EXPERT ANALYSIS

The negligence duty of assisted living facilities: Between a rock and a hard place

By Nancy Reynolds, Esq.
LeClairRyan

The statutory and regulatory schemes defining qualifications of residents for admission to skilled nursing and assisted living facilities are vastly different and can set parameters on levels of care required for residents.

When potential residents are in the gray area between the two sets of requirements, it is not unusual for families to request assisted living admission to avoid the higher cost of skilled care. In light of the different levels of care that can affect negligence duties, assisted living facilities should be very careful when considering those requests.

Assisted living facilities run a significant risk of potential liability by failing to provide care levels to residents who should be placed in skilled care. That same risk is posed when the facilities delay re-evaluation of residents upon changes of condition that require levels of care beyond what the assisted living facility can provide.

The specific qualifying conditions that bump a resident from assisted living to skilled care vary from state to state. However, most states prohibit admission to assisted living facilities when the resident requires regular to constant skilled nursing or medical care, has an infectious disease (including active tuberculosis), is a danger to self or others, has a Stage III or higher pressure ulcer, requires more than minimal assistance with activities of daily living, cannot self-evacuate, or requires restraints.

The constant skilled nursing care that excludes residents from assisted living can include suctioning tracheotomy or nasogastric tubes, ventilator care, catheter care, and intravenous administrations.

In Virginia, for example, the excluding characteristics for assisted living residents are ventilator dependency, Stage III (nonhealing) and Stage IV skin ulcers, intravenous therapy that is not intermittent, airborne infectious disease requiring isolation, use of psychotropic medications without diagnosis and treatment plans, use of nasogastric tubes, and use of gastric tubes in a dependent feeder.

In Virginia and other states that do not recognize assisted living facilities as providing medical care, remaining true to the admission exclusions is very important to the liability assessment.

In Virginia, the Department of Health Professions regulates skilled care facilities. Skilled care facilities or nursing homes are also defined as health care providers under the Virginia Medical Malpractice Act.

In contrast, assisted living facilities are regulated by the Department of Social Services, and they are not identified as health care providers under the Medical Malpractice Act.

Thus, Virginia assisted living facilities are not held to the standards of medical providers.

Against this backdrop, the obvious issue in negligence cases is how to define the assisted living facility’s duty and breach of duty. The scenarios below highlight this issue:

• An assisted living facility resident ambulates with a walker and requires
minimal assistance, if any, with her activities of daily living. She falls in her room behind closed doors and suffers a hip fracture. What is the assisted living facility’s duty?

• An assisted living facility resident resides in a memory care unit. His dementia is well-managed through administration of psychotropic medications, but his family will not allow administration because of the side effects, including lethargy and inability to effectively communicate. The resident threatens other residents with his cane, which is regularly taken from him by the facility staff and returned to him by the family. The resident threatens the wrong memory care unit resident with his cane and is severely beaten. What is the assisted living facility’s duty?

• An assisted living resident with moderate ambulation difficulties and mild dementia loves to smoke cigarettes but can do so only when her financial power of attorney sends cash. On one such occasion, she informs the nurse that she is leaving the facility. She has no history of wandering or elopement, and there is no medical justification for restraints or confinement. On her way to the local convenience store, she attempts to cross a train track when the train is approaching. She is struck by the oncoming locomotive. What is the assisted living facility’s duty?

• On an outing to a World War II memorial, an assisted living resident using a motorized wheelchair rolls herself into the reflecting pool. What is the assisted living facility’s duty?

In states where the assisted living facility is not considered a medical provider, the applicable standard is arguably a common law negligence duty as long as the facility has not assumed a higher level of care. For the resident who falls in her room while ambulating, as long as the facility did not create a fall hazard in the room by such conduct as permitting area rugs that can shift location or waxing the floor, there is no breach of duty.

The assisted living facility that complies with the strict requirements for admission is not required to provide constant nursing care. Thus, a plaintiff’s standard-of-care expert who opines that the resident must be within a staff member’s line of sight at all times is articulating a standard that is beyond the duty of an assisted living facility.

For the cane-wielding, memory care resident, the facility assumed a duty in excess of the requirements for admission to assisted living. That resident was a danger to himself and others, and that condition could not be neutralized without use of psychotropic medications administered through a physician and a treatment plan.

Legislatures in some states, such as California and Arizona, have passed elder-abuse statutes that have been applied to negligent acts affecting assisted living residents by virtue of their incapacity.

The family rejected the recommended treatment plan. Thus, he required psychotropic medications pursuant to a treatment plan to reside in the facility, making him ineligible for assisted living care. The facility was aware of this condition and did not reassess him to determine whether he remained qualified to live in an assisted living environment.

In this case, the negligence duty analysis focuses on a medical condition, which is precisely why that condition disqualifies the resident for admission to an assisted living facility — it is not a medical provider.

The attempted train dodger is a classic example of remaining diligent to upholding resident rights. Assisted living residents have the right to come and go at will unless they are elopement risks. Many assisted living residents may be limited by mobility constraints or access to transportation, but they retain the right to come and go.

If the facility was aware of a poor judgment issue with the train dodger, then it needed to assess whether the resident was a danger to herself and whether she required a different level of care. However, judgment was not a prior issue triggering a reassessment obligation. The facility had no duty, common law or otherwise, to protect the resident from the events that unfolded.

In the case of the resident going into the reflecting pool, the facility assumed responsibility for the well-being of the residents taken on an outing sponsored by the facility and organized and attended by the facility’s activities director. This duty is a common law negligence duty applicable to organized outings of adults with no cognitive deficits or medical conditions that would provide notice of a foreseeable danger.

The Virginia Supreme Court has held that like a landlord, an assisted living facility only had a duty of ordinary care to its residents while they were on facility property.

When a resident left the facility, as he was free to do, and threw himself off a bridge to his death, the facility was not considered to have a duty. However, when the assisted living facility is distributing medications, it must do so within the medical standards for that activity.

That rationale was also followed in a Tennessee case of medication error in an assisted living facility. The court held that status as an assisted living facility does not mean all negligence claims are also medical malpractice claims.

When the offending conduct involves medical care, a medical malpractice claim may be appropriate. Otherwise, the claims are for ordinary negligence. In sum, defining duty depends on what obligations and accompanying care levels the facilities assume.

A New Jersey federal court held that assisted living facilities are not covered by the New Jersey Nursing Home Responsibilities and Rights of Residents Act and dismissed any claims of malpractice under that act. The court noted that there are separate regulatory schemes for nursing homes and assisted living facilities and that the lines between the two are clearly drawn.

Thus, Virginia is not the only state applying separate standards for nursing homes and assisted living facilities. New Jersey attorneys defending negligence cases against assisted living facilities are also required to appreciate and argue the separate standards.

Similarly, an Illinois federal court held that negligence claims against an assisted living facility in a resident-on-resident assault case were not medical malpractice claims.
The conduct and any duties of the assisted living facility were not medical in nature.7
An Ohio veterans’ assisted living home was not held liable after a resident fell off a second-floor balcony to his death because the condition was open and obvious and because the veteran was mentally competent, with only mild ambulatory impairment and mild memory deficits.8 The court applied a standard premises liability analysis.

A New York assisted living facility resident, who ambulated independently, participated in a bowling outing with the activities director and other residents. While bowling, he slipped, fell and broke his hip. The court dismissed a common law negligence claim that was based on the facility’s alleged failure to ensure safety while bowling as well as its decision to allow the resident to participate.9 The facility had no duty because it was not an insurer of the safety of the resident, who was a competent adult.

It should be noted that the legislatures in some states, such as California and Arizona, have passed elder-abuse statutes that have been applied to negligent acts affecting assisted living residents by virtue of their incapacity, or that hold care providers accountable for failure to provide care.10 When assisted living facility staffers fail to provide services for activities of daily living that residents require, claims of elder abuse can be successfully lodged in those states. Assisted living facility litigation is fraught with confusion over what the negligence duties are. The answer is not clear and can be dependent on statutory construction.

In states that consider the assisted living services to be medical in nature, medical experts usually define the duty. In states where assisted living services are not considered medical in nature, courts resort to common law negligence principles.

Considering that admission requirements in many states tend to exclude potential residents requiring medical care, if medical care is the issue litigated, the assisted living facility may have been providing care beyond its regulatory mandate. When the assisted living facility assumes a higher burden, it will be required to provide care that comports with that higher standard.

The moral of the story? Remain true to the well-defined limitations for assisted living facility admission or suffer the consequences when the higher level of care assumed is not provided. WJ

NOTES