

HEALTH CARE LAW

The Nursing Home Residents' Bill of Rights

The responsibilities nursing homes have to their residents

By William P. Isele

When I met Angelica, she was in tears. A diminutive woman, her deep, dark eyes probed my blue ones. "Are you a priest?" She asked, eyeing my dark suit. "No," I allowed, "I'm here to talk about your complaint." "I need a priest, not a lawyer," she said, and quietly resumed crying. What possible sin could this gentle octogenarian have committed, that was the cause of such remorse, such despair? "Do you want to tell me about it?" I asked. This time, she did not look me in the eye. She hung her head and softly, almost in a whisper, said, "I missed Mass last Sunday. It's a mortal sin. I pleaded with them, but they ignored me."

For 87 years, she had unquestioningly followed her church's dictum to assist at mass on Sundays and Holy Days of Obligation, never missing a one, until last week. Her increasingly frail health had caused her children to commit her to the care of a local, nonsectarian nursing home. All day that first Saturday, she pestered

the nurses and nurse aides: How will I get to Mass tomorrow? Who will take me? Saturday night and Sunday passed, and her inquiries were never answered. On Sunday night, in *terrorem mortis*, she called the phone number of the state agency listed on the poster by the pay phone. She didn't know what else to do.

The title "Nursing Home Residents' Bill of Rights" is not found in the statutes, but refers to portions of N.J.S.A. 30:13, which was adopted under the title: "An act concerning the responsibilities of nursing homes and the rights of nursing home residents," Laws of 1976, Ch. 120, effective November 30, 1976.

True to its name, the Statute, after presenting legislative findings and definitions, first lists nine responsibilities nursing homes have to their residents:

- Maintaining a complete record of all funds, personal property and possessions of a nursing home resident;
- Providing for the spiritual needs of residents;
- Admitting only that number of residents for which it can reasonably care;
- Ensuring that discrimination is prohibited;
- Prohibiting restraints except on physician orders;
- Ensuring that drugs not be used for punishment or the convenience of the staff;
- Permitting access to governmental representatives and legal services;

- Ensuring compliance with all state and federal laws, rules and regulations; and
- Providing a written statement of services provided by the nursing home.

In New Jersey, it is not enough that nursing homes provide a neat, clean environment, where state and federal laws, rules and regulations are, for the most part, dutifully followed. That is the minimum that is expected. In addition, nursing homes have affirmative duties to their residents, that include assuring that their spiritual needs are met (an area in which this "Care" home failed Angelica), that their financial affairs are properly managed, and that the needs of the residents are put before the convenience of the staff and the profits of the owners.

In addition to itemizing the duties of nursing homes toward their residents, the Statute goes on to list 13 rights to which residents of nursing homes are entitled. Some are tersely stated, such as the right to privacy; others are expressed in lengthy detail, such as the right to make decisions about one's treatment.

N.J.S.A. 30:13-6 separately sets forth a resident's rights regarding transfer or discharge, and N.J.S.A. 30:13-7 requires that residents be informed of their rights.

Private Cause of Action, Costs and Fees

Of particular interest to lawyers who represent the elderly, N.J.S.A. 30:13-8 creates a private right of action on the part of a resident whose rights have been violated,

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as well as entitling a prevailing plaintiff to reasonable attorney fees and costs.

The portion of N.J.S.A. 30:13-8 relevant to a private right of action reads as follows: "Any person or resident whose rights as defined herein are violated shall have a cause of action against any person committing such violation. The action may be brought in any court of competent jurisdiction to enforce such rights and to recover actual and punitive damages for their violation. Any plaintiff who prevails in such action shall be entitled to recover reasonable attorney's fees and costs of the action."

Treble Damages

Effective September 5, 1997, N.J.S.A. 30:13-8 was amended by addition of a subsection (b). This amendment has caused some confusion regarding the availability of treble damages.

Sub-section (b) reads as follows: "In addition to the provisions of subsection a. of this section, treble damages may be awarded to a resident or alleged third party guarantor of payment who prevails in any action to enforce the provisions of section 3 of P.L. 1997, c. 241." P.L. 1997, c. 241, § 3, is codified at N.J.S.A. 30:13-3.1, and prohibits nursing homes from (1) requiring that applicants or residents waive any right to benefits under Medicare or Medicaid; and (2) requiring a third-party guarantee of payment as a condition of admission or continued residence. It also requires nursing homes to inform applicants and residents how to apply for and receive benefits under Medicare and Medicaid. Although there are no judicial decisions on point, it seems clear that the treble damages provision of N.J.S.A. 30:13-8(b) relates only to violations of that section of the statute, and not to violations of the more general rights listed at N.J.S.A. 30:13-3, 30:13-5, and 30:13-6.

Case Law

Since its enactment in 1976, there have only been two reported cases judicially interpreting N.J.S.A. 30:13-8.

In *Profeta v. Dover Christian Nursing Home*, 189 N.J. Super.83 (App. Div., 1983), the Appellate Division ruled that next of kin

of a nursing home resident lack standing to bring an action under N.J.S.A. 30:13-8. Only the resident or the resident's legal representative can enforce the resident's rights in court.

In *Brehm v. Pine Acres Nursing Home, Inc.*, 190 N.J. Super 103 (App. Div., 1983), the Appellate Division ruled that, even though the nursing home violated the resident's rights related to transfer under N.J.S.A. 30:13-6, the resident's wife could not recover damages for her emotional distress under this statute. The Appellate Division did, however, approve the award of compensatory damages to the resident's estate, plus attorney fees and costs.

With the understanding, therefore, that only the resident or the resident's legal representative is covered, counsel should carefully evaluate each case in the light of the specific language of N.J.S.A. 30:13-3, 30:13-5 and 30:13-6, to determine whether any of the specific responsibilities or rights listed there has been violated. It should be noted that the Department of Health and Senior Services ("DHSS") has an even more comprehensive listing of 35 enumerated rights in its Standards for Licensing of Long-Term Care Facilities (N.J.A.C. 8:39-4.1). In every case involving a nursing home, an OPRA request should be made for records of deficiencies cited against the facility, because under N.J.S.A. 30:13-3(h), any violation of state or federal law, rules or regulations applicable to nursing homes should be able to trigger a private right of action under this statute.

Punitive Damages

Neither of the cases cited above deals with the issue of punitive damages. The plaintiffs in *Profeta* alleged punitive damages, but since the court dismissed the family's claims on summary judgment, the issue was never reached. The estate in *Brehm* was awarded compensatory damages only.

Accordingly, one must look to the Punitive Damages Act (N.J.S.A. 2A:15-5.9 to 5.17) and cases decided thereunder for guidance. N.J.S.A. 2A:15-5.12 sets forth the standard of proof for punitive damages as follows:

Punitive damages may be awarded to the plaintiff only if the plaintiff proves, by clear and convincing evidence, that the harm suffered was the result of the defendant's acts or omissions, and such acts or omissions were actuated by actual malice or accompanied by a wanton and willful disregard of persons who foreseeably might be harmed by those acts or omissions. This burden of proof may not be satisfied by proof of any degree of negligence including gross negligence.

Instructive is the case of *Smith v. Whittaker*, 160 N.J. 221 (1999). In *Smith*, a 60-year-old widow was killed in a vehicular crash. Her executor sought punitive damages, alleging that the defendant's negligent maintenance of the vehicle was "willful, wanton, and with knowledge of a high degree of probable harm to others." The jury awarded \$1,250,000 in punitive damages, and the appellate division affirmed. In further affirming the award, the Supreme Court stated: "Beyond proof of a negligently-caused death, the assertion of a claim for punitive damages requires a plaintiff to prove by clear and convincing evidence that defendant's conduct amounted to a 'deliberate act or omission with knowledge of a high degree of probability of harm and reckless indifference to the consequences.'" [citation omitted].

In Summary and Conclusion

Treble damages are available under the statute only for violations related to N.J.S.A. 30:13-3.1, requiring a resident to waive rights to benefits under Medicare or Medicaid, or requiring a third-party guarantee of payment.

Attorney's fees and costs are available if violations of N.J.S.A. 30:13-3, 30:13-3.1, 30:13-5 or 30:13-6 can be proven.

Punitive damages are available if there is clear and convincing evidence that those violations constituted "deliberate acts or omissions with knowledge of a high degree of probability of harm and reckless indif-

ference to the consequences.”

What was the outcome of Angelica’s dark night of the soul? A compassionate local priest was contacted, who visited Angelica and assured her of God’s love and forgiveness. He, in turn, arranged with a member of the parish’s social concerns

group to pick Angelica up every Sunday and bring her to mass. Within a month, the parish was sending a seven-passenger van to transport residents to Sunday mass. Within three months, arrangements had been made to offer Sunday mass in a make-shift chapel at the nursing home.

Within a year, a permanent chapel area had been dedicated, and mid-week as well as weekend services were offered for several denominations, both Christian and Jewish. When Angelica died, her funeral was held in that chapel now called the Chapel of Care. ■