

Litigating Nursing Home Cases **Preparing to Prove Your Case**

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After years of work, meetings with the client, depositions, hearings, countless hours spent reviewing and analyzing the chart, consultation with experts, preparation and presentation of witnesses, you are now on the eve of trial in a nursing home case. You have a great responsibility to the nursing home resident and/or their family, as well as to the nursing home population at large. You have the evidence ready to offer in support of the claim that your client was neglected, received sub-standard care, and suffered as a result. You are prepared to present your fact witnesses, your experts, to cross-examine the defense witnesses and argue the evidence, but what is the overall picture that you want to present to the jury? How should the evidence be presented? How will you frame the evidence into a compelling story, through words and exhibits, to satisfy the questions in the minds of the jurors and to convince them that your cause is righteous?

In the frantic pace of trial preparation, Plaintiff's attorneys sometimes fail to move beyond the examination of individual trees and step back to view the forest as a whole by asking themselves these questions. This overall examination of the case is a crucial one that should not be overlooked.

Jury Bias

When you contemplate the story you will tell the jury you must consider the fact that each person on the panel, just like everyone else in society (including you and me), tends to be biased in their decision-making. Recognizing and removing juror bias in your trial is absolutely necessary if it is to be fair. The reason the general public has faith in the jury system is that they perceive that the people sitting on juries will be fair and unbiased. However, as you voir dire and choose your next jury, you should be mindful of the fact that in recent years the jurors you face have been bombarded by a national tort reform campaign that has convinced many that our country is in crisis due to frivolous litigation. This campaign is well orchestrated, well financed, and has been extremely successful. You will find people sitting on your panel who believe our justice system has been taken over by litigants who have brought misfortune on themselves and who are out to “win the lottery.” You may find yourself in the predicament of having far more individuals on the panel who believe that frivolous lawsuits are a serious problem in our country than can be removed for cause or by preemptory challenge. Some of the jurors you face will be watching you and your client closely to see if you are “part of the problem.”

Forget The Old Ways

Years ago, before the Chamber of Commerce was blanketing our country with tort reform propaganda, before Newt Gingrich and the “Contract with America” called for “common sense legal reform,” before tort reform was one of the main planks of the Republican party agenda and before George W. Bush, the strategy was to focus on your client at trial, tell their story, generate sympathy and thereby connect with the jury. The

jury would then identify with the plaintiff and consider how they themselves would like to be in the plaintiff's position. As you and I know, this approach no longer works. Extensive research, mock trials and studies have now shown that juries no longer feel sympathy for victims. Juries today are likely to see themselves as different from the plaintiff and blame the plaintiff for what happened. In a nursing home case the jury may blame the family even when there has been no evidence presented of fault on their part. In this era of tort reform, you will face jurors who will readily believe that if the resident had been compliant or not combative, or if their family had been more attentive, they would not be in court asking for money from a corporation that is doing all they can to care for the elderly when no one else wants to.

How Did We Get Here

In the mid to late 1990's, the Association of Trial Lawyers of America sponsored a comprehensive study of juror dynamics. This research discovered two attitudes that are very prevalent in today's society: personal responsibility and anti-plaintiff bias.¹

Personal responsibility is the belief that each person is responsible for their own actions; therefore, if a person has suffered some misfortune in their lives they must have brought it upon themselves. As will be discussed later, this theme is not the private domain of defendants and can be used effectively by the plaintiff in a nursing home case. Nevertheless, this belief has resulted in the corresponding anti-plaintiff bias that now exists in the minds of many.

¹ Wenner and Cusimano, "A Brief Look at Overcoming Juror Bias," Trial (June 2000).

The ATLA jury research also resulted in an understanding of how juries process competing trial themes. These principles include the concepts of confirmation bias, belief perseverance bias, and availability bias.²

Confirmation Bias

Confirmation bias refers to the tendency of jurors to hear and interpret evidence in accordance with their preconceived beliefs. They will accept evidence and discount evidence in accordance with what they believe to be true based on their life experience. An abundance of knowledge as to how a juror will interpret the evidence you present can be gained through the use of focus groups. In a focus group, attitudes, perceptions, and beliefs can be identified in response to the evidence. Your trial story should be framed and presented in such a way that it emphasizes these predominant ideas and beliefs.

Belief Perseverance Bias

Belief perseverance bias refers to the tendency of jurors to adopt a trial story early and hang on to it regardless of the subsequent evidence that is introduced. This principle underscores the importance of developing your trial story early during voir dire, and repeating and reinforcing it throughout the trial.

Availability Bias

According to David Wenner and Greg Cusimano in their article, “Overcoming Juror Bias”:

The availability of information can influence perception. People often mistakenly equate the availability of information with frequency, probability, and causality. We propose that whatever most occupies juror attention during trial will most influence what the jurors focus on during deliberation and disproportionately use in rendering a verdict. A simple rule of thumb is that if the trial is focused on the defendant's conduct, jurors will focus on the defendant's conduct in deciding the case. In contrast, if the trial focuses on causation, jurors likely will focus on

² Id.

causation. Likewise, if jurors focus on the plaintiff's conduct during trial, they will focus on the plaintiff during deliberation. That does not mean that we can ignore the plaintiff's conduct if it is an issue or that we should not inoculate against defenses. On the contrary, it just means the focus of the case, and the juror's attention, should be the defendant's conduct."³

With these thoughts in mind, some useful ideas regarding combating juror bias are as follows:

1. Tell your story early during voir dire. Begin outlining the theme of your case in the context of your questions to the panel during jury selection.

2. Focus on the Defendant and their conduct. Your client was elderly and sick, that is why they were in the nursing home. Do not focus the case on the nursing home resident. The case should be about the nursing home corporation and their conduct.

3. Put on your best evidence as soon as possible and incorporate that evidence into your theme. Refer to your best evidence throughout the trial. Many successful nursing home trials have begun with former employees who can describe the conditions in the home, the understaffing and the subsequent results. Follow these witnesses with the corporate representative, administrator or director of nursing who will be hard-pressed to explain the testimony of the former employees as well as the inadequacy of the charting on your resident.

4. Demand accountability on the part of the nursing home corporation. This theme will coincide with the belief that all persons are responsible for their actions. Show that the nursing home corporation knew or should have known of the conditions at the home that were resulting from their decision to under staff the facility, therefore they should be accountable for the bad outcome that occurred to your resident.

³ Id.

Trial Themes

The importance of a well-crafted theme cannot be overemphasized. A good theme, based on the facts, pulls the evidence together in the minds of the jurors. It validates the evidence and gives the jury a real-life frame of reference for their verdict.

There are an endless number of themes that are effective in nursing home cases. Consider the facts of your case in their entirety and state what your case is about in one sentence. Mock trials and focus groups are an excellent way to find out what your jury will think about your case. Ask the mock jurors how they would describe the case. Whatever the theme, you must emphasize it throughout the trial.

Some themes that have been persuasive and have produced significant verdicts in nursing home cases are outlined below:

1. **Accountability**

Accountability is the notion that we are all held to certain standards in our lives and in our jobs. Nursing homes are no different and must also be accountable. What would our lives be like if our society had no benchmarks by which we judge performance and rules to which our conduct must conform. The premise that actions have consequences is closely aligned with personal responsibility and will strike a common chord with the jury. Nursing homes must be held to the same standard.

2. **There Was No Captain Of The Ship**

The facts in many nursing home cases will allow you to argue to the jury that, in terms of the overall care given to the resident, the right hand did not know what the left hand was doing. Perhaps an appropriate care plan was prepared for the resident, but the staff was not familiar with it and did not implement the recommended approaches. There

was no comprehensive coordination of the care, no continuity of care, no overall supervision of the resident's care. There was no Captain of the ship.

3. **Sanctity Of Life**

This theme resonates with conservative jurors. It is the belief that all life is precious, even if you are old and feeble and your mind and body do not work as well as when you were young. The right of a human being to live free of neglect and abuse and to receive good care is inviolate and deserves no less protection just because that human being is old and infirm. Children and the elderly are the most vulnerable human beings in our society. If children were treated the way some nursing home residents are, the public outcry would be overwhelming. There should be no different standard for the elderly.

4. **They Gave Up On Them**

Analysis of the chart in some nursing home cases may reflect an attitude on the part of the staff that "they were going to die anyway", which will support this theme. Emphasize that the job of the nursing home is to keep trying regardless of how long the resident has to live.

5. **Acceptance Of Responsibility**

Similar to accountability, the nursing home assumed responsibility for caring for the resident, accepted payment for that responsibility, failed to fulfill that responsibility, and now it should be held responsible for its failure.

6. **Bad Faith**

The nursing home had the resources to provide proper care and accepted payment to provide that care, but failed to do so.

7. **Betrayal of Trust**

The family trusted the nursing home to provide proper care for their loved one and the nursing home let them down.

8. **Indifference**

The nursing home received numerous signs and warnings that the resident's physical condition was declining, yet they ignored them failed to respond.

Common Defense Themes

Defense counsel in a nursing home case typically will try and establish facts that take the focus off the bad care at the nursing home and place it elsewhere.

1. **They Were Sick When We Got Them**

Of course they were sick that is why they needed a nursing home. Healthy people do not go to nursing homes to live. Embrace this argument and use it to your benefit. You can show that the resident's pre-existing condition, of which they were well aware, put the nursing home on notice of the need for a high level of individualized care.

2. **We Did The Best We Could Considering**

Giving good care means never giving up. It also means giving the care that was promised and giving care that was appropriate. Do not allow the defense to argue that the bad outcome of your resident was unavoidable unless they have first proven that adequate and appropriate care was given. For instance, unless appropriate skin care was provided to the resident and documented, the facility should not be allowed to argue that the resulting pressure sore was unavoidable.

3. **They Were Going To Die Anyway (The Silent Defense)**

This defense will be presented in a very subtle manner during trial. The defense will make a point of blowing up records that say “prognosis poor”, “condition terminal” and “life expectancy nil.” This is an attempt to create the picture that death was a welcome relief. You should argue that no one on earth has the right to cut a life short by neglect. Whatever quality of life a nursing home resident has, it is theirs and no one has the right to take it away prematurely.

4. **Reverse Sympathy**

In cases where the family is not particularly sympathetic or did not visit often (thus inviting the accusation that they are simply opportunists looking for a windfall), the defense may try to take the sympathetic “high-ground” by creating a theme portraying the nursing home as an innocent good Samaritan who tried to provide comfort to a terminal elderly person in their waning years, while the family and society ignored the resident.

To rebuke such a theme, plaintiff’s attorney could have an expert address how the societal dilemma of elder care is no excuse for the nursing home providing inadequate health care to the resident while concomitantly trying to avoid their contractual and legal obligations for which they have been well compensated.

In a situation where the family was justifiably unable to visit often, plaintiff’s attorney should outline and demonstrate for the jury the family’s trust in the nursing home and its medical staff, and the family’s lack of sophistication and knowledge.

Visual Exhibits

Rather than simply placing enlargements of the chart in front of the jury, think of creative ways that you can use the chart to tell the story. The exhibits should be an

integral part of the trial presentation and should anchor your theme. Attached to this paper are some exhibits that have been used in past nursing home trials.

Conclusion

In preparing to prove your nursing home case at trial, you must consider seriously the story you will tell and the ones who will hear it. Hopefully, this paper and presentation will provide some assistance in doing so.