen down a flight of stairs while unattended, alleged that the home had violated a provision of the New York Public Health Law. That statute provided that if a residential health care facility deprived any patient of a right or benefit, that facility would be liable to any patient injured as a result.[44] Defendants argued that the purpose of the statute was to "insure availability to the court system for patients denied rights of privacy, private communications . . . and freedom from mental and physical abuse."[45] In holding that the statute did not afford the plaintiff relief, the court reasoned that "absent a clear expression of an intention to confer a right not vested by the common law," the common law cause of action would not be extended beyond personal rights or benefits.[46] Here the plaintiff's claim was based upon the condition of the building, not a private right or benefit. Thus the statute was inapplicable to plaintiff's cause of action.[47]

C. *Standards Established by Experts*

Expert testimony may be required if the standard of care is not set by statute or if the court does not believe that the jury can determine the appropriate standard from case law. In these situations the court may require

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38. Stiffelman v. Abrams, 655 S.W.2d at 528.

39. Kujawski v. Arbor View Health Care Center, 139 Wis. 2d 455, ____, 407 N.W.2d 249, 249 (1987).

40. *Id.* at ____, 407 N.W.2d at 250.

41. *Id.* at ____, 407 N.W.2d at 253. *See, e.g.*, WIS. ADMIN. CODE § HSS 132.31(1)(k).

42. Kujawski v. Arbor View Health Care Center, 139 Wis. 2d at ____, 407 N.W.2d at 252. The court stated that the "general rule of Wisconsin is that a hospital must exercise such ordinary care as the mental and physical condition of its patients, [which was] known or should have been known, may require . . . ." *See also* Rosemont v. Marshall, 481 So. 2d 1126, 1129 (Ala. 1985).

43. Begandy v. Richardson, 134 Misc. 2d 357, ____, 510 N.Y.S.2d 984, 985 (N.Y. Sup. Ct. 1987).

44. *Id.* at ____, 510 N.Y.S.2d at 985.

45. *Id.* at ____, 510 N.Y.S.2d at 987.

46. *Id.*

47. *Id.*

that the plaintiff provide an expert to testify that the standard or duty was breached.

Generally, "whether expert testimony is necessary to prove negligence is dependent on whether, under the facts of a particular case, the trier of fact would be able to understand, absent expert testimony, the nature of the standard of care required of defendant and the alleged deviation therefrom."[48] Often the trier of fact lacks the "ability to evaluate whether a particular application of health care services violated the required standard of care and/or proximately caused injury."[49] Courts have held that expert testimony is not required if the case involves facts which are within the lay person's common knowledge and experience in general. But an expert witness can be a virtual necessity to a plaintiff in a malpractice action if the case involves issues too technical for lay juries.[50] Also, the amount of care owed to the plaintiff will largely depend on the type of health care which is provided. With respect to certain types of care, expert testimony may be necessary to establish what constitutes ordinary care.

In *Juhnke v. Evangelical Lutheran Good Samaritan Society*, plaintiff was a patient at defendant nursing home.[51] Plaintiff sustained serious injuries when she was struck by another resident.[52] The trial court granted defendant's motion for a directed verdict, holding that "plaintiff had failed to establish a standard of care for defendant and a deviation therefrom with expert testimony."[53] The Kansas Court of Appeals reversed and remanded with an order for a new trial. The court stated that the trier of fact, given the facts of the case, did not need the aid of expert testimony in order to determine whether or not the defendant breached its duty of exercising reasonable care to avoid injury.[54] The court further stated that the purpose of expert testimony is to establish the community standard of care, which, without an explanation of the technological terms used within the medical profession, would prohibit the jury from making an intelligent decision.[55] Also, the defendant had notice of the resident's dangerous propensities of

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48. Juhnke v. Evangelical Lutheran Good Samaritan Soc'y, 6 Kan. App. 2d ___, ___, 634 P.2d 1132, 1136 (1981).

49. KAPP, *supra* note 7, at 17. *See also* Kujawski v. Arbor View Health Care Center, 139 Wis. 2d 455, ___, 407 N.W.2d 249, 252 (1987); Golden Villa Nursing Home v. Smith, 674 S.W.2d 343 (Tex. Ct. App. 1984).

50. KAPP, *supra* note 7, at 17. In malpractice cases the judge decides, based on the credentials and qualifications of the expert, whether or not his testimony will aid the jury in their deliberations. *Id.* at 16.

51. Juhnke v. Evangelical Lutheran Good Samaritan Soc'y, 6 Kan. App. 2d at ___, 634 P.2d at 1132.

52. *Id.* at ___, 634 P.2d at 1135.

53. *Id.* at ___, 634 P.2d at 1136.

54. The court stated that the home's conduct was so "obviously lacking in reasonable care and had such serious consequences" as to be within the experience of mankind in general. *Id.* at ___, 634 P.2d at 1137.

55. *Id.* at ___, 634 P.2d at 1137.

"pushing, tripping and hurting others," which enabled the trier of fact to discern the defendant's degree of negligence.[56]

Another case in which no expert testimony was required was *Kujawski v. Arbor View Health Care Center*.[57] In *Kujawski* the plaintiff sued the defendant nursing home for injuries she sustained after she fell from her wheelchair while being pushed by a volunteer. The plaintiff alleged that the defendant was negligent in: "(1) not securely tying or strapping plaintiff into the wheelchair; (2) pushing the wheelchair at a speed which was too fast under the conditions; (3) striking the table with the wheelchair as it was being pushed; and (4) stopping the wheelchair [too abruptly]."[58] The Wisconsin Supreme Court held that "the determination of whether to use a restraining belt . . . involves a matter of routine care within a jury's common knowledge;"[59] thus an expert was not required.[60] The court analogized the facts of this case to the facts of a similar case which had arisen in a hospital setting.[61] The court held that the general rule which applied to hospitals also applied to the nursing home: that is, the use or non-use of a restraint by a nursing home is a matter of routine care[62] which need not be established by expert testimony.[63] However, "if the patient requires professional nursing or professional hospital care, then expert testimony as to the standard of

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56. *Id.* at ____, 634 P.2d at 1135.

57. Kujawski v. Arbor View Health Care Center, 139 Wis. 2d 455, 407 N.W.2d 249 (1987).

58. *Id.* at ____, 407 N.W.2d at 250.

59. *Id.* at ____, 407 N.W.2d at 251.

60. The administrator of the home testified as an adverse witness, and apparently the court did not consider her an expert witness. She testified concerning numerous types of restraints used by the home. *Id.* at ____, 407 N.W.2d at 251.

The volunteer who was pushing the plaintiff at the time when she fell out of her chair was called as an adverse witness *upon instruction from the plaintiff's attorney*. The anomaly of her direct testimony was that the volunteer, while reconstructing the accident for the court, sat in a wheelchair and demonstrated for the jury how the plaintiff had reached forward for the table. However, this time the wheelchair did not tip over. The problem was that this could not have been an accurate demonstration of what happened because the plaintiff was an extremely large woman with a past history of falling because of her weight. Furthermore, plaintiff was suffering from a ventral hernia. A doctor testified that a safety belt which would keep plaintiff from slipping in her chair could have been used because it appeared that the hernia was not painful to the plaintiff. There was no evidence that the defendant had even tried to restrain the plaintiff or use any type of safety belt. The trial court, which held that whether to use a safety belt of the type suggested is "not a matter within the realm of the ordinary experiences of mankind," seems to have reached the most practical conclusion. *Id.* at ____, 407 N.W.2d at 252. The rationale of the supreme court was based on WIS. ADMIN. CODE § HSS 132.60(6)(a)1. *Id.* at ____, 407 N.W.2d at 252-53.

61. *Id.* at ____, 407 N.W.2d at 253, citing Cramer v. Theda Clark Memorial Hosp., 45 Wis. 2d 147, 149, 172 N.W.2d 427, 427 (1969).

62. *Id.* at ____, 407 N.W.2d at 252. Routine care was described by the court in *Cramer* as "nonmedical, administrative, ministerial or routine . . . ." Cramer v. Theda Clark Memorial Hosp., 45 Wis. 2d 147, 150, 172 N.W.2d 427, 428 (1969).

63. Kujawski v. Arbor View Health Care Center, 139 Wis. 2d at ____, 407 N.W.2d at 252.

that type of care is necessary."[64] Furthermore, because the patient did not need a restraint to modify her behavior, the court held that it was not necessary to restrain her.[65]

In *State v. Serebin*[66] the need for expert testimony was obvious. The defendant, a nursing home administrator, was convicted at the trial court level of homicide (reckless conduct) and twelve counts of abuse of nursing home residents.[67] The state alleged that the defendant did not provide adequate staff, that he reduced food portions while increasing admissions of residents, and that his actions were the proximate cause of the death of one patient and of injury to several others.[68] The injuries described by experts included weight loss and bedsores. The experts testified that "in cases of patient incontinence, prompt cleansing of the skin is required in order to prevent bedsores."[69] The court of appeals reversed the conviction because none of the experts had given an opinion as to the specific causes of the bedsores and weight loss, and no expert testified that the injuries were the result of Serebin's conduct.[70]

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64. *Id.* at ____, 407 N.W.2d at 252, citing Cramer v. Theda Clark Memorial Hosp., 45 Wis. 2d 147, 149-50, 172 N.W.2d 427, 427 (1969). In Wisconsin the court requires expert testimony if the situation is "so complex or technical that a jury would need expert testimony . . . ." *Id.* at ____, 407 N.W.2d at 253.

65. *Id.* at ____, 407 N.W.2d at 254.

66. State v. Serebin, 119 Wis. 2d 837, 350 N.W.2d 65 (1984).

67. *Id.* at ____, 350 N.W.2d at 66.

68. *Id.* at ____, 350 N.W.2d at 65.

69. *Id.* at ____, 350 N.W.2d at 74. Three experts testified concerning bedsores. The conclusion was that "prevention of bedsores [was] possible with sufficient nursing care . . . ." *Id.* at ____, 350 N.W.2d at 74. Two nurses employed by Glendale Nursing Home testified that "it was standard nursing practice to reposition bedridden residents every two hours." *Id.* at ____, 350 N.W.2d at 74.

70. *Id.* at ____, 350 N.W.2d at 76. It is unquestionable that states may impose criminal sanctions upon a person who commits wrongful acts upon, or fails to perform necessary acts for, elderly individuals. *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940) (actions subject to regulation because of the government's interest in protection of society). For an individual to be found guilty of abuse, there must be a causal connection between his action and the injury.

> [T]he predicate for punishing any criminal omission must be either a common law duty whose breach directly caused injury . . . or a statutory duty, in which case the *consequences* of breach are irrelevant because it is the *breach* which is punishable, not the consequences thereof. Thus, where a statute creates the duty to act, no further causal connection need be found between omission and injury. The "causal connection" is therefore a common law doctrine which brings legitimacy to the practice of punishing offenders for breaches of duties based on moral, social or ethical considerations rather than on statutes.

Comment, *Penal Code Section 2204: A Duty to Care for the Elderly*, 35 BAYLOR L. REV. 588, 608 (1983). The influence of tort theories on criminal justice was also felt by an Arizona court which relied on the Restatement of Torts "as authority for finding a legal duty whose breach resulted in a manslaughter conviction." *Id.* at 609-10. There is a tendency to combine the two areas of law, although most courts do point out that the imposition of criminal liability for omissions requires a higher degree of culpability than is sufficient to impose tort liability. *Id.* at 610.

The supreme court disagreed with the court of appeals' decision, which would have allowed the fact-finder to "rely" on the state's expert testimony and "ultimately allowed the jury to rely on its own common knowledge in order to draw a reasonable inference from circumstantial evidence . . . ."[71] With respect to the weight loss suffered by residents as a result of reduction in food and failure to have an adequate staff to assist patients with feeding, the court held that the jury did not need the testimony of an expert to enable them to find a causal connection between the reduction in food portions and the weight loss.[72] The court did, however, find a need for expert testimony concerning the causal connection between the reduction in staff and the bedsores.[73] The court held that testimony regarding the need to reposition the patient every two hours was outside of the fact-finder's common knowledge.[74] Thus the supreme court reversed the court of appeals and affirmed the conviction.

In *Makas v. Hillhaven, Inc.*,[75] the plaintiff testified that she often found her great-grandmother, a resident of the defendant's nursing home, soiled with her own wastes.[76] One day, after the plaintiff complained to nurses about the condition, she found the resident "in a dreadful state,"[77] with "severe bruises about her eye, mouth, hands, and wrists."[78] The plaintiff in this case refused to identify any of her witnesses as experts, and did not offer any expert testimony as to the applicable standard of care.[79] The court held that the plaintiff did not produce sufficient evidence to support her cause of action.[80] The court implied that the jury could not apply "its own common knowledge and experience to the injuries . . ." in order to link the resident's condition to the defendant.[81] The court analogized the situation to that of a parent and an infant, stating that a nursing home could not be expected to remedy the situation immediately.[82] Since neither the court nor the jury had knowledge as to when a period of lying in one's own waste would become unreasonable,[83] the testimony of one who was familiar with proper proce-

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71. State v. Serebin, 119 Wis. 2d at ____, 350 N.W.2d at 76.

72. *Id.* at ____, 350 N.W.2d at 77.

73. *Id.*

74. *Id.* The court stated that "[a]lthough a reasonable juror might realize that prolonged periods of remaining in one position may cause pressure which results in bedsores, most jurors would not know the exact time period within which a person could remain in one position without suffering such effects." *Id.*

75. Makas v. Hillhaven, Inc., 589 F. Supp. 736 (M.D.N.C. 1984).

76. *Id.* at 739.

77. *Id.*

78. *Id.*

79. *Id.* at 738. Plaintiff relied on a statute entitled "Resident's Bill of Rights." N.C. GEN. STAT. § 131E-117 (1981).

80. *Id.* at 742-43.

81. *Id.* at 743.

82. *Id.* The court noted that the adage "once a man, twice a child" seemed pertinent. *Id.*

83. *Id.* The court said the type of proof required would be "[a]t a minimum . . . the

dure was required.[84] In the absence of such testimony, the court had to grant the defendant's motion for a directed verdict.

Apart from expert testimony required to establish the negligence of the nursing home, expert testimony may also be needed to establish the physical condition of the patient. In *Oswald v. Rapides Iberia Management Enterprises*,[85] the plaintiff's decedent had been complaining during the day of pain in his stomach and leg, so he was put to bed after he was given medication.[86] Two days later, early in the morning, the decedent began to vomit bright red blood, the nurse was unable to get a blood pressure reading, and after she had contacted a doctor, the decedent was transported to a hospital, where surgery was performed.[87] The issues in the case were whether or not "defendant's actions or omissions caused plaintiff's injuries," and if they did, "whether defendant owed plaintiff a duty of care and whether that duty protects the plaintiff from the harm incurred."[88] The court found that the decedent's condition was not one which should have caused alarm prior to the time when the doctor was notified, and that no doctor could testify that the decedent "could have been saved had his condition been noted sooner."[89] Thus the court did not find any negligence on the part of the defendant nursing home.[90]

Although the court did not state that expert testimony was required, four physicians who were qualified as experts testified on behalf of the plaintiff.[91] Under the standard set out in the previously discussed cases—that which is so intricate and complex that it is outside of the realm of the fact-finder's common knowledge requires explanation by expert testimony—it is clear that, in this type of factual situation, expert testimony

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ordinary intervals at which patients without bowel and bladder control in intermediate and skilled nursing care should be checked and/or routinely cleaned, the frequency of patient problems, and the customary procedures employed to adequately care for these patients. Evidence of the customary training and qualifications of nursing home staff to deal with patients like Mrs. Cranfill and problems created by her condition would likewise be required." *Id.*

84. Because the plaintiff relied on the doctrine of negligence per se (based on violation of the statute) as the sole authority concerning the standard of care required and, therefore, failed to supply the jury with expert testimony, the case was dismissed. *Id.* at 743.

85. Oswald v. Rapides Iberia Management Enter., 452 So. 2d 1258 (La. Ct. App. 1984). The plaintiff in this case was the victim of a car accident which left him partially paralyzed. *Id.* at 1261. The partial paralysis made it difficult for the patient to articulate his words. Thus it was difficult for aides and nurses to understand the patient.

86. *Id.* The nurse who observed him reported that his skin was cool and pale and his stomach was distended. *Id.*

87. *Id.* The decedent "had no blood pressure, was in shock and dehydrated and had a distended abdomen . . . . An initial diagnosis of a perforated ulcer was made and surgery was performed . . . . A peptic ulcer was found which was found to have been leaking for some period of time . . . ." *Id.*

88. *Id.* at 1262.

89. *Id.* at 1264.

90. *Id.* at 1265.

91. *Id.* at 1262. Defendant also called an internal medicine specialist. *Id.* at 1263.

would be mandatory.

Another situation which requires expert testimony arises when the resident has medical problems which require a twenty-four-hour-a-day watch. In *Rosemont, Inc. v. Marshall*[92] the resident was confused and could not care for herself. She had a history of attempted suicide, depression, and senility.[93] Having been left alone, she managed to leave through an exit which had no alarm.[94] She wandered "across the street, down an embankment, fell and broke her right shoulder."[95] She died four days later.[96]

The court held that the mere fact that the nursing home was not successful in confining the resident did not permit the jury to find negligence.[97] Because the plaintiff did not present expert testimony concerning the standard procedure of a twenty-four-hour watch, nor testimony concerning the standard procedure of installation of alarms on doors, the court held that there was insufficient evidence to find the defendant negligent.[98]

IV. Actions Which Create Civil Liability for Nursing Homes; Defenses to Suits Based on These Actions

Nursing homes are the center of much activity: people visit residents, deliveries are made, residents pursue various activities, employees work to create a healthy environment, and so on. Because of this daily activity, the nursing home becomes a potential target for civil lawsuits. The list of potential plaintiffs is not short. It includes residents, visitors, staff, students, and independent contractors such as repairmen and deliverymen.[99]

Personal injury and wrongful death suits are brought against nursing homes based on acts of patients, such as wandering away from the premises, and on acts of others, such as abuse of patients by employees, fellow residents, or third persons.

Nursing home residents are always potential plaintiffs, due in part to their frailty and vulnerability. Factors making them vulnerable include:

1. their advanced age (average 82);
2. their failing health (average four disabilities);

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92. Rosemont, Inc. v. Marshall, 481 So. 2d 1126 (Ala. 1985).
93. *Id.* at 1128.
94. *Id.* at 1129.
95. *Id.*
96. *Id.* The forensic pathologist determined that the cause of death was blood clots in the resident's lungs, originating in her broken shoulder. *Id.*
97. *Id.* at 1130.
98. *Id.* at 1130-31.
99. Kapp, *supra* note 7, at 19. Resident injuries related to the nursing home's professional negligence may take the form of falls, medication errors, dietary mistakes, thermal injuries, allergic reactions, infections, improper assessments, improper transfers, improper discharges, bed sores or decubitus ulcers, and resulting conditions, harm occurring during wandering, loss or destruction of resident property, assaults by fellow residents, assaults by intruders, assaults by nursing home personnel, and violation of resident rights. *Id.* at 20-21.

3. their mental disabilities (55 percent are mentally impaired);
4. their reduced mobility (less than half can walk);
5. their sensory impairment (loss of hearing, vision, or smell);
6. their reduced tolerance to heat, smoke and gasses; and
7. their greater susceptibility to shock.[100]

These factors help to create situations which can result in lawsuits.

The ultimate goal of the home and its employees is to provide a home-like atmosphere for the residents. Typically these residents are people who no longer have family, who cannot physically or mentally care for themselves (even with a live-in nurse), or who cannot afford to live with family or friends. There are, however, some homes which fail to comply with legislative requirements concerning adequate care, and the result can be neglect or even intentional abuse of patients.[101] Generally abuse is not specifically defined by a state statute or administrative code. Failure to abide by state or federal regulations may, however, lead to abuse.[102] Illinois has defined abuse as "any physical or mental injury or sexual assault inflicted on a resident other than by accidental means in a facility."[103]

A. *Intentional Physical Abuse*

Stiffelman v. Abrams[104] provides an excellent illustration of intentional physical abuse in a nursing home setting. Mr. Stiffelman entered the Missouri Evergreen Nursing Home "for the purpose of receiving nursing and health care of which he was then in need" and died two weeks later from "blows, kicks, kneeings, or bodily throwings intentionally, viciously, and murderously dealt him from among the facility's staff over a period of approximately two to three weeks prior to his death."[105] The plaintiff sued the operator and owner of the facility under a Missouri statute which provided

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100. Stiffelman v. Abrams, 655 S.W.2d at 529 (quoting Friedman v. Division of Health, 537 S.W.2d 547, 548-49 (Mo. 1976)). *See also* F. Moss & V. Halamandaris, Too Old, Too Sick, Too Bad: Nursing Homes in America (1977).

101. Stiffelman v. Abrams, 655 S.W.2d at 529. The majority of plaintiffs are nursing home residents. However, in "rare instances the courts are now permitting complaints for emotional injury brought by a person who has a special relationship with the resident." Kapp, *supra* note 7, at 20. In wrongful death cases the suit can be brought on behalf of the decedent by a relative, friend, or a person acting either on behalf of the decedent or as the decedent's court appointed *guardian ad litem*. *Id.*

102. Telephone interview with Sue Morse, R.N., administrator of the Grundy County Home, Morris, Illinois (Mar. 4, 1988). According to Mrs. Morse, these violations are classified according to their gravity: an "a" violation is one which will lead to a patient's discomfort, illness, or death. A "b" violation probably could lead to the same. A "c" violation might cause some discomfort.

103. Ill. Admin. Code tit. 77, § 300.330(c) (1987).

104. Stiffelman v. Abrams, 655 S.W.2d 522 (Mo. 1983).

105. *Id.* at 526. At the time of this abuse, Mr. Stiffelman was ninety years old. His injuries included "thirteen fractures to his ribs, subpleural hemorrhaging, and marked lesions to his chest, flanks, abdomen, legs, arms and hands." *Id.*

that any resident deprived of any right may bring a civil action against any owner or operator to recover actual damages.[106]

The court held in favor of the plaintiff, rejecting defendant's argument that the Missouri wrongful death statute provided the exclusive remedy.[107] The court believed that "the obvious purpose of this statute was to protect the health and safety of citizens who are unable fully to take care of themselves, particularly the more elderly persons, who, from necessity or choice, spend their later years in homes of the type which the statute would license or regulate . . . . [S]uch an enactment as this is a vital and most important exercise of the state's police power . . . ."[108]

The court also rejected the defendant's contention that the statute's definition of abuse violated due process.[109] The defendant contended that the definition was so vague and ambiguous that it could subject any nursing home owner or operator to liability "for any type of injury."[110] The court stated that there was nothing "vague or uncertain" about the abuse of Mr. Stiffelman and that this type of abuse was well within the purview of society.[111]

A different kind of intentional abuse occurred in the California case of *People v. Casa Blanca Convalescent Homes*.[112] In *Casa Blanca* the court discussed the plight of nine residents who were victims of bedsores, filth, dehydration, and malnutrition. One resident, after a two-month stay at the home, had to be returned to a hospital due to her deteriorating condition, which was described as "stuporous, unresponsive, semicomatose, [and] with huge bedsores on her hips."[113] She also had contractures, and she was dehydrated to a point which caused her to lie in a fetal position.[114] The court stated that these conditions could have been prevented if she had received careful nursing care.[115] Another patient had been scalded by hot bath water

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106. *Id.* The act also provided for attorney's fees. *Id.* at 528.

107. *Id.* at 532.

108. *Id.* at 528.

109. *Id.* at 533.

110. *Id.* at 533-34. Defendant also argued that the statute violated equal protection because it made the nursing home "an insurer of freedom from mental and physical abuse of any resident, but [it] is not applicable to all nursing homes . . . ." *Id.* at 534. The court rejected this argument, stating that the statute did not contain any exclusions. *Id.* at 535. The court noted that the home was not an insurer. *Id.*

111. *Id.* at 533.

112. People v. Casa Blanca Convalescent Homes, 159 Cal. App. 3d 509, 206 Cal. Rptr. 164 (1984).

113. *Id.* at 517-20, 206 Cal. Rptr. at 168-70.

114. *Id.* at 517, 206 Cal. Rptr. at 168.

115. *Id.* Other problems included loss of transfer sheets, failure to record turning the patients, failure to complete medical records directly after observation of the patient, failure to note obvious deterioration of a resident on her medical record (a patient was found by a friend sitting in a pool of urine with her tongue hanging out of her mouth, her arms and legs swollen, and blisters on both heels "the size of baseballs"). *Id.* at 517-20, 206 Cal. Rptr. at 169. One

even after the home had been warned that its water was too hot to bathe patients.[116]

The most serious problems seemed to be the filth and moldy food. A licensed vocational nurse, who subsequently left the Casa Blanca Home, found maggots in the vagina and anus of one of the patients.[117] Even though the nurse reported this to her superiors, there was never a report that anything was done about it.[118]

The court also mentioned that "if Casa Blanca needed to add trained personnel anywhere other than the nursing department, it was in the kitchen."[119] Casa Blanca had no full-time dietitian; it employed a "dietary consultant."[120] Not only did the home keep (on a regular basis) liver which had turned green with mold, but it ordered the liver to be served to patients instead of being thrown out.[121]

Casa Blanca defended on the ground that it was impossible "to make continuous total compliance" with the California regulations.[122] The trial court responded by finding that the home had violated the regulations on sixty-seven occasions, and by assessing a fine of $2,500 for each "act"—a total penalty of $167,500.[123] The court also stated that the defendants would be "enjoined from allowing any of the following acts or conditions to exist in any of [its institutions]."[124]

On appeal Casa Blanca contended that industry-wide noncompliance demonstrated that it was impossible to comply with the state's regulations.[125] The court held that although other homes failed to comply with regulations, that fact would not provide Casa Blanca with a lawful excuse.[126]

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other patient's leg was tied to the rail on his bed, as a result of which his leg was broken; no doctor had ordered a restraint. *Id.* at 522, 206 Cal. Rptr. at 171. The Hilltop Nursing Home also employed someone "to fill out blank spaces in medical records without regard for accuracy." *Id.* at 520, 206 Cal. Rptr. at 170. One of her duties was to alter her style of writing to match the style of the person who had initially made the report but had failed to complete it. *Id.* at 520-21, 206 Cal. Rptr. at 170.

116. *Id.* at 522, 206 Cal. Rptr. at 171. The water was still too hot even after the complaint had been filed in this case. *Id.*

117. *Id.* at 521, 206 Cal. Rptr. at 170.

118. *Id.*

119. *Id.* at 522, 206 Cal. Rptr. at 171.

120. *Id.*

121. *Id.*

122. *Id.* at 523, 206 Cal. Rptr. at 172. The court held that there was more than enough evidence to find that Casa Blanca had sufficient opportunity to comply with the regulations. *Id.* at 528, 206 Cal. Rptr. at 175.

123. *Id.* at 524, 206 Cal. Rptr. at 172. Casa Blanca's net profit for the year was well over one million dollars. *Id.* at 523, 206 Cal. Rptr. at 171.

124. *Id.* at 524, 206 Cal. Rptr. at 172.

125. *Id.* at 528, 206 Cal. Rptr. at 175.

126. *Id.* The court stated that "whether competitors employ the same or similar methods in their business practices is immaterial to the charge against Casa Blanca concerning those methods." *Id.* at 528-29, 206 Cal. Rptr. at 175.

The court focused its decision on public policy, stating that "[a] court cannot excuse unfair acts with a claim that business considerations of industry-wide practice justify such conduct."[127] The court affirmed the trial court's finding that the home had engaged in unfair business practices.[128]

B. *Wandering Away*

Some patients—including those who are mentally impaired—may stroll from their nursing home. They may be unable to return. Then the nursing home may be sued for failing to exercise reasonable care under the circumstances. The problem is that it is virtually impossible for the home to watch a single patient twenty-four hours a day.

In *Golden Villa Nursing Home v. Smith*, the court held that the nursing home had breached its duty to a third person by failing to take into consideration the resident's known tendency to wander.[129] The resident had been a patient of the home for five years, and suffered from "schizophrenia, senility . . . confusion and a tendency to wander."[130] The nursing home was located next to a highway, and the patient's records showed that she had previously wandered onto this highway.[131] On the day in question, she was left unsupervised for about an hour and was last seen on the back porch of the home.[132] Apparently she darted out onto the highway, where she was hit by a motorcycle.[133] Both the patient and the cyclist received serious injuries, which the plaintiff claimed were the result of Golden Villa's failure to provide adequate supervision of the patient.[134] The defendants not only claimed that there was insufficient evidence to render a judgment against them, but also that their supervision of the patient was not a deviation from accepted standards, statutes, and regulations.[135] The Texas Court of Appeals, in affirming the lower court's decision in favor of the plaintiff, held that defendants' knowledge of the patient's proclivity to wander toward the highway placed the defendants under a duty to "take such tendencies into consideration in protecting and providing for her" and to provide reasonable care in accordance with the known mental and physical conditions of the

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127. *Id.* at 529, 206 Cal. Rptr. at 175. The court held that regulation of the health care industry is not an unreasonable use of police power, and that "an unfair business practice occurs when it offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *Id.* at 531, 206 Cal. Rptr. at 177.

128. *Id.* at 531, 206 Cal. Rptr. at 177.

129. Golden Villa Nursing Home v. Smith, 674 S.W.2d 343 (Tex. Ct. App. 1984).

130. *Id.* at 346.

131. *Id.* The facility is located twenty to twenty-five feet from the highway and is fenced. *Id.* at 347. However, to comply with fire and safety regulations, the gates are kept unlocked. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 346.

135. *Id.* at 347.

patient.[136] The court also held that "a mere showing of conformity with the nursing home industry custom does not preclude a showing of negligence and of breach of duty in specific situations."[137]

In *Nichols v. Green Acres Rest Home*, the resident wandered from the home and was found dead, face down, near the bank of a river which was the northern boundary of the rest home property.[138] The decedent had been in good health and had been very active for his eighty-one years of age.[139] He had only been away for ten minutes when employees of the home realized he was missing, and he was found approximately twenty minutes after he had left.[140] Unfortunately, efforts to revive him failed.[141]

In ruling in favor of the defendant nursing home, the court reasoned that Green Acres had complied with all regulations, and that it had no prior notice that the patient might wander.[142] Furthermore, the patient's children had never requested, nor were there any doctors' orders, that the patient be restrained in any way.[143]

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136. *Id.* at 348.

137. *Id.* The Texas Department of Health stated that its regulations provided merely the minimum duty owed to the patient, rather than the full duty owed. *Id.* at 349. Several Texas courts have held that the owner of premises which abut or are adjacent to a highway "must exercise reasonable care not to jeopardize or endanger the safety of persons using the highway as a means of passage or travel and that the owner or occupant is liable for any injury that proximately results from any breach of this duty." *Id.* at 350.

138. Nichols v. Green Acres Rest Home, 245 So. 2d 544, 545-46 (La. Ct. App. 1971).

139. *Id.* at 545.

140. *Id.* at 546.

141. *Id.*

142. *Id.* at 545. Louisiana's minimum standards required that the Home provide 128 hours of nursing care for each twenty-four hour period; at the time the home was providing 150 hours of care. *Id.* at 545-46.

In Murphy v. Allstate Ins. Co., 295 So. 2d 29 (La. Ct. App. 1974), the plaintiff's husband, a nursing home resident, wandered away and was killed while walking along a major U.S. highway. Plaintiff alleged that the home was negligent in "failing to provide adequate attendants and supervision to prevent the decedent's escaping from the Nursing Center . . . ." *Id.* at 30-31. In reversing the trial court's decision in favor of defendant nursing home, the court held that, if a home has not "breached a contractual agreement to furnish special care beyond that [which is] usually furnished . . . there is no presumption of negligence on the part of the institution . . . ." *Id.* at 34-35. The court relied on *Nichols*, in which the court had stated that the defendant could not be found liable because "[r]egulations prohibited locking of exits because of the necessity of fire escape routes, and the rest home had no authority to physically restrain patients." *Id.* at 34 (quoting Nichols v. Green Acres Rest Home, 245 So. 2d at 546).

The most recent response to the problem of wandering away has been the development of an ankle bracelet which residents wear at all times. As a resident exits, an electronic eye immediately sets off an alarm and the patient may be apprehended before any accident occurs. Telephone interview with Sue Morse, R.N., Administrator, Grundy County Home, Morris, Illinois (Mar. 4, 1988).

143. Nichols v. Green Acres Rest Home, 245 So. 2d at 546. The children sent Mr. Nichols to the Green Acres Rest Home specifically because he would be able to indulge his habit of taking walks after smoking his pipe.

In Rosemont, Inc. v. Marshall, 481 So. 2d 1126 (Ala. 1985), plaintiff wandered away from a

C. *Tortious Actions by a Third Party*

Torts committed by third parties may provide the basis for suits against nursing homes. In *Collier v. Ami, Inc.*, the plaintiff was attacked by an unknown person at about three o'clock in the morning.[144] She told the nurse that she had severe pain in her abdomen, and that she had a nightmare in which someone had been choking her.[145] Her injuries included bruises and scratches on her "neck, face, throat, and mouth, with a blood-letting laceration on her face [and] numerous bruises, scratches and contusions near and in the entrance to the vagina."[146] As a result of the attack, internal bleeding caused the patient to develop a large blood clot in her abdomen, which required surgery to remove.[147] The plaintiff sued to recover damages for pain, suffering, mental anguish, and humiliation, alleging that the home and its employees failed to provide adequate security for patients and guests, and failed to take immediate action to prevent aggravation of her injuries.[148]

With respect to the plaintiff's first claim, the court held that the fact that prowlers had entered the premises in the past had no bearing or importance in establishing that the defendant had been negligent in failing to provide a safe home.[149] The court also held in favor of defendants on the more serious charge (against the nurse on duty) of failure to prevent aggravation of the patient's injuries.[150] The nurse had called the plaintiff's physician approximately forty-five minutes after the attack, explaining to him that the plaintiff was bleeding from the lower pelvic area; and this was all that the nurse was permitted or authorized to do at that time.[151] She did not have the training required to perform the pelvic examination which the plaintiff needed, and she carried out the doctor's orders by giving the plaintiff a tranquilizer.[152] Finally, the court noted that the defendants' expert testified that there were no regulations which required a nursing home to employ security guards, nor did she know of any home which did.[153] Thus the home was

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home and fell down an embankment. Plaintiff alleged that the home was negligent in failing to have guards at the doors or some type of alarm system on all the exits. *Id.* at 1130. The court rejected this contention, saying that there was no evidence that Rosemont was unique in failing to use alarms or guards. *Id.* at 1131.

144. Collier v. Ami, Inc., 245 So. 2d 170, 171 (La. Ct. App. 1971).

145. *Id.* at 172.

146. *Id.* at 171.

147. *Id.* Plaintiff was hospitalized for forty days.

148. *Id.* at 170-71.

149. *Id.* at 171-72. The prior incident apparently involved children playing in the attic. The incident was reported but an investigation revealed no trace of foul play. *Id.*

150. *Id.* at 174.

151. *Id.* at 172-73.

152. *Id.* The court stated that the nurse "did not have that information, nor was she trained, authorized, or permitted to make an examination that would have disclosed that fact." *Id.* at 173. The nurse who went on duty during the morning shift also followed standard procedure. *Id.*

153. *Id.* The expert was Mrs. Elva Watson, a registered nurse with thirty-seven years of

absolved of any negligence claim.

In *Juhnke v. Evangelical Lutheran Good Samaritan Society*, the plaintiff was struck by a fellow resident, which caused her to fall to the floor, as a result of which she suffered serious injuries.[154] The plaintiff alleged that the home was negligent in failing to take ordinary care to protect her from assaults by other patients.[155] In holding that the nursing home breached its duty to exercise reasonable care, the court relied on the fact that the defendant had knowledge, for at least one year, that the patient who struck the plaintiff had a tendency to be "very belligerent [and to] wander around the nursing home and in the rooms of other patients, pushing, tripping and hurting others."[156]

In sum, the duty owed to a patient depends on the applicable standard of care, which is defined by statute, case law, and expert testimony. A health care provider will not be held legally liable "for every mistake or error in judgment, or for every unfortunate patient outcome, but only for patient injuries that are directly caused by the provision of care that falls below the due care or reasonable range."[157]

Although there may not be a specific statute which will provide a plaintiff with relief, there remains the tort concept of negligence which the plaintiff may employ to seek a remedy for a negligence or wrongful death claim. Plaintiffs' claims most frequently stem from some type of deviation from the acceptable standard of care recognized by nursing homes which are similarly situated. This has been defined as abuse; it may be either intentional or unintentional. However, if the court finds that the home complied with the minimal standard of care and had no prior notice of the injured resident's self-endangering propensities, then the home will be absolved from liability. It is extremely important to give a patient the type of care which is required by his or her known mental and physical conditions. Thus, if a nursing home takes measures to prevent injury—such as restraining the patient—and these efforts are not successful, the law will not permit a finding

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experience. Her job with the Louisiana State Department of Hospitals was to evaluate nursing homes. *See also* Rosemont, Inc. v. Marshall, 481 So. 2d at 1130-31.

154. Juhnke v. Evangelical Lutheran Good Samaritan Soc'y, 6 Kan. App. 2d ____, ____, 634 P.2d 1132, 1135 (1981).

155. *Id.* at ____, 634 P.2d at 1134.

156. *Id.* at ____, 634 P.2d at 1135. *See also* Rosemont v. Marshall, 481 So. 2d 1126 (Ala. 1985); Bezark v. Kostner Manor, Inc., 29 Ill. App. 2d 106, 172 N.E.2d 424 (1961). Other courts may rely on § 319 of the Restatement (Second) of Torts, which provides: "One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to another if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm." Restatement (Second) of Torts § 319 (1965). *See also id.* at § 320.

157. KAPP, *supra* note 7, at 5. *See also* McGillivray v. Rapides Iberia Management Enter., 493 So. 2d 819 (La. Ct. App. 1986). It should be noted that a nurse's aide who performs functions which a licensed practical nurse or registered nurse would normally perform will be held to the higher standard. KAPP, *supra* note 7, at 5.

of negligence.[158]

V. Remedy and Reform

A. *Remedy*

Nursing home operators may protect themselves from potential liability by implementing a risk management program. Risk management involves a "systematic [facility]-wide program designed to reduce injuries and accidents and minimize the financial severity or claims" or a method of "reducing patients' risks . . . and reducing injuries to plaintiffs."[159] There are three aspects to this type of program. They are:

1. In-service education for all nursing home staff and employees;
2. Identification and investigation of, and where possible intervention into, specific incidents of resident injuries; and
3. Generation and maintenance of a risk data base from which negative trends and danger spots may be identified.[160]

These programs are introduced to educate employees about the substantive risks and issues which are litigated in professional malpractice cases; to supply knowledge and improve skills which would prevent or mitigate malpractice claims; and to "sensitize [employees] to the emotional, interpersonal aspects . . . and foster more positive attitudes and morale toward residents, families, and resident care."[161]

Incident reports are another very important aspect of a risk management program. These reports describe events which take place in the home.[162] Individuals required to file reports include "any person[s] employed by the nursing home or [who] enjoy staff privileges there . . . including private physicians who treat private patients . . . ."[163] Any occurrence which is unusual or which departs from the routine pattern of resident care should be reported because of the potential liability which may follow from such incidents.[164]

B. *Reform*

It is important that health care facilities not only care for their patients in the medical sense, but also provide some atmosphere of home-life for

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158. Rosemont v. Marshall, 481 So. 2d at 1130.

159. Kapp, *supra* note 7, at 21-22.

160. *Id.* at 22. The main purpose of this procedure is to preserve the financial stability of the home and to provide the patients with the highest quality risk-free health care reasonably feasible.

161. Kapp, *supra* note 7, at 23.

162. *Id.* at 24.

163. *Id.* Every nursing home should have a policy which specifies who must file an incident report and what qualifies as an incident. *Id.*

164. *Id.*

them.[165] The reality of the life of a nursing home resident is often less than home-like. Some homes provide neither "supportive atmosphere for their residents nor the rehabilitative services necessary to assist their residents in attaining a maximum level of functional capacity and independence."[166] This problem stems in part from the fact that most residents have to depend on staff members who are poorly paid and poorly motivated. Another problem is that standards set for nursing homes are usually patterned after standards set for hospitals, disregarding the medical, residential, social and emotional needs of nursing home and hospital patients.[167]

Health care facilities which receive state and federal funding are required to comply with Medicaid and Medicare certification standards.[168] State licensing agencies, such as state health departments, conduct annual, unannounced inspections. These inspections consist of "a physical inspection of nursing home premises, interview[s] of patients and staff, and examin[ations] of documents and records."[169] If a deficiency is detected, the state inspectors submit a "deficiency list" to the facility, which then files a "plan of correction" with the agency.[170]

The sad reality of this type of enforcement is that these federally funded inspections "are ineffective because of inadequate funding, apathetic personnel, cumbersome legal remedies, inappropriate standards, interagency fragmentation and maldistribution of long-term care resources."[171] Last year, however, Congress passed the Omnibus Budget Reconciliation Act,[172] which provides for enforcement and improvement of nursing home care. The new law is a "milestone because it sets national standards for nursing homes where none existed before . . . ."[173] Among the requirements imposed on skilled nursing facilities are: (1) that residents be cared for in such a manner as to improve their quality of life; (2) that the residents' mental and psychosocial well-being, as well as their physical conditions, be attended to "in accordance with a written plan of care which describes the medical, nursing, and psychosocial needs of the resident and how such needs will be met;" and (3) that nurse's aides be qualified by a state training and testing program.[174] Of course, the effect this new law will have cannot fully be appreciated at this time. But with the increase in fines imposed on homes and the increase in litigation, the future looks better for future nursing home

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165. *See* Butler, *Assuring the Quality of Care and Life in Nursing Homes: The Dilemma of Enforcement*, 57 N.C.L. REV. 1317, 1318 (1979).
166. *Id.*
167. *Id.* at 1324.
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.* at 1328.
172. H.R. REP. No. 495, 100th Cong., 1st Sess., at 669 (1987).
173. The Des Moines Sunday Register, Feb. 21, 1988, at 3E, col. 1.
174. H.R. REP. No. 495, 100th Cong., 1st Sess., at 669 (1987).

residents.

VI. Conclusion

The increase in lawsuits brought in the last few decades against nursing homes has caused alarm among nursing home owners, Congress, and the legal and nursing professions. Unless nursing homes conform to and follow a recognized standard of care in the treatment of their patients, potential plaintiffs will not only increase in number but cause a threat to the financial well-being of skilled nursing facilities. This standard of care is set out in state and federal regulations; so it should not be difficult for facilities to make a good faith effort to comply with these standards.

A malpractice complaint may be brought against a home under several theories, among the most common being common law tort and contract. The majority of these claims arise from unintentional acts, but if the plaintiff is able to meet his burden of proving negligence, the home will be liable.

While the possibility of litigation always exists, there are many ways a home may protect itself. First, of course, the home should comply with all state and federal standards. Second, the home should educate its employees concerning the types of acts or omissions which can cause liability. Third, the administrator or owner of the home should endeavor to hire people who genuinely want to care for the elderly and provide a decent home-like atmosphere. Fourth, at all times the employees should keep in mind the physical and mental condition of each patient. Fifth, in the event that any abnormality in routine procedure should occur, an accurate and detailed report of the event should be submitted to the nurse on duty. Sixth, the knowledgeable nursing home owner will have adequate professional liability insurance against the inevitable risks which the nursing home encounters. If these procedures are followed, much of the risk will be alleviated. Ultimately, however, it must be remembered that the skilled nursing facility is a home and that the patient should be treated as a resident guest in a home.

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