

# PUBLICATION

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## Winning on Causation in Nursing Home Negligence Cases

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When a nursing home is sued in a medical negligence case, the primary line of defense is typically to show that the care provided to the resident was appropriate and did not constitute a deviation from the applicable standard of care. Even where there is evidence that the defendant did not provide appropriate care to a resident, however, the defendant may still prevail if the plaintiff fails to show that the resident's injuries were caused by the defendant's actions. To establish liability in a nursing home medical negligence case, the plaintiff must prove to a reasonable degree of medical certainty both that the defendant acted negligently and that the defendant's negligent act or omission caused the plaintiff's injuries or death. These cases may be successfully defended on causation, even when there is clear evidence of negligence.

Use of a causation defense was successful in one recent nursing home arbitration defended by **Christy T. Crider** of Baker Donelson's Nashville office. The case arose out of the death of an 82-year-old resident who was admitted to the defendant nursing home after experiencing a devastating stroke. Upon his admission, the resident was noted to have reddened heels and to be at high risk for the development of pressure sores. After an approximately six-month residence, the resident's right leg was surgically amputated immediately following his discharge. Plaintiff alleged that the nursing home had acted negligently in its treatment of the resident, and further, that the defendant's conduct had caused injuries to the resident, including the development of pressure wounds, which ultimately resulted in the amputation of his left leg.

The arbitration featured the testimony of the resident's wound care nurse, the facility's director of nursing and assistant director of nursing, and the resident's treating physician. Additionally, expert witnesses for both the plaintiff and the defense testified. Notably, the defense expert testified that the resident's amputation was inevitable because of the damage caused by his pre-admission stroke. He testified that the resident's underlying peripheral vascular disease was the cause of his amputation and that it had not been caused by infection or any other conditions which could be attributable to nursing home neglect. Based on the testimony of all the witnesses, the arbitrator found that the plaintiff had not established that the alleged conduct of the nursing home was the cause of the resident's injuries, noting that he found the testimony of the defense expert extremely convincing on this issue.

Despite the potential effectiveness of causation defenses, they may be difficult for juries to digest due to their tendency to be dependent on complex medical evidence. However, explaining causation issues to the jury in an organized fashion using demonstrative evidence and good experts can overcome this challenge. Nursing homes and their counsel can utilize the following strategies to maximize the effectiveness of a causation defense:

1. **Choose Defense Experts Carefully.** Select causation experts who actually treat the injuries at issue in the case and who can teach and explain to the jury the basis for your contention that the plaintiff's injuries were not caused by the defendant's conduct. If possible, the expert should examine the plaintiff, even if a physical examination is not important to their testimony, because it may lend credibility to the expert's opinion. In cases where the defense has retained multiple expert witnesses, be conservative with respect to the witnesses who are actually called at trial to avoid overwhelming the jury.

2. **Use the Autopsy Report.** Juries are always interested in the autopsy. If the autopsy assists in your causation defense, use it. If it is inconclusive, but certain findings are helpful, emphasize those findings. If your experts disagree with the autopsy findings, hire a forensic pathologist to explain how an autopsy is done, any problems with the performance and conclusions of the autopsy in this particular patient, and why the cause of death was not related to the conduct of the defendant.
3. **Normalize the Plaintiff's Health Issues.** Explain to the jury how the plaintiff's particular disease, injury, or complication can occur without negligence and/ or is caused by something else such as a pre-existing disease, family history or failure to follow directions.
4. **Simplify Complex Evidence.** Use language to make the evidence, including expert testimony, less complicated and more interesting by using substitute terms for medical terminology. For example, rather than myocardial infarction, say heart attack. Rather than hypertension, say high blood pressure.
5. **Differentiate Between a Differential Diagnosis and Causation.** The term "differential diagnosis" is utilized in medicine to determine what the condition is and how to treat it. It often has nothing to do with the causal determination. Medical experts often testify that in performing a differential diagnosis, they were trying to identify a condition for purposes of providing care, not to determine a cause or the most likely cause. The cause often does not impact the doctor's treatment. Make sure the jury understands this concept.
6. **Challenge the Plaintiff's Treating Physicians.** Do not accept what is in the treating physician's record. Sometimes a treating physician will put something in the medical record that is merely based upon the history given by the patient rather than their actual belief on causation or the timing of the event. If the treating physician testifies, ask why he/she was making a differential diagnosis. Establish that it was for the purpose of providing care, not to determine the cause or timing of a particular medical condition.
7. **Challenge the Plaintiff's Expert Witnesses.** When cross-examining a plaintiff's expert on the causation aspect of the case, your counsel should focus on the flaws in the expert's methodology, analysis or bias which will keep the expert on the defensive. Before impeaching an expert, however, your counsel should try to get the expert to agree to as many of the facts and conclusions to be presented by the defense expert as possible. From the outset, the opposing expert will then typically be less hostile. Counsel should capitalize on the inherent weakness of experts, which is the desire to appear knowledgeable, helpful and cooperative. Throughout cross-examination, counsel should attempt to obtain agreement with respect to the possible alternative explanations that favor your theory of causation in the case.