



Making a Difference

Baker Donelson Long Term Care Newsletter

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BEARMAN, CALDWELL
& BERKOWITZ, PC

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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

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In the Trenches

The Tennessee Health Care Association/Tennessee Center for Assisted Living Annual Convention and Trade Show is August 29-30, 2011 at Gaylord Opryland Resort & Convention Center



Crider

in Nashville. Join Baker Donelson shareholder **Christy T. Crider** and associate **Carrie W. McCutcheon** for their



McCutcheon

panel, "Big Survey Fines: Appeal or Pay?" on Sunday, August 28, 2011 at 2:00 p.m. Directly



Thiel

following, join Ms. Crider, fellow Baker Donelson shareholder **Donna K. Thiel** and Tennessee Health Management Chief Operating Officer Mark

Davis for their panel, "Get Paid for Care: Fighting Medicare Program Audits" at 3:00 p.m.

Baker Donelson is proud to sponsor the 21st Annual Conference for the National Investment Center for the Seniors Housing & Care Industry for lenders, operators

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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

In the Trenches, *continued*



Beckman



Faulkner



Hoeffcker



Levine



Lupinacci



Mahone



Whitaker



Smith



White

and investors in the long term care industry. This year's conference is September 21-23, 2011 in Washington, D.C.

Baker Donelson lawyers attending the conference are **Ken Beckman, Rich Faulkner, Heidi Hoeffcker, Jim Levine, Tim Lupinacci, Amy Mahone** and **Philip Whitaker**.

Jackson shareholder **Bradley W. Smith**, and associate **Everett White** successfully defended a Mississippi nursing home and rehabilitation center in a case involving an alleged fall and resulting bruise and hematoma. The plaintiff, the estate of the deceased resident, alleged that the nursing home negligently allowed the resident to fall during a diaper change and negligently monitored her injury. The nursing home argued that there was no fall, and that the bruise was self-inflicted. The case was tried before an arbitrator in February 2011. The arbitrator found that the nursing home did not breach the standard of care and entered an award in the nursing home's favor.

L. Eric Ebbert, shareholder in the Knoxville office, conducted supervisor training for two long term care clients. For one client, Mr. Ebbert

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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.

Tennessee Tort Reform: The Effects on Long Term Care Providers

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Tennessee Governor Bill Haslam signed the Tennessee Civil Justice Act of 2011 (the Act) on June 16. The legislation is effective on October 1, 2011 and does not affect pending lawsuits or causes of action that have not yet accrued by that date.

The provisions of the legislation extend to all forms of tort claims based on negligence or alleged fraud, including product liability actions and proposed class action consumer protection claims.

As a practical matter, most, if not all, of the pre-suit notices and lawsuits filed against health care providers through calendar year 2011 will not be affected by the Act. However, by June 2012, most claims and potential claims will be covered by this legislation and by October 2012, almost all pre-suit notices and lawsuits against health care providers will be governed by the provisions of the Act.

In the Trenches, *continued*



Ebbert

trained their supervisors on the ADA. For another client, he trained their supervisors on sexual harassment.

Christy T. Crider, shareholder in the Nashville office and leader of the Long Term Care Industry Service Team, spoke at the Tennessee Health Care Association Assisted Living Facility Leadership Series on May 20 on resident services agreements: "Assisted Living Resident Service Agreement, Protecting Your Facility While Providing Quality Care."

Christy T. Crider was also named among the *Nashville Business Journal's* 2011 Health Care Heroes.



Collins

Christy T. Crider and **Caldwell Collins** obtained a complete defense verdict in a nursing home wrongful death arbitration on August 8, 2011. The complaint alleged that the resident fell and died as a result of medication errors and lack of supervision. The arbitrator found that the nursing home complied with the standard of care in every regard.

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Tennessee Tort Reform: The Effects on Long Term Care Providers, *continued*



The Act addresses a number of significant issues faced by long term care providers in liability claims and litigation.

- “Health care provider” is defined to include a broad range of health care workers, including physician assistants, nursing technicians, orderlies, certified nursing assistants and technicians.
- The definition of “Health Care Services” includes “staffing, custodial or basic care, positioning, hydration and similar patient services.”
- “Health care liability action” includes any kind of claim alleging negligence on the part of a health care provider involved in the provision of health care services. Therefore, the special rules applicable to those kinds of cases (pre-suit notices, expert certification, etc.) are applicable. This is intended to address recent case law from Tennessee’s appellate courts holding that certain kinds of suits involving claims of ordinary negligence, such as positioning patients and helping them out of bed, do not require expert testimony on standard of care. The language in the Act effectively overrules those cases for claims falling within the realm of the legislation.
- Compensatory Damages: The legislation divides compensatory damages into two general categories: economic (“objectively verifiable pecuniary damages”) and noneconomic (claims for pain and suffering, disfigurement or disability and the loss of the pleasures of life, as well as derivative claims not involving direct physical injury, such as loss of consortium).
- Caps on Noneconomic Damages: In most cases, there will be a \$750,000 cap on noneconomic damages in personal injury lawsuits. A \$1,000,000 cap will apply to certain types of catastrophic injuries such as paraplegia or quadriplegia resulting from spinal cord injuries, amputations, injuries resulting from third degree burns to 40 percent or more of the body or face, or the wrongful death of a parent leaving surviving minor children.
- Limitations on Capped Damages:
 - A single plaintiff can’t recover separate capped damages from separate defendants, regardless of what kind of tort case is alleged. If there is more than one defendant found to be at fault for damages, the defendants will bear a proportionate share of damages. For noneconomic damages, the collective exposure in most cases will be \$750,000 to \$1,000,000 depending upon the nature of the injury.
 - Each injured plaintiff can recover damages, but derivative damages, such as loss of consortium, are subject to the overall cap applicable to the directly injured party.
 - The noneconomic damages cap will not be disclosed to the jury, but the verdict form must separate out this category of damages. As a practical matter, this means that the presiding judge will be able to reduce awards when necessary to reflect the maximum recovery permitted under the caps.
- Exceptions to Caps on Damages: There are a few exceptions to caps for noneconomic injuries, essentially revolving around intentional wrongdoing or where the defendant’s judgment was substantially impaired by alcohol or drugs. There is also an exception for instances where the defendant is found to have *intentionally concealed, altered or destroyed records with the purpose of avoiding or evading liability*. If this issue is raised, it will be decided by the jury. We expect the plaintiffs’ attorneys to attempt to exploit this exception by focusing even more intently on records production, and in particular, modification of or failure to produce records.

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Tennessee Tort Reform: The Effects on Long Term Care Providers, *continued*

- Punitive Damages Cap: Punitive damages for all cases will be capped at twice the total of compensatory damages, or \$500,000, whichever is greater. As with compensatory damages, there are limited exceptions to the punitive damages cap for intentional conduct or judgment impaired by alcohol or drugs.
 - One new twist on punitive damages involves the culpability of a principal for punitive damages alleged against an agent. The liability of the facility for the acts of an agent or employee for such claims "...shall be determined separately from any alleged agent..." A principal can be found not to be responsible for punitive damages even if the agent or employee whose conduct is at issue is found liable for such damages.
 - This same language regarding the liability of a principal being determined separately from that of the agent in cases of vicarious liability is in the section of the statute governing compensatory damages. The provision does not make much sense in the compensatory damages context. Liability should be automatic if the agent acted within his or her scope of authority. A plaintiff might possibly argue that this provision opens the door to a separate cap for the principal as well as the agent (or agents). Other sections of the law are so clear on this subject, however, that such arguments should not work.
- Appeal bond: The maximum appeal bond required of a defendant is reduced from \$75,000,000 to \$25,000,000, or 125 percent of the amount of judgment, whichever is lower (unless there are unusual circumstances).

Conclusion

The existence of caps on most claims involving noneconomic damages should reduce the number of long term care provider claims in Tennessee even more than they have already been reduced by the 2008 legislation requiring pre-suit notices and expert certifications in medical negligence cases. Most jurisdictions in Tennessee have experienced a reduction in filed lawsuits of 30 percent to 50 percent – even more in some jurisdictions.

In order to avoid claims of intentional concealment, alteration or falsification of records, it will be critical for long term care providers to have good systems in place for the creation, maintenance and preservation of records. Additionally, it will be important for providers to have good systems in place to respond to records requests from claimants and/or opposing counsel during all phases of potential claims and litigation.

Long term care providers can expect constitutional challenges to the legislation. The primary argument will be that tort cases are being treated differently from other types of civil litigation, for arbitrary reasons. Such court challenges to the legislation will probably not be resolved for at least two years.

Upcoming Events

Please check out the events page on the Baker Donelson website for a comprehensive list of events on a variety of topics that may be of interest to you: www.bakerdonelson.com.

Making a Difference is edited by Heidi Hoffecker, an attorney in our Chattanooga office, who can be reached at 423.209.4161 or hhoffecker@bakerdonelson.com. For more information about our **Long Term Care Industry Service Team**, please contact Christy Crider, team leader and an attorney in our Nashville office, at 615.726.5608 or ccrider@bakerdonelson.com.

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