

**NURSING HOME MALPRACTICE IN ALABAMA**

**NURSING HOME LITIGATION- PRESUIT PREPARATION**

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*The misery of a child is interesting to a mother, the misery of a young man is interesting to a young woman, the misery of an old man is interesting to nobody.*

**Victor Hugo, *Les Miserables***

Approximately twenty-five thousand people in Alabama wake up everyday in a nursing home, dependent on others to meet most or all of their needs. They are a helpless, vulnerable population whose numbers will increase dramatically in coming years as the baby boomers begin entering retirement. This oncoming growth will require that the quality and quantity of care offered by nursing homes be increased proportionately.

The demand for more and better care is not unfamiliar to nursing homes. The increase in acuity level of the nursing home population during the last decade is well documented. Yet, in the opinion of many, the long-term care industry was not responsive during that time to the increased needs of the residents. As a result, nursing home litigation increased dramatically and continues to grow.

Few people dream of one day living in a nursing home. Typically, it is a decision made when all other care options have been foreclosed. A competent individual's decision to admit himself or herself into a nursing home requires a painful and immediate acceptance of their mortality. If the family must make this decision, it is equally distressing. The family of a nursing home resident may experience guilt and feelings that they have failed their loved one.

By definition, nursing homes are places where nursing personnel serve residents that need continuous assistance with their basic activities of daily living. The nursing personnel of the facility should be committed to teaching residents how to cope with their disabilities and functional incapacities, as well as monitoring the chronic, multiple illnesses of the residents. If they are not committed to these duties, inevitably, nursing standards of care are breached and residents suffer.

This paper will discuss how to evaluate a potential nursing home case and the work that must be accomplished to determine if a case is meritorious.

## **A. EVALUATION OF NURSING HOME CASES**

Nursing home litigation is complex and requires a great deal of time, money, and effort. There are several reasons for this, not the least of which is the fact that nursing homes are governed by numerous Federal and State Regulations. These Regulations are extensive and detailed as to the type of documentation that is necessary for the home to maintain its license to operate the facility. Next, the people who live in nursing homes typically have complex medical problems, which is why they are there. The medical records you must review are kept on a day-to-day basis, three shifts a day, and can be very difficult to understand. To be effective in pursuing and presenting a nursing home case, the attorney must have a basic understanding of medicine, particularly as it relates to geriatrics, and an understanding of the regulations that apply. Finally, the attorney must be intimately familiar with the law of these cases, much of which seems to be constantly changing.

### **Regulations and Standards**

The Federal Regulations governing nursing homes are contained in and created by the Omnibus Budget Reconciliation Act of 1997, also known as the Nursing Home Reform Act. The Federal Agency responsible for their enforcement is the Health Care Finance Administration (HCFA) of the Department of Health and Human Services. Federal nursing home regulations are located at 42 USC § 1396 (the Nursing Home Reform Act), and 42 CFR § 483 (the Requirements for Long Term Care Facilities).

Alabama nursing home regulations, which are patterned after the Federal law, are located in Alabama Administrative Code § 420-5-10. These state and federal regulations created standards which have heightened the expectations of nursing home care from a minimum maintenance goal, to the goal of maintaining the “highest practicable physical, mental and psychosocial well being” of nursing home residents. 42 C.F.R. § 483.25 **These regulations, in part, require:**

- Adequate numbers of nursing personnel to provide for the needs of the resident;
- Adequate amounts of food, supplies, equipment and medication;
- Competent nurses, aides, and orderlies who are screened when hired and who have been monitored throughout their employment to eliminate unfit personnel;
- Adequate and systematic planning to create an individualized plan of care for each resident;
- Continuous systemic assessment of each resident and notification of the attending physician when necessary;
- A record keeping system that accurately documents the clinical condition and progress of residents as well as delivery of care; and
- Adequate quality assurance programs that identify and correct care deficits.

A facility’s failure to insure that these minimum requirements are enforced can result in systemic neglect in the home, which can be devastating to the residents who are

unable to help and protect themselves. The intent of the regulations are to require the nursing home to pay heed to the needs of the individual resident and adjust accordingly, rather than require the resident, who is least able, to adjust to the nursing home.

### Gathering the Information

Most families frequently visit their loved ones in a nursing home. Some family members may visit every day. The first thing you must do is to spend time with the family and listen to them. They can provide you with information you may never discover elsewhere.

In nursing home cases, the initial client interview is typically with a resident's family member (spouse, child) or guardian since the resident may be deceased or incapacitated. Ask the family to bring all available information concerning the resident to the interview. Encourage over-inclusiveness. You are in a better position to determine whether certain information is pertinent. The basic information that the family needs to provide concerning the resident is:

- Age
- Date of birth
- Date of death (if applicable)
- Marital status
- Children
- Social Security number
- Medicare/Medicaid numbers

- Medical provider's names
- Medical and nursing home records (if they already have them)
- Any documentation provided by the nursing home
- Legal documents (Power of attorney, letters of guardianship, estate papers, wills)
- Certificate of death (if applicable)
- Lack of staff to respond to residents' needs

Obtain a history from the client of the resident's health conditions. Listen carefully as the family relates the story of what occurred at the nursing home. Be patient and understanding, as this is usually an extremely emotional ordeal for them. It often serves as a cathartic experience for the family and a fountain of information for the attorney. Remember, the family has been waiting to tell their story to someone who understands.

When dealing with the family of a nursing home resident, you need to be aware that they may have strong feelings of guilt because it was necessary for them to put their loved one in a nursing home, even though a physician recommended it. In addition, the choice of nursing home was often made quickly, under stressful circumstances, and the family may not have had sufficient time to evaluate various homes. When the care at the home became poor, anger, desperation, and a feeling of helplessness compounded the family's guilt. It is common for families to experience extreme frustration in dealing with the staff of the nursing home concerning their complaints. Although there may have been numerous instances of bad care, it is not unusual for family members to continue to trust the staff of the nursing home and place credence in the staff's representations that

the care will get better. If the care does not get better, at some point the frustration becomes too great and that is when they seek an attorney's advice.

The family will have vast knowledge of specific information that cannot be obtained from a resident's nursing home chart or other sources. As you gain a factual understanding of the case, you should begin to ask specific questions in order to build a strong foundation for the injuries and damages.

Specific knowledge may be:

A. Instances of indignities/bad acts which may prove to be relevant:

- Sitting in body waste for extended periods of time
- Dirty or missing clothing
- Missing/stolen possessions
- Ignored requests for care
- Knowledge of falls or pressure sores
- Lack of turning and repositioning
- Missed treatments, therapies and medications
- Skin problems
- Missed meals and/or water
- Weight loss
- Improper restraints
- Verbal or physical abuse

B. Names of nursing home employees

C. Prior medical conditions

D. Persons with additional knowledge

Gathering information from a family member is especially important in nursing home cases since a nursing home admission may span several months or even years. The complaint is usually not based on one incident or occurrence, but on numerous incidents of neglect that transpired over an extended period of time.

You should also listen for clues that could indicate problems with the case. The cost of obtaining records and the time commitment in reviewing them is significant and you need to be aware of the potential pitfalls.

Some negatives to watch out for are:

- Many years in the home
- Single incident
- Statute of limitation problems
- Bickering family members
- Multiple nursing homes
- Treatment worse at other facilities
- Family reluctant to move resident from defendant nursing home
- Home with excellent reputation and small damages
- Small town, single owner home

Even if some of these factors exist in a case, it may still be worth pursuing. It is possible to overcome a bickering family with significant damages, but you must find out their motivation. You should use your judgement to envision how the jury will view your client. Does your client want to bring a lawsuit to elevate the standard of care given to residents at nursing homes? Or, are they only seeking to better themselves monetarily

down the line? Most of the time, money is not an issue; they simply do not want other nursing home residents to be subjected to the same bad conditions and poor care.

## **B. INVESTIGATION**

### Probate Work

You must consider at the time of your initial interview the legal authority that the family member has to represent the resident, or the estate of the resident. In order to obtain nursing home and other medical records in Alabama you must have a legal representative, unless the resident is alive and competent. If the resident is alive but incompetent, it will be necessary to have a guardian appointed for the purpose of obtaining the nursing home chart. If the resident is deceased, it will be necessary to open an estate. If your resident is alive and competent, they have the right to access all records in the nursing home pertaining to themselves within 24 hours, or they can request a copy of the chart and it must be provided within 2 working days advance notice to the facility.

42 C.F.R. § 483.10(b)(2)

You should discuss with the family the cost and the process of establishing a guardianship or opening an estate for the purpose of investigating whether there is a valid claim. Obviously, there is a risk to the client and/or the attorney of putting in the time, effort and expense of obtaining records and determining ultimately that no cause of action exists.

You should consider whether or not you want to handle your own probate work. My experience has been that it is preferable to retain the services of another attorney with

significant experience in probate to handle those matters. The work that must be done in establishing the guardianship or opening the estate is not difficult or time consuming, but there are potential problems that may occur once a settlement is reached in a case.

Although your client may profess to have told you all of the known relatives of the nursing home resident, it is amazing how, once the word circulates through the family grapevine that a settlement has been reached, “new” children of the deceased suddenly appear. When this occurs, the resulting litigation in probate court can be extremely time-consuming and just as difficult as the wrongful death case. It is not uncommon in such probate litigation for the decedent’s body to be unearthed for purposes of DNA testing to establish paternity. If you separate yourself from these matters with a probate attorney’s involvement from the outset, you will not become embroiled in this “after the fact” litigation.

### The Records

The interview process should provide enough information to determine whether medical records should be ordered. Strong consideration should be given to ordering the records if the interview indicated any of the following:

- Pressure sores
- Malnutrition/weight loss
- Dehydration
- Contractures

- Falls
- Drops
- Improper restraints
- Significant general neglect/abuse

If the decision is made to go forward, request a copy of the resident's entire nursing home chart and intervening hospital admissions. This could be very expensive for an extended nursing home residency; however, obtaining the records and reviewing them is absolutely necessary for a firm grasp of the medical issues involved in the case.

The records request should be detailed to maximize the chance of getting the most complete record early on in the evaluation process. See Attachment "A". The medical records of current residents can be found on the nursing unit or wing where the resident is assigned. The records of discharged residents will be found, hopefully, in a secured area of the facility. Medical records must be retained for five years from the date of discharge when there is no other requirement under state law. 42 C.F.R. § 483.75(1)(2)

Medical records personnel will periodically review the medical charts of current nursing home residents to determine if there are any missing or incomplete records. This is referred to as "auditing" the chart. If the resident you are investigating has been in the facility for a long time, the records will be voluminous. In such situations, the medical records custodian will typically remove certain portions of the chart and store it as it becomes less useful to the nursing personnel. This is sometimes referred to as "thinning the chart". When you make a records request concerning a living resident, make certain that you receive all of the records.

Once you have received the records, the key to evaluation is having the willingness to READ the records. This can be overwhelming when faced with six thick notebooks of poorly written nurses notes and stacks of group sheets. Nevertheless, read your medical records with a ruler.

### Evaluation of the Chart

As you review the chart, remember that the accuracy of the information contained in it cannot be assumed. Unfortunately, it is not uncommon to find false entries of various types in nursing home charts. Keep this in mind when you read through the chart and compare information from various sections of the records.

### The Foundation Documents of Resident Care

- Minimum Data Set (MDS)

Unless the resident you are investigating was in the facility for only a very short stay, you should see a document called a Minimum Data Set. This standardized national assessment tool is unique to long term care. It is intended to produce a comprehensive, accurate, standardized assessment of each resident's functional capacity. Its purpose is to help the nursing home staff assess the resident's capability, needs and strengths. It is a collection of resident information regarding demographic, physical, mental and psychosocial functional information and forms the basis for the care plan.

- Resident Assessment Protocol (RAP)

After completion of the MDS, a Resident Assessment Protocol (RAP) is prepared from the data contained in the MDS. The RAP will contain a list of certain problems likely to exist that were “triggered” by the MDS and will need to be addressed in the resident’s care plan.

- Care Plan

The MDS and RAP are prepared in order to develop a care plan for the resident. The care plan should identify the resident’s major problems and include interventions designed to maintain and improve, if possible, the resident’s current functional capacity and prevent injury. Typically, the care plan is prepared by a care plan team which is comprised of persons from several disciplines in the facility such as the Activity Director, the Social Services Director, Nursing, etc. The care plan is then required to be revised anytime that a “significant” change in the resident’s status is identified. 42 C.F.R. § 483.20(b)(4)

A Care Plan should also be revised anytime it appears the care plan is not working. After you read the care plan, look further in the chart to see if the care plan was followed and if its goals were being met. For instance, if the care plan calls for turning and repositioning of the resident in order to maintain skin integrity and prevent skin breakdown, was it done? Check the Activities of Daily Living flow sheets to see if the staff turned and repositioned the resident in accordance with the directives of the care

plan. If the problems identified in the care plan were becoming worse, what was the response of the care plan team?

### Look for Inconsistencies

Compare the nurse's notes to the activities of daily living flow sheets and see if the information is consistent. Review the doctor's orders and compare them to the Medication Administration Record (MAR) and the Treatment Administration Record (TAR) to determine if the orders were correctly carried out. If the resident was losing weight or was malnourished, look at the percentage of food consumed each day. Does it make sense? Things to look for include:

- Absent charting
- Inconsistent charting
- False charting
- Failure to recognize changes in the condition of a resident
- Failure to notify the Physician and family of condition

changes

You should obtain medical records from sources other than the nursing home as well, such as the doctor and the hospital. Compare these records with the nursing home chart. You should also compare the chart with the billing records of the nursing home, and compare the Medication Administration Record with the pharmacy bills.

## State Surveys

The Alabama Department of Public Health, through its Division of Provider Services, is responsible for inspecting nursing homes in Alabama to insure compliance with state and federal regulations. Under Federal Law, nursing homes in Alabama that participate in the Medicaid and Medicare programs are to undergo an annual survey/inspection and certification process. The purpose of the survey is to assess whether the type of care intended by the law and regulations, and as needed by the resident, is actually being provided. Nursing homes must be in substantial compliance or they can be denied payment for new admissions, civil monetary penalties can be assessed, Medicaid and Medicare certificates can be revoked, residents can be transferred and temporary management can be imposed on the facility. Certification surveys are, by law, to be unannounced.

The reports generated from these surveys can be obtained from the Alabama Department of Public Health, Division of Provider Services, P.O. Box 303017 Montgomery, AL 36130-3017. A quick evaluation of a particular home's compliance with state and federal regulations can be found at the Medicare web site. This site has a database that contains information on Medicare and Medicaid certified nursing homes with survey results for most recent surveys. The web site is located at:  
[www.medicare.gov/NHCompare/home.asp](http://www.medicare.gov/NHCompare/home.asp)

## The Survey Process

In a typical inspection, the surveyors arrive, identify a sample of residents in the facility, tour the facility, observe and interview residents and staff, and review the sample residents' medical records. The inspectors rely on Resident's charts during the surveys to evaluate compliance. If deficiencies are found, a deficiency statement will be written and discussed with staff in a conference. On-site visits are also performed by the State to investigate complaints that deserve further inquiry.

The survey and complaint inspections are intended to be random, surprise visits without any advance notice to the nursing home. In my experience, this is not always the case. There is much evidence that indicates in many homes charts are often "amended" to prepare for a survey visit. It is not uncommon for a corporate pre-survey team or consultants to visit a home to prepare them for a survey.

Nevertheless, survey information is particularly valuable because state inspectors may go where no consumer is allowed. Surveyors have access to confidential medical records of all residents and may even perform physical examinations, checking for bedsores and other signs of deterioration or injury. The facility is required to post their most recent survey results at the facility.

## The Legal Nurse Consultant (LNC)

If you are new to nursing home litigation you should consider retaining the services of a legal nurse consultant to review the nursing home chart and any other medical records. Be aware there are many nurses who will review medical records for attorneys. However, I would strongly suggest that you investigate and ask your colleagues for references. You need to find a nurse that not only is experienced in reviewing medical charts for attorneys, but who also has a great deal of experience in long term care.

You may want to retain a nurse certified by the American Association of Legal Nurse Consultants. This association requires a certified LNC to have a current nursing license as a registered nurse and a minimum of a bachelor's degree or the equivalent of five years experience as a legal nurse consultant. Applicants must also pass a comprehensive examination developed by the AALNC that insures the LNC has mastered a body of knowledge on the subject and developed consulting skills through extensive experience. An LNC can prepare a case summary for you, which will be used for identifying key information concerning the case and will be of invaluable assistance to you as discovery begins.

If you decide to retain the services of an LNC, you should not forego reviewing the chart yourself in detail. Although an LNC's review is invaluable in cases like these, the LNC's review can never replace an attorney's judgement. You must review the chart

yourself page by page. Not only will you have a better understanding of the case but you will also become familiar with long-term care documents and charting. It is extremely time consuming. When I first began handling nursing home cases, I did my own chart reviews. It was not uncommon for me to spend sixty plus hours reviewing the nursing home chart for a case involving a two or three year residency.

### **C. CASE ANALYSIS**

It is very important to sift through the information the family relates to you and separate it into acts/omissions that constitute negligence and those that, unfortunately, only constitute extremely poor care. For example: family members who come to you may be very upset because their loved one has been left laying for long periods of time in their own waste. Although this is substandard and inhumane, it is not necessarily a claim that can practicably be pursued without some type of associated injury. In these types of situations, I typically urge the family to be vocal with the staff of the home about their concerns and to contact the Eldercare Hotline at 1-800-356-9596. They should also contact their local Ombudsman. An Ombudsman is an individual employed by the State of Alabama who is responsible for addressing such concerns with the nursing home on behalf of the resident. The name and contact information of the Ombudsman is usually posted somewhere at the home.

### **The Effect of A Settlement on Public Assistance Benefits**

An issue that needs consideration is the effect that a settlement will have on a living resident's public assistance benefits. In the majority of cases I handle where the resident is alive at the time of filing the lawsuit, they are deceased by the time the case is settled. Nevertheless, you should address with the client at the beginning of the case the possibility that any settlement that may be recovered could make it impossible for the resident to continue to receive Medicaid benefits. A Supplemental Needs Trust, depending on the age of the injured resident, may be able to preserve public assistance benefits. Typically, however, the client realizes that a significant settlement will enable the family to insure that their loved one receives better care at another long-term care facility or with private nursing.

Also, a pre-death injury settlement will be subject to Medicare liens and Medicaid subrogation (Ala. Code § 22-6-6) for the reimbursed medical expenses related to the injuries that formed the basis of the lawsuit. If you have a wrongful death case, the settlement recovery will pass "outside" the estate and will not be subject to any debts or liabilities of the estate. Ala. Code § 6-5-410.

### Distributions of Settlements

Discuss with the client how any settlement that may be recovered in the case will be distributed. Obviously, if the resident is still alive and a guardianship has been established, the money will be placed under the supervision of the Probate Court for the benefit of the resident. Once the resident passes away, those proceeds would then pass according to any will that may exist or pursuant to intestate distribution.

A more difficult situation lies in the distribution of a wrongful death settlement. As you probably know, in the State of Alabama any recovery in a wrongful death case will pass according to the statute of distributions, regardless of whether or not a will exists. Ala. Code § 6-5-410. The client you are dealing with may be outraged to learn that his or her sibling who never visited Mom or Dad, has not seen them for 10 years, and provided no assistance whatsoever in caring for the parent, will nevertheless receive an equal portion of any recovery. This issue must be addressed at the beginning of the lawsuit to avoid these problems later. I have had more than one good case come into my office that the client chose ultimately not to pursue because they felt it was unfair for their uninvolved sibling to receive an equal portion of any recovery.

#### Fear of Retaliation

Many family members I speak with who have a loved one presently in a nursing home fear that if they file a complaint, the staff at the facility may retaliate on the resident. No one can be at the nursing home 24 hours a day; therefore, this could be a critical concern, particularly in the case of residents who cannot communicate.

Personally, I have not seen this occur. What I have seen is that often the care becomes better once a lawsuit has been filed and the conduct of the nursing staff is placed under a microscope. Nevertheless, this is a difficult issue and one you must be prepared to discuss.

## Damages

In cases where the resident is still alive, recovery can be had for medical bills related to the injury and for elements such as disability, disfigurement, and pain and suffering. In determining damages you need to compare the condition of the resident upon entering the home with their condition after the substandard care occurred. With a long residency, this becomes much more difficult to do.

With regard to punitive damages, you should remember that we now have caps on punitive damages in Alabama on injury claims. Ala. Code § 6-11-21. Your punitive damage award on an injury claim, if successful, will be limited to 3 times the compensatory damages award or \$1,500,000, whichever is greater, unless the defendant is determined to be a “small business” (net worth of \$2,000,000 or less). *Id.* If the defendant is considered to be a “small business” any punitive damage award shall not exceed \$50,000 or 10% of the defendant's net worth, whichever is greater. Ala. Code § 6-11-21(b). You should not overlook the fact, however, that compensatory damages awarded on injury claims in nursing home cases can often be significant. Our firm recently tried a case in Florida involving a bedsore that had deteriorated to a Stage IV level (down to the bone), but later healed. The compensatory damages awarded by the jury were just under \$3 million dollars, the majority of which was for pain and suffering. The jury's punitive damage award was \$17 million dollars. If that were an Alabama verdict, the punitive award would be remitted under the statute to approximately 9 million dollars, as the defendant in that case would not fall into the definition of a “small business”.

### Expert Witnesses

Even though you may have retained the services of an LNC to assist you in review of the nursing home chart, it is advisable at this point in your analysis that you also retain the services of an expert to review the chart and tell you whether or not they can support the claims of substandard care. In almost every nursing home case you will need an expert nurse and a doctor. I prefer experts who have experience in geriatrics and long-term care.

The Alabama Medical Liability Act contains certain experience requirements of experts testifying as to the standard of care. Your nurse expert must have provided hands-on care during the year prior to the time when the acts or omissions occurred. Ala. Code § 6-5-548(b). One exception to that is when your nurse expert has devoted their full efforts to the teaching of nursing. Dowdy v. Lewis, 612 So. 2d 1149 (Ala. 1992). The physician expert will be retained, in an injury case, primarily for the purpose of tying the injury to the acts of the nursing home staff. In a death case, the physician should provide an opinion as to the cause of death.

### **E. IDENTIFICATION OF CORRECT PARTIES**

#### Plaintiff:

If you have had a guardian appointed or a personal representative established you should file suit in the name of that person on behalf of the resident or the estate. If the resident is competent and you have not had a guardian appointed, ARCP 17(c) allows for the filing of the complaint by an individual as “next friend” of the incompetent nursing home resident. This is important to remember in order to preserve injury claims when the death of the resident may be imminent. After the lawsuit is filed, you should continue with the process of having this individual appointed as guardian for the eventual purpose of any settlement of the case. If the resident dies during the litigation, you should have an estate opened and then amend your complaint to substitute the estate as the plaintiff in the case. ARCP 25(a)(1) requires that you amend and add the estate within six months from the time a suggestion of death is filed.

Defendant:

The following are potential defendants in a nursing home case:

Licensee/Owner/Parent:

In determining who is the appropriate defendant to sue in a nursing home case, you should begin with the entity that is licensed to operate the facility. You can contact the Division of Provider Services at the Alabama Department of Public Health and request a copy of the licensing documents for the facility. These documents will reflect the name of any licensee during the year that is at issue in your case. In addition to

naming the licensee, you need to determine the owner of the facility. One good resource for doing this is Dunn and Bradstreet. You can obtain software from Dunn and Bradstreet that allows you to find out the corporate information of any business on-line. If the licensee and the corporate owner of the facility are two different entities, I would suggest naming both as defendants. If the corporate owner has a parent company, investigate whether you can pierce the corporate veil by showing that the parent is actually the entity that controls and runs the facility and the corporate owner is nothing more than a shell.

#### Management Company:

Find out if a management company was involved in running the nursing home during the time at issue in your case. If there was, they are most likely a necessary defendant and may be a separate corporation unaffiliated with the owner or the licensee.

#### Physician:

A decision must be made as to whether the physician who cared for the resident should be made a defendant. Even if the physician is the medical director of the facility, they typically are independent contractors. You should discuss this issue carefully with the family. They may not want to sue the doctor. On the other hand, they may have very bad feelings concerning the doctor and the fact that he or she only saw the resident once every thirty days at most, and on those occasions never got beyond the doorway of the

resident's room. If you do not name a physician in the lawsuit, you need to be prepared to rebut the "empty chair" defense that will be asserted by the defendant.

### Administrator:

When you review the State and Federal Regulations that specifically address the duties and responsibilities of a nursing home administrator you will see that the law charges them with the responsibility of developing and implementing policy and procedures to ensure that all the residents in the nursing home receive appropriate care. All of the regulated duties imposed on the nursing home are the responsibility of the licensed nursing home administrator. If you name the administrator as a defendant it can be argued that the administrator is responsible for ensuring the quality of each resident's care in the facility.

## **E. IDENTIFYING CAUSES OF ACTION IN INITIAL PLEADINGS**

Some of the most common theories available to the plaintiff in a nursing home case include:

- A. Negligence and wantonness
- B. Wrongful death
- C. Breach of express contract/third party beneficiary
- D. Fraud

It is important to remember that a contract claim is always available in a nursing home case based on the resident admission agreement. In a bedsore case my firm recently tried in Arkansas, the jury did not award the plaintiff a verdict on the negligence claim, but did on the contract claim in the amount of approximately 3 million dollars. In Alabama a contract claim survives the death of the decedent. Ala. Code § 6-5-462. A successful claim for breach of that contract should allow for recovery of some pre-death damages such as mental anguish and suffering. See Wellcraft Marine v. Zarzour, 577 So. 2d 414 (Ala. 1990); Walker Builders, Inc. v. Lykens, 628 So. 2d 923 (Ala. Civ. App. 1993). In a nursing home case pre-death damages are often significant when it can be proven that neglect occurred over an extended period of time. In essence, this allows the plaintiff to retain some of the injury claim that otherwise would not survive the death of the decedent.

## **CONCLUSION**

Proper evaluation of a potential nursing home case is critical to avoid wasting time and money. Once you have determined a case to be meritorious, pursue it vigorously. The elderly in our society have been avoided, overlooked and neglected for too long. It is time for a change.