Common Misunderstandings about the Care Required in Nursing Homes and Assisted Living Facilities in New York State

Wednesday, January 5, 2011 at 4:28PM

By: Louis G. Adolfsen

There are many misunderstandings about the responsibilities of nursing homes and assisted living facilities under the laws of the State of New York. This paper is intended to touch upon a number of these subjects and highlight the misconceptions on the part of the spouses or children, (who sometimes become plaintiffs in lawsuits), of the residents of such facilities.

"Restraint-Free"

On Saturday, January 1, 2011, The New York Times published an article, entitled, ***Giving Alzheimer's Patients Their Way, Even Chocolate***, describing a nursing home In Arizona that allows a resident with Alzheimer's to do whatever she wants – bathe at 2 a.m., feed a doll she calls her baby, and even eat chocolate whenever she feels like it. Prior to the decision to give the resident more freedom in her schedule and her desires, she was striking other residents and fighting with the staff. Now she is calm and contented. Does this sound strange? It should not. While perhaps the unlimited chocolate is a bit extreme, giving a resident at a nursing home unfettered freedom is consistent with the law in New York which requires that all facilities caring for the elderly be "restraint-free."

What does it mean to be "restraint-free"? What this means is that residents cannot be confined to the bed or strapped into a wheelchair or any other device without the express orders of a physician chosen by the resident. Even where a resident needs a great deal of care, the nursing home is not allowed to restrain them by putting up rails and keeping them in bed or by making them sit in a wheelchair where they are unable to ambulate or remove themselves from the wheelchair into bed or onto another place to sit.

Thus, there are many opportunities in a restraint-free facility for a resident of a nursing home to fall and injure themselves. Such falls are a common circumstance because the residents are allowed to move freely. As for side rails on beds, they are

generally only half rails which allow the resident to get up from the bed. In fact even half rails may soon be considered a restraint in New York. Many times in lawsuits the plaintiff will point to the fact that the resident was a fall risk and suggest that a parent should have been restrained in the bed or in the wheelchair. This is simply not the case.

Differences Between Nursing Homes and Assisted Living Facilities

In considering the restraint-free rule and related requirements, one should also understand the differences, and similarities, between nursing homes and assisted living facilities.

A nursing home is a skilled medical facility and is subject to Article 2801-d of the Public Health Law. Under Article 28, which was passed in the 1970s in reaction to some extremely poor care at a number of nursing homes, residents can recover damages by asserting that the care they received was not reasonable even if they suffer no physical injury. Article 28 of the PHL does not apply to assisted living facilities.

Fortunately, assisted living facilities are not subject to Article 2801-d of the Public Health Law. Assisted living facilities also do not provide medical care or sub-acute care provided by nursing homes. Instead, they provide, as their name implies, "assisted living." Indeed, assisted living facilities are not allowed to dispense medication nor are they permitted to assist a resident in eating.

Wheelchairs and Walkers

Another issue that commonly arises is whether people at assisted living facilities should be using a wheelchair or a walker. In our understanding of the state requirements, a person who requires a wheelchair all the time would not generally be allowed in an assisted living facility under state guidelines. A person in that condition would need more care than assisted living facilities are allowed to give. What our experience has shown is that many residents do have wheelchairs. For example, a resident who might be able to walk unassisted or walk with the assistance of a walker might use a wheelchair as means of transportation. Some administrators have advised that residents may take their wheelchair with them on a trip to the supermarket and wheel themselves around putting items in their cart rather than attempting to walk up and down the aisles. The reason we raise this distinction is there often are claims that a resident of an assisted living facility should not leave the premises unless they are in a wheelchair. If a person needs a wheelchair to such a degree that they should not leave the facility without it, they are an unlikely candidate under New York State guidelines for residents in an assisted living facility.

As the foregoing shows, a resident in an assisted living facility is free to come and go and to use a walker or a wheelchair as he or she determines. What this suggests is that there really are no restraints on a person in an assisted living facility. There are simply instances where they may need help getting around or doing a particular task such as dressing or cleaning.

The Public Health Law

There are significant changes in the law as a result of the Public Health Law. In a "slip and fall" case, and many nursing home cases are just that, the burden of proving negligence is on the plaintiff. However, under the Public Health Law, the burden of proving that the nursing home provided "all reasonable care" to the resident is on the nursing home. This is extremely problematic. The courts allow an Article 2801-d claim under the Public Health Law where the burden of proof is on the nursing home, even if there is also a claim for negligence where the burden of proof will be on the plaintiff. As to the Public Health Law claim, the burden of proof will be on the defendant nursing home to show that it used "all reasonable care" to prevent the resident from falling even though, if only negligence were claimed, the burden of proof would fall on the plaintiff. The courts have not addressed how they can harmonize these inconsistent burdens of proof. In our view, the courts will, for all intents and purposes, place the burden of proof on the nursing home as to both issues, not simply the PHL claim, even if there is a curative instruction as to the burden of proof being on the plaintiff with regard to the negligence claim.

Another aspect of Article 2801-d of the Public Health Law is that it permits a recovery of a minimum of 25 percent of the daily average cost at the nursing home. This is separate and apart for the recovery for pain and suffering on the separate negligence or malpractice claim.

Another important consideration under Article 2801-d of the Public Health Law is that the court, in its discretion, may award attorney's fees. Generally speaking, in New York attorney's fees are not recoverable because the state follows the American rule where such fees are not awarded to plaintiff absent a contract requiring the payment of such fees or a statute like Article 2801-d of the Public Health Law. In our view, it is unlikely that a court would award attorney's fees simply because of for simply substandard care or a deviation in the standard of care. To allow recovery of attorney's fees should require a case of extreme neglect on the part of the nursing home. Still, this is an important consideration since the award of fees is in the discretion of the trial judge and under New York practice it is difficult to overturn an exercise of discretion on appeal.

A different issue arises with respect to residents of nursing homes and the use of walkers and wheelchairs. By state law, In the case of nursing homes, as well as assisted living facilities, claims are often made that someone should have been with the

resident at the time they toileted or moved from one place to another in the facility. While in nursing homes it may be that someone who is a fall risk needs additional care, and they also need sensors on the bed to warn if the resident begins to get up from the bed or wheelchair, the facility remains restraint-free absent a doctor's order as to that particular resident. Even warning devices only advise the nursing home after the resident has begun to move or, as the term is used in the industry to "self-transfer." Thus, there is no basis for suggesting that a resident who is a fall risk can never self-transfer because the fact that the facility is restraint-free means that there will always be an opportunity for the resident to self-transfer.

One final thought that applies to both nursing homes and assisted living facilities. There is simply no one-on-one treatment. Plainly, an assisted living facility is not permitted to provide one-on-one treatment. There is also no requirement that a nursing home provide such treatment even to a person who is a high risk for falls. Of course, it would be better if one person could have a person standing next to a resident at all times but that is simply not feasible. There are no state requirements for one-on-one treatment and it is simply not required even though in lawsuits the assertion is often made that someone should have been with the injured resident at the time of the accident. Such care is not required and, think about, who would want a person with them at all times? Certainly, not the chocolate loving resident at the nursing home discussed in the New York Times article we used to introduce this subject.