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Sexual abuse in skilled-nursing facilities

THE LAWS GOVERNING ELDER ABUSE AND NEGLECT CASES PROVIDE SEXUAL-ABUSE VICTIMS WITH MANY AVENUES FOR RECOVERY

Sexual abuse of residents in skilled-nursing facilities (also called “nursing homes”) has been essentially a hidden and unknown problem nationwide, and it is a subject that has been rarely discussed in the media until recently. In December 2018, at a Phoenix nursing home, a 29-year-old woman who was in a vegetative and non-communicative state for at least a decade, gave birth to a baby boy at the facility. She had been a longtime resident and, in fact, the employees of the facility only became aware that she was pregnant when they discovered she was in labor and giving birth. Clearly, since this resident was unable to give consent, any sexual contact with her constituted abuse and sexual battery. DNA evidence subsequently linked a male caregiver at the facility to the crimes against this young woman and the alleged perpetrator was charged with multiple counts of unlawful sexual acts.

This incident finally sparked a national discussion on sexual abuse of elders and dependent adults at nursing homes and other residential facilities.

However, for those of us who litigate these cases on a regular basis, learning of the horrors of sexual abuse in these facilities is nothing new. Sexual assault is the least acknowledged, most hidden, and least-reported form of elder and dependent-adult abuse.

Sexual-assault statistics in the general population are staggering – one in six women and one in 33 men will likely be victims of sexual abuse sometime in their lifetimes. And despite the stereotypes, sexual abuse has no age limit and there is no “typical” victim. Here are some additional statistics with respect to sexual abuse of elders and dependent adults, which are alarming:

- 75% of all female rape victims over age 60 were assaulted in a nursing home.
- 40% of women with physical disabilities will experience some form of sexual assault in their lives.
- People with disabilities are 1.5 to 5 times more at risk of suffering a sexual assault than members of the general population.
- Women over the age of 75 and who suffer from declining mental conditions

such as dementia are at the greatest risk of sexual assault in nursing homes.

- Up to 75% of sexual assaults in nursing homes have at least one witness, typically other residents or facility employees.
- Only about 30% of elder sexual assaults are reported to law enforcement.
- Nationwide, over 1,000 nursing homes have been cited or suspected of mishandling allegations of sexual assault.
- About 80% of the time, the perpetrator of elder sexual abuse was a caregiver to the elder.
- More than 16,000 complaints of sexual abuse have been reported since 2000 in long-term care facilities, according to federal data, however, these only account for cases in which state long-term care ombudsmen (who act as advocates for facility residents) were somehow involved in resolving the complaints. There are likely tens of thousands more complaints.
- At least 500 facilities have been cited for failing to investigate and report allegations of sexual abuse at their facility.

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- Within a year of being sexually assaulted, 50% of elder victims die, according to case studies. (Smith, et al., *A Systematic Review of Sexual Assaults in Nursing Homes* (2017) The Gerontological Society of America.)
- Victims of elder sexual abuse tend to be cognitively impaired. About two-thirds of victims were diagnosed with some form of dementia, and researchers have found that most of the victimized elders need help with orientation to time (86%) and place (81%). (Rosen, Lachs & Pillemer, *Sexual Aggression between Residents in Nursing Homes: Literature Synthesis for an Unrecognized Issue*, (October 2010) Journal of American Geriatric Society 58).
- Victims are also commonly physically impaired with two-thirds needing at least some physical assistance with ambulation and 15% are not ambulatory. One study done found half of these victims required assistance with ADLs and only 1/3 were able to walk without assistance. (Rosen, Lachs & Pillemer, *Sexual Aggression between Residents in Nursing Homes: Literature Synthesis for an Unrecognized Issue*, (October 2010) Journal of American Geriatric Society 58).

In California, sexual assault and other forms of sexual misconduct are included within the definition of "abuse" and "sexual abuse" for purposes of pursuing litigation for victims under both statutory and common law theories.

A common and accepted definition of sexual abuse is "non-consensual physical contact of a sexual nature." Within this general definition, a broad spectrum of behaviors is included. The National Center of Elder Abuse's definition of sexual abuse includes unwanted touching, all types of sexual battery or assault including rape, penetration, and sodomy, coerced nudity, and sexually explicit photographing. Other sexual abuse includes sexual harassment, forcing to view pornography, exhibitionism, and threatening to molest or rape. (Rosen, Lachs & Pillemer, *Sexual Aggression between Residents in Nursing Homes: Literature Synthesis for an Unrecognized Issue*, (October 2010) Journal of American Geriatric Society 58).

What constitutes "sexual contact?"

Legal authority confirms that sexual contact which occurs under the following conditions at a nursing home is considered sexual abuse:

- A person is physically forced or coerced into contact.
- A person is threatened, manipulated or tricked into contact.
- A person has not consented or is unable to give consent to the activity.
- A service provider engages in sexual contact with a resident.

Furthermore, in a skilled-nursing facility setting, unwarranted, intrusive, and/or painful procedures by healthcare providers or custodians while providing "treatment" or "care" to a resident's breasts and genital or rectal area can also constitute sexual abuse. This includes the application or insertion of creams, ointments, thermometers, enemas, catheters, fingers, soap or objects when not medically prescribed and unnecessary for the health and well-being of the resident. In these situations, perpetrators may appear obsessed with this behavior, claim that the harmful practices are required for health or hygiene reasons, and/or may be reluctant to stop when instructed to do so. Examples mentioned in research and from cases I have litigated include unnecessary fecal checks, genital harm with a washcloth or soap while bathing, improper genital examinations, and insertion of urinary catheters that were not ordered.

Why are skilled nursing facility residents vulnerable?

- They are perceived as easy targets.
- They are seen as less likely to report.
- Reports are less likely to be believed.
- Physical or mental conditions may make them unable to report.
- They tend to be isolated from family and friends.
- They are less able to offer physical resistance.
- Learned compliance.
- Co-housing of residents, including those with sexual-assault backgrounds.

Perpetrators of sexual abuse against residents at nursing homes include other

residents, care givers, family members/visitors, and outsiders.

Although the perpetrators of most sexual abuse in nursing homes are caregivers, many resident-on-resident sexual abuse incidents are common. In 2010, a report from the U.S. Government Accountability Office found at least 700 registered sex offenders were living as residents in nursing homes. (Rosen, Lachs & Pillemer, *Sexual Aggression between Residents in Nursing Homes: Literature Synthesis for an Unrecognized Issue*, (October 2010) Journal of American Geriatric Society 58.) And that number is growing as the population ages.

State and federal regulations governing nursing homes provide residents with the right to be free from verbal, sexual, physical, and mental abuse. And when a resident is abused, the facility can be held directly and/or vicariously liable for failing to prevent the abuse. A number of theories are available to a victim, or on a victim's behalf, in filing a civil action against the perpetrator, facility owners, and facility operators.

In every instance of alleged sexual abuse, the following causes of action must be considered:

- Negligence:
 - Failure to supervise the plaintiff
 - Failure to train staff to recognize signs of sexual abuse
 - Failure to report abuse
 - Lack of adequate security
 - Negligent hiring of employee
 - Negligent retention of employee
 - Negligent screening or retention of a perpetrator-resident
 - Negligent staffing (understaffing)
 - Sexual Battery / Battery / Assault
 - Intentional Infliction of Emotional Distress
 - Fraud – Intentional
 - Misrepresentation
 - Fraud – Concealment
 - Negligence per se (See, for example, 22 C.C.R. 72315(b).)
 - Premises Liability
 - Breach of Fiduciary Duty

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- Sexual Harassment: Violation of Civil Code section 51.9 (when perpetrator is a service provider.)

- Breach of Mandatory Duty to Report (Welf. & Inst. Code, § 15630.)

- Neglect/Elder Abuse or Dependent Adult Abuse (Welfare & Institutions Code §§ 15610.07, 15610.57; Neglect includes “failure to protect from health and safety hazards; and sexual abuse is included in the definition of “physical abuse” under Welf. & Inst. Code, § 1560.63.)

Although as a general rule, a facility is not vicariously liable for the intentional acts of its employees, a facility is at fault under a theory of direct liability. Those causes of action are set forth above. In addition, however, “[a]n alternate theory to respondeat superior, an employer may be liable for an employee’s act where the employer either authorized the tortious act or subsequently ratified an originally unauthorized tort. [Citations.] The failure to discharge an employee who has committed misconduct may be evidence of ratification. [Citations.] The theory of ratification is generally applied where an employer fails to investigate or respond to charges that an employee committed an intentional tort, such as assault or battery.” (*C.R. v. Tenet Healthcare Corp.* (2009) 169 Cal.App.4th 1094.)

Discovery

Once a civil lawsuit has been filed on behalf of a victim of sexual abuse, discovery should begin immediately. Staff members of these facilities “disappear” often and getting their videotaped

depositions completed early is essential. Discovery requests for documents should include the following:

- All charts of the plaintiff (including “medical” charts and business files)
- Plaintiff’s Care Plans
- Reports on the internal investigation of the incident (expect having to file a motion to compel to get around “peer review” privilege)
- Prior incidents, complaints, etc.
- The perpetrator-caregiver’s personnel file (expect having to file a motion to compel)
- Written Policies and Procedures of facility
- Staff manuals
- Resident manuals
- Facility photographs and diagrams
- Facility cost reports
- Facility staffing documents
- Staff job descriptions, schedules, and attendance records (of all personnel such as Administrators, Directors of Nursing, Medical Directors, RNs, LVNs, CNAs, maintenance staff, etc.)
- Law enforcement records if applicable (through subpoena)
- Hospital, ambulance, and other medical records if applicable (through a written authorization from the client)
- CA Department of Public Health records of the facility, including all survey reports, statements of deficiencies (CMS 2567) and plans of correction (through subpoena and FOIA request)

You should also conduct independent research on the defendant facility. Copies of citations, deficiencies, and survey

reports are now available online through these websites:

1) Nursing Home Compare: “www.medicare.gov/nursinghomecompare/search.html”; and

2) California Dept. of Public Health: www.cdph.ca.gov/Programs/CHCQ/LCP/CalHealthFind/Pages/SearchResult.

Urgency of representation

Representing elder and dependent-adult victims of sexual abuse in nursing homes is becoming more urgent as the elderly population soars. The effects of sexual abuse include life-long, severe physical and emotional harm, and most of these incidents could have been prevented simply by a facility’s appropriate screening, supervision, and monitoring of its residents and employees. The laws governing elder abuse and neglect cases provide sexual abuse victims with many avenues for recovery, and attorneys should consider all litigation options to ensure that facilities uphold their duties and obligations to our elders and dependent adults.

Louanne Masry is founder of Masry Law Firm. Louanne litigates general personal injury cases, with a focus on adult and childhood sexual abuse, elder abuse, discrimination, and civil rights cases. Louanne is a member of the CAALA Board of Governors.

