

Newsletter - Fall 2007

Elder Abuse in the Civil Justice System

The number of people in nursing and assisted living facilities is on the rise. There is an aging population, and patients are often moved from hospitals to nursing homes to recuperate. People living in institutional care facilities are vulnerable to abuse and neglect by their care-givers. Many cases of abuse go unreported. Victims are sometimes hidden, with infrequent visits from family and friends who might observe the abuse; people often fail to report complaints, doubting the elder victim's version of events; and care-givers sometimes fear retaliation.

We generally see only the most severe cases of abuse and neglect in our practice. Oregon has enacted an elder abuse act, which was intended to make it easier and faster for elders to access the civil justice system. ORS 124.005 to 124.140. That Act provides a civil action for physical, emotional, or financial abuse, with treble damages and plaintiff's reasonable attorney fees recoverable. ORS 124.100 to 124.140. The statute of limitations for the civil action is seven years from the date the conduct is discovered. ORS 124.130.

But the protections given by this Act are limited: nursing homes and health care facilities are not subject to suit under the Act unless the institution or its employee is convicted of a financial crime, assault, menacing, reckless endangerment, criminal mistreatment, rape, sodomy, unlawful sexual penetration, sexual abuse, or strangulation. ORS 124.115.

That's why most civil cases against nursing homes are brought under common law theories of negligence. Such claims are complex and require much time and resources. The plaintiff's medical chart is usually voluminous, due to the length of time spent in the nursing facility, and due to paperwork generated to comply with various Medicare and Medicaid rules and to obtain payment from these agencies.

As a first step in evaluating a case, request a complete copy of the resident's chart. Oregon law requires that the nursing home provide copies of the resident's chart upon request. OAR 411-085-0310(15-16). It is also essential to obtain the State of Oregon's annual surveys of the nursing facility. The surveys are available to the public upon request from the Seniors and People with Disabilities Division. In addition, the State often investigates the incident or incidents giving rise to the civil action and creates a report of investigation. Copies of the report are available, but names of the resident, the witnesses, and the complainant are redacted based on statutory privileges.

Also obtain and review early documentation of insurance coverage. More and more nursing homes are owned and operated by large out-of-state corporations, and it can be difficult to identify the entity that is responsible for the skilled nursing facility. Often, a facility's real estate holdings are "purchased" by an outside entity. Most of the real estate is then placed into protected real estate investment trusts. The trust

JOHNSON JOHNSON LARSON & SCHALLER PC

www.jjlslaw.com

975 Oak Street, Citizens Building, Suite 1050 • Eugene, OR 97401

(541) 484-2434 • (800) 783-2434

owns the property and leases it out to other entities, creating the appearance that the real estate owner has nothing to do with the operations on the property, and therefore no liability. The facility may appear on paper to have no assets, other than sheets and bedpans.

Occasionally, nursing home chains ignore the rules of discovery and refuse to turn over relevant documents. Conduct a thorough pre-suit investigation and gather as much information as possible. Once the Complaint has been filed, then depose the facility administrator to establish a detailed hierarchy of the companies and the relationship between the nursing facility and the corporation that operates it.

As in any negligence claim, both economic and noneconomic damages are recoverable. Economic damages may be limited, however, because elders in nursing homes often are not wage earners. If an elder is already in a nursing facility, it may be difficult to attribute medical bills to the abuse and neglect. When elder abuse results in a wrongful death action, the statutory cap of \$500,000 on noneconomic damages applies. ORS 31.710.

Neglect can substantially increase medical bills. For example, failure to provide basic wound care can result in severe pressure ulcers, which can require emergency interventions, hospitalization, and surgery. Abuse or neglect can also destroy a victim's independence, forcing an elder to move from a low-skill or short-term environment to a more expensive, long-term care facility. Such increased costs of care over even a short period can result in dramatic economic damages.

If a victim or the victim's family has a potential claim for abuse, they should contact an experienced personal injury attorney, or two. Many legal, factual, and business issues must be assessed before a civil action against the abuser can be recommended. Whether brought under ORS 124.100 et seq., or as a common law tort claim, these cases must be pursued aggressively with qualified experts, thorough discovery, and skilled trial preparation. The elderly and disabled victims of abuse deserve no less.

CASE NOTES

Nursing Home Abuse

Our firm helped four seniors who were physically abused by a CNA at a Eugene nursing home. The CNA beat one 76-year old woman, causing multiple bruises and skin tears. He punched another woman in the stomach and left her laying in her own vomit. He hit one woman, called her names, and left her laying in her own urine and feces. He punched a fourth diabetic man in the stomach and deprived him of food.

JOHNSON JOHNSON LARSON & SCHALLER PC

www.jjlslaw.com

975 Oak Street, Citizens Building, Suite 1050 • Eugene, OR 97401

(541) 484-2434 • (800) 783-2434

Eventually, the abuse was reported to the Oregon Seniors and People with Disabilities Division, who reported it to the police. A grand jury indicted the CNA for mistreatment, criminal coercion, and harassment, and he was sentenced to prison for his crimes.

The families came to us to prosecute their claims against the nursing facility. Our firm devoted a team of staff to work on the case and retained several experts on nursing home administration and residential treatment. We were disturbed to discover that the facility's administrators knew of the abuse, but failed to report it. The director of nursing services denied knowledge of the abuse, but police found written records of the abuse hidden in her office. These cases were resolved in settlement conferences. We tried the fourth case to an arbitrator and received a substantial award along with attorney fees.

Marion County Nursing Home Negligence

We represented the family of an 85 year old woman who died from a head injury she received in a fall in a Marion County nursing home. When she first entered the nursing facility, she could walk using a walker. During her first few months at the facility, she fell several times and eventually fractured her hip. She was hospitalized for the fracture and returned to the nursing home in a wheelchair. She fell from her wheelchair many times over the next 15 months. After a particularly bad fall causing deep cuts to her face, her doctor ordered that a lap tray be in place at all times while she was in the wheelchair. The staff did not consistently follow this order, and she continued to fall from her wheelchair. Finally she fell forward head first onto the concrete floor and badly bruised her forehead. Over the next two weeks her condition deteriorated, she lapsed into a coma and died. After discovery and multiple depositions, the case settled for a confidential amount in mediation.

Truck and Ambulance Collision -- Wrongful Death

We represented the family of a 47-year old ambulance driver and emergency paramedic from Madras, Oregon. He died when a commercial tractor-trailer crashed into his parked vehicle on Highway 97 early on a New Year's morning.

Our client responded to the scene of an accident, but the drivers were not injured. On the way back to Madras, he saw another accident, and he stopped to volunteer his help. He parked the ambulance with headlights and red flashers on and set flares. He saw the defendant's truck speeding toward him, and fearing for his safety, he ran approximately 10 feet up a steep embankment adjacent to the road shoulder. The truck passed him, but slammed into the ambulance, propelling it about 115 feet down the road. As the out-of-control truck slid off the road surface, it rolled onto its side, and the top of the loaded truck trailer landed on our client, crushing and killing him.

JOHNSON JOHNSON LARSON & SCHALLER PC

www.jjlslaw.com

975 Oak Street, Citizens Building, Suite 1050 • Eugene, OR 97401

(541) 484-2434 • (800) 783-2434

Drug tests and log books showed that the truck driver was coming down from a methamphetamine high and had been driving too long. However, the state police reports, criticized both drivers, including our client for stopping on the left side of the road facing traffic.

Our firm retained two highly qualified experts to review the truck driver's methamphetamine use, withdrawal and impairment, aggravated fatigue, his delayed overreaction, and the brake lock-up and loss of control. These experts were able to show that even at the short distance of visibility reported by the police, the truck driver would have been able to stop or simply avoid the stopped ambulance if he had not been impaired by drugs and fatigue. The case settled for a confidential amount.

Clergy Sex Abuse

We represented a Klamath Falls woman who brought a claim for sexual abuse against the pastor of her church youth group. Ms. Stacey was severely injured in a car crash, and she stayed with the pastor and his wife during her recovery. Her body was devastated from the crash: she had a traumatic brain injury, right scalp and ear lacerations, a fractured pelvis, bilateral pneumothorax, fractured vertebrae, multiple broken ribs, a ruptured right kidney, and dislocation of her right hip. In a police investigation of the incidents, the pastor described her as having a mental capacity of 2 to 3 out of 10 and a physical capacity of 1 out of 10. Nevertheless, the pastor induced her into sexual contact over a period of months. After extensive discussions between the parties, and a mediation presided over by retired judge Mitch Karaman, the parties reached a confidential settlement.

Nursing Home Neglect: Stage IV Pressure Ulcers

A 50 year old Pendleton man was admitted to a local nursing home to rehabilitate from a sudden exacerbation of multiple sclerosis. When he entered the nursing home, the facility's employees documented that he had two or three mild skin abrasions described as Stage II pressure ulcers.

Over the next three months the facility failed to provide basic wound care, failed to document the status of the wounds, and failed to tell the patient, his family, and his physician the seriousness of his condition. The mild abrasions advanced to deep, infected Stage IV ulcers exposing bone and muscle on his hips, buttocks, and ankle. The man eventually had to have skin grafts and a permanent colostomy to treat the ulcers. We filed a complaint against the nursing home for failing to provide basic wound care. After depositions showed the frightening incompetence of the nursing staff and administrators, the claim settled after mediation.

Hospital Negligence: Failure to Ensure Adequate Oxygenation After Surgery

Our sixty-seven year old client entered a Portland hospital for repair of a painful spinal condition. He had a prior history of severe sleep apnea, and he normally used a CPAP device to breathe during his sleep. After the surgery, the hospital failed to ensure that our client received oxygen. He stopped breathing and by the time he was resuscitated, severe brain damage had occurred. He passed away a few days later. We retained medical experts who explained that the standard of care required the hospital to ensure that the patient was sufficiently oxygenated after surgery. The claim settled after mediation for a confidential amount.

Medical Malpractice: Negligence of Obstetrician and of Hospital Staff in Failing to Properly Monitor Mother in Labor and to Perform Timely C-Section Which Resulted in Permanent Brain Damage to the Newborn

Everything was promising for the young expectant mother and her unborn child when they arrived at the hospital for prenatal care and delivery of the mother's first child. The mother received her prenatal care from the same obstetrician who was present to supervise and assist in the delivery of her child. Her prenatal care was uneventful, and upon admission to the hospital both mother and child were healthy. However, after several hours of labor the electronic fetal heart monitor began to show that the baby's heart was under stress; a warning that the baby was not receiving enough oxygen. These signs continued for hours, but the obstetrician and nurses responsible for the delivery failed to respond. They failed to achieve a timely delivery. Too late, the obstetrician attempted to use a vacuum extractor and forceps, and failed to perform a timely C-section. The child was finally delivered blue and lifeless. As a consequence of the failure to properly intervene, the baby suffered severe and irreversible brain damage which will prevent him from ever walking or talking, and will leave him dependent upon a feeding tube. After protracted discovery battles and dozens of depositions, the parties participated in mediation conferences. The case went to trial and we took testimony of many highly qualified experts in obstetrics, pediatrics, neurology, genetics, radiology and other fields. After two and a half weeks of trial, with the services of an experienced settlement judge, the parties arrived at a settlement (confidential amount). We associated Larry Wobbrock and Richard Lane of the offices of Lawrence Wobbrock Trial Lawyer, P.C. of Portland in this case.

STAFF NOTES

Arthur Johnson

Firm founder Art Johnson has been named, once again, in Best Lawyers of America.

JOHNSON JOHNSON LARSON & SCHALLER PC

www.jjlslaw.com

975 Oak Street, Citizens Building, Suite 1050 • Eugene, OR 97401

(541) 484-2434 • (800) 783-2434

Derek Johnson

Derek Johnson has been elected President of the Oregon Trial Lawyers Association for 2006-2007. He has also been appointed to the Civil Law Advisory Committee, held at the call of the Chief Justice, to consider matters regarding the state's system of civil justice. The Committee serves as a forum for communication for the civil trial bar, the Judicial Department and the public.

Art Johnson, Derek Johnson, and former associate attorney Marilyn Heiken again served as the Editorial Board for the two volume Oregon State Bar Torts CLE for 2006. Art has been an editor of this venerable publication since 1981. Derek and Marilyn have been editors since 2000. This handbook is reportedly the best seller of all Oregon State Bar CLE publications.

Mardel Chinburg

Mardel Chinburg was one of nearly 2000 bicyclists riding in this year's "Cycle Oregon" throughout the eastern part of the state. Congratulations Mardel for earning yet another T-shirt!

Closing Remarks and Referrals

We want our newsletter to be helpful and informative to our colleagues and friends. Our firm litigates a wide range of complex personal injury and wrongful death cases involving motor vehicle accidents and defects, construction accidents, medical malpractice, and defective products and medical devices. So think of us when it comes to working on your case. We especially enjoy working with other counsel throughout Oregon and adjoining states. Referral arrangements vary from case to case. Most commonly, our firm guides strategy while we advance costs and resources for investigation and prosecution. Attorney fees are based on agreement between counsel.