

Extension of Liability for Abuse Against Nursing Home Residents Under the Nursing Home Care Act

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I. INTRODUCTION

Abuse prevention in nursing homes is a developing area of long-term care, with legislation evolving quickly in recent years due to the unfortunate increase in reports of resident abuse.¹ Less than thirty-five years ago there was tremendous concern over increasing reports of “inadequate, improper and degrading treatment of patients in nursing homes.”² Yet, Illinois legislation in place at the time did not provide an adequate remedy for nursing home residents abused in state long-term care facilities.³ The Illinois Legislative Investigation Commission (the “Commission”) conducted a statewide investigation of nursing homes to determine proper legislative reform.⁴ In 1979, the Commission developed the current Nursing Home Care Act (the “Act”), which provides an express statutory right for nursing home residents to be free from any abuse or neglect *and* to be able to pursue the long-term care provider for civil remedies.⁵ In 1986, the Institute of Medicine Report conducted a national investigation into nursing homes and documented an alarming number of reports of abuse.⁶ In

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1. *Harris v. Manor Healthcare Corp.*, 111 Ill.2d 350, 357-58 (1986) (quoting Senate Debates, 81st Ill. Gen. Assem., May 14, 1979, at 184 (statement of Senator Karl Berning)).

2. *Id.*

3. Steven M. Levin, et al., *Protecting the Rights of Nursing Home Residents through Litigation*, 84 ILL. BAR J. 36, 37 (1996).

4. *Id.*

5. 210 ILCS 45/2-101 (1980).

6. Levin, 84 ILL. BAR J. at 37.

response to this report, Congress passed landmark federal nursing home legislation in 1987, known as OBRA (Omnibus Budget Reconciliation Act), to meet nursing home residents' needs.⁷

The Act's revision, and similar federal regulations, have greatly heightened nursing home liability and continue to increase litigation regarding resident abuse.⁸ However, newly developed resident rights and the Act create an uncertain extension of liability.⁹ Litigation and recent research regarding nursing home legislation reveal that the Act extends liability to nursing homes for inflicting abuse, failing to prevent abuse, or operating their facility in a way that directly threatens the resident.¹⁰ However, the Act falls short in imposing liability due to its uncertain and vague guidelines.

This article will first discuss the parts of the Act that detail a nursing home resident's guaranteed right to be free from intentional abuse. Next, this article will detail how the Act protects nursing home residents from the negligence of nursing home facilities. Both sections will detail the shortcomings of the Act and how legislatures and courts are left without a bright line rule to protect nursing home residents.

II. THE ACT GUARANTEES RESIDENTS THE RIGHT TO BE FREE FROM INTENTIONAL INFLICTION OF ABUSE.

The Act extends strict liability to nursing homes when a resident is a victim of an intentional tort (e.g. physically assaulting a resident.)¹¹ An

7. *Id.*

8. Kira Anne Larson, *Nursing Homes: Standards of Care, Sources of Potential Liability, Defenses to Suit, and Reform*, 37 *DRAKE L. REV.* 699, 699-700 (1987-1988); *see generally* 42 C.F.R. § 483.25 (2005).

9. *Id.* at 701.

10. *See infra* Childs v. Pinnacle Health Care, LLC 399 Ill.App.3d 167, 180 (2010); Myers v. Heritage Enterprises, Inc., 354 Ill.App.3d 241, 248 (2004); Mason v. Dep't of Pub. Health, 326 Ill.App.3d 616, 623 (2001).

11. 210 ILCS 45/3-601 (1980).

intentional tort can be inflicted on a nursing home resident by the nursing home itself—represented by the owner of the nursing home, other residents of the nursing home, or third parties not affiliated with the nursing home.¹² In *Childs v. Pinnacle*, the court found that the Act does not extend liability to the nursing home itself where employees of the nursing home commit intentional torts; and therefore, those lawsuits must be asserted independently of the Act.¹³ In addition, Illinois courts have held that in order to charge a nursing home entity rather than a specific employee with abuse, the resident must show that the nursing home operated or maintained its facility in a manner that was “directly threatening to the health, safety, or welfare of a resident.”¹⁴ Illinois case law directly speaks to extension of liability to a nursing home entity; however, the Act itself is silent as to how residents can pursue the nursing home entity in regards to negligent hiring or where the employer failed to take action when it had knowledge that the employee presented a risk of harm to others.¹⁵

Notwithstanding the silence of the Act and other federal long-term care facility regulations, a resident can pursue a nursing home entity for intentional torts committed by its employees. For instance, under federal law, a nursing home facility can be held liable in a court of law or through the State’s nurse aide registry for abuse inflicted on its residents by an employee when it employs staff with previous convictions of abuse, negligence, or mistreatment.¹⁶ The Act requires nursing homes to participate in a federal and state regulated licensure system, thereby

12. *Id.*

13. *Childs*, 399 Ill.App.3d at 180.

14. 210 ILCS 45/1-103 (1980); *Mason v. Dep’t of Pub. Health*, 326 Ill.App.3d 616, 622-23 (2001) (quoting *Alden Nursing Center-Morrow, Inc. v. Lumpkin*, 259 Ill.App.3d 1027, 1032 (1994)).

15. Stephen C. Buser, Harriet A. Hamilton, *Overview of Illinois Nursing Home Litigation*, 88 ILL. BAR J.316, 356 (2000).

16. *See* 42 C.F.R. § 483.13(c)(1)(ii) (2013).

requiring all nursing homes statewide to abide by long-term care facility regulations and actively ensuring that nursing home residents are free from abuse.¹⁷ Nursing home lawsuits have increased exponentially across the country as a result of these regulations, the public attention to nursing home abuse, and the desire of families of nursing home residents to seek damages for abuse against their loved one.¹⁸ Newly developed regulations, such as the Act, reflect the demand for change in nursing home facilities and have opened up nursing homes to an immense amount of liability for torts committed by its employees.

Although the Act extends a great deal of liability to nursing homes for torts committed by its employees, other legislation enacted amidst the drastic nursing home liability reform has created setbacks for plaintiffs. Most notably, the Health Care Worker Background Check Act strips plaintiffs of the ability to recover treble damages.¹⁹ This aspect of nursing home legislative reform is unique to Illinois and indicates that the Illinois legislature and courts sought to restrict the extension of liability that nursing homes were facing all over the country as a result of sweeping reform.²⁰ Yet, the Act still exposes nursing homes to ambiguous, and at times, unprecedented negligence liability.

III. ILLINOIS NURSING HOMES MUST PREVENT ANY HARM FROM ITS RESIDENTS AS A REASONABLY CAREFUL FACILITY WOULD.

Modern interpretations of the Act require nursing homes to act as a “reasonably careful” facility when assisting with the personal care of its

17. 210 ILCS 45/3-101 (1985).

18. Stephen C. Buser, *Illinois Nursing Home Litigation 2000*, 88 ILL. BAR J. 302 (2000).

19. Stephen C. Buser, Harriet A. Hamilton, *Overview of Illinois Nursing Home Litigation*, 88 ILL. BAR J. 316, 318 (2000); *See Darden v. Heartland Manor, Inc.*, 186 Ill.2d 291, 299 (1999) (holding that the treble damages remedy is not a vested right of a nursing home plaintiff).

20. Stephen C. Buser, *Illinois Nursing Home Litigation 2000*, 88 ILL. BAR J. 302 (2000).

residents.²¹ This provision can create liability for an immense amount of injuries and issues affecting its residents. First, nursing homes can be liable under common law theories of negligence, or as of recently in other states, through state statutory law.²² Typical negligence actions deriving from the Act, the Illinois Administrative Code, and the OBRA regulations are those “in which the resident developed pressure ulcers, suffered malnutrition or dehydration, wandered away from the nursing home and suffered injuries, was administered medication to the point of chemical restraint, or fell.”²³ The Act does not determine how far this liability extends to nursing home facilities, especially where residents of nursing homes are prone to such injuries due to age and illness.

Illinois case law extends liability to a nursing home under the Act if the nursing home fails to assist with personal care as a reasonably careful facility would.²⁴ In most jurisdictions, statutes such as the Act establish the standard of care nursing homes in the state must abide by.²⁵ For instance, the Act defines “personal care” as

Assistance with meals, dressing, movement, bathing or other personal needs or maintenance, or general supervision and oversight of the physical and mental well-being of an individual, who is incapable of maintaining a private, independent residence or who is incapable of managing his person whether or not a guardian has been appointed for such individual.²⁶

The Act appears to incorporate the idea that nursing home residents are at a higher risk for injury or illness because of their feeble condition; yet it makes no account for how this weakened condition may lead to injuries

21. *Myers*, 354 Ill. App. 3d at 248.

22. FROLIK & BROWN, *ELDERLY OR DISABLED CLIENT*, (Nursing Homes and Long-Term Care Insurance, 1, 1, 2nd ed. ch. 15.03 2012).

23. Buser & Hamilton, *supra* note 19, at 356.

24. *Myers*, 354 Ill. App. 3d at 248.

25. Robert J. Rice, *Nursing Home Liability*, 24 AM. JUR. POF 3d §6 (1994).

26. 210 ILCS 45/1–120 (1980).

sustained in a nursing home. The Act's disregard for a resident's preexisting condition is unique to negligence claims because it seems to soften the influence contributory or comparative negligence has on a nursing home resident's recovery from a nursing home.

The Act also creates a broad spectrum through which a resident may pursue a nursing home.²⁷ Other negligence theories of liability against nursing homes for its own actions are: failure to provide adequate staff, failure to provide proper nutrition, meals, and hydration, failure to properly prescribe, fill, and administer drugs and medication, and failure to provide elopement.²⁸ Further, nursing home residents whose rights have been violated can also pursue nursing homes for a breach of contract, wrongful death, fraud, and loss of chance.²⁹ Nursing homes are obligated to post signs in visible areas in the nursing home listing all the state and federally mandated requirements of care and treatment the facility owes to its residents, ensuring that residents are informed of the many ways they can bring a cause of action against a facility.³⁰

The Act also potentially imposes liability to nursing homes where a third party inflicts abuse on a nursing home resident. Nursing homes and their residents constitute a special relationship on which Illinois case law imposes a duty to protect another from a reasonably foreseeable criminal attack by a third party.³¹ Liberal interpretation of the Act and case law indicate that where a criminal third party not associated with the nursing home enters the facility and abuses a resident, that resident has the right to

27. Daniel J. Penofsky, *Litigating Nursing Home Negligence and Wrongful Death Cases*, 110 AM. JUR. TRIALS 1 §30 (Feb. 2013).

28. *Id.*

29. *Id.*

30. *Id.*

31. See *Hernandez v. Rapid Bus Co.*, 267 Ill.App.3d 519, 524 (1994) (listing voluntary custodian and protectee as one of the four special relationships imposing such liability).

pursue the nursing home for civil damages.³² Thus, a nursing home has exclusive control of its residents, and residents place themselves under its exclusive control with the expectation that the nursing home will protect them. This liability-imposed relationship in concert with the Act opens nursing homes up to tremendous liability through negligence, or even *res ipsa loquitur*.³³ Nursing homes must prevent all outside threats of violence against its residents; however, how nursing homes are to prevent attacks of abuse by other residents or self-inflicted abuse is a more complex matter.

A nursing home must protect its residents from criminal conduct by other residents and even themselves.³⁴ The Act and federal statutes extend a duty to nursing homes to properly monitor and supervise residents to prevent abuse against its residents.³⁵ Supervision can become especially difficult where nursing homes commonly provide care and housing to residents with mental illness or who have criminal histories.

The Act requires nursing homes to pre-screen all potential residents and determine whether they can safely co-exist with residents and employees.³⁶ The Act requires that a psychiatrist, psychologist, registered nurse certified in psychiatric nursing, professional counselor, or social worker conduct the screening.³⁷ The screening must determine a diagnosis of any mental health disorder, a proper treatment plan, and determination of whether the facility is able to meet the needs of the individual.³⁸ The screening also determines whether a nursing home can provide an array of community mental health

32. 210 ILCS 45/2-101 (1980).

33. See *Heastie v. Roberts*, 226 Ill.2d 515, 538 (2007) (citing *Napoli v. Hinsdale Hospital*, 213 Ill.App.3d 382, 388 (1st Dist. 1991)) (explaining that *res ipsa loquitur* applies “where it can be shown that the defendant was responsible for all reasonable causes to which the accident could be attributed.”).

34. 210 ILCS 45/2-201.5.

35. Penofsky, *supra* note 21, at §26.

36. 210 ILCS 45/2-201.5.

37. *Id.*

38. *Id.*

services that would enable the resident to humanely live in the community; such as, permanent supportive housing, assertive community treatment, or peer support services.³⁹ Nursing homes are also required to run criminal background checks on all possible residents.⁴⁰ Where a resident has a criminal history, the nursing home must fingerprint the resident and report the resident to the Illinois Department of Public Health, which prepares a Criminal History Report.⁴¹

Analysis of the Act reveals that there are strict guidelines for the admittance of potentially dangerous residents; however, the Act is markedly silent as to the regulation of these residents once they are in the facility.⁴² The Act focuses on admittance of mental health residents to ensure that highly dangerous residents do not live in the facility.⁴³ However, the Act does not speak to the proper monitoring and safety measures a nursing home must take when a mental health resident resides in the facility, including prevention of the onset, or worsening, of dangerous mental health disorders.⁴⁴ The steps a nursing home must take in order to ensure its potentially dangerous residents are separated from the rest of the facility is unclear and creates a large and ambiguous area of liability.

Nursing homes also have a duty to keep the nursing home free from all hazards so residents cannot self-inflict harm.⁴⁵ Nursing homes must take the proper precautionary steps to prevent residents from inflicting harm on themselves.⁴⁶ This includes removing all physical objects that can result in self-harm attempts and providing proper care and treatment to residents to

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. 42 C.F.R. § 483.25(h) (2005).

46. *Id.*

prevent self-harm ideation.⁴⁷ Nursing homes often successfully combat liability in this area by claiming that the resident inflicted self-harm due to a pre-existing condition.⁴⁸ Nevertheless, it is crucial that a nursing home properly monitor and treat the mental health of all of its residents in order to avoid liability for resident self-harm.

IV. CONCLUSION

The Act requires Illinois nursing homes to provide proper treatment for all of its residents. Further, the Act extends a statutory duty to all nursing homes to ensure that its residents are free from abuse and neglect. The numerous areas of care and treatment a nursing home provides and the seemingly never-ending list of potential threats to residents creates an immense amount of liability for nursing homes. While the newly reformed Act helps to ensure that residents are protected from threats of abuse and neglect, it falls short in many areas where it does not determine how a facility should act when presented with potential threats. Litigation in this area represents a new and a highly contested issue that continues to evolve along with resident rights. The Act may be able to provide an improved interpretation of liability once resident rights and facility duties are more clearly defined.

47. 42 C.F.R. § 483.25(h) (2005); Penofsky, *supra* at note 21 §27.

48. Penofsky, *supra* at note 21 §28.