

*The Journal of*

# Legal Nurse Consulting

Volume 23 ▲ Number 1 ▲ Spring 2012

- ▲ Pressure Ulcers
- ▲ Nutrition Strategies for Wound Healing
- ▲ Avoidable & Inevitable? Skin Failure:  
The Kennedy Terminal Lesion
- ▲ Pressure Sores and the Law
- ▲ Pressure Ulcers: Is it a Case of Negligence?

# Pressure Sores and the Law

Joshua D. Silverman, Esq.

## KEY WORDS

Pressure Ulcer, Decubitus Ulcer, Bed Sore, Expert Witness

---

*Pressure sore litigation is legally and medically complex. This article provides an overview of the legal issues in a pressure sore case and how the legal nurse consultant can effectively screen meritorious from defensible cases and assist in preparing the case for trial.*

---

## Introduction

Despite the fact that most pressure sores are preventable, patients in nursing homes, assisted living facilities, and hospitals continue to develop pressure sores at alarming rates. While studies produce conflicting results, the number of patients developing pressure sores is staggering. It is estimated that each year between 1 and 3 million people in the United States develop pressure sores (Donner, Posthauer & Thomas, 2009). In skilled nursing facilities, it is estimated that up to 28% of patients suffer pressure sores (Donner et al, 2009.). The numbers increase dramatically with patients in high risk groups including 60% of quadriplegics suffering pressure sores (National Pressure Ulcer Advisory Panel, 2009.). Between 1993 and 2006, pressure ulcer related hospitalizations increased by 80% (Donner et al, 2009). Because most pressure sores are preventable with proper nursing care, these cases are often ripe for litigation (National Pressure Ulcer Advisory Panel, 1992).

Pressure sore litigation has become increasingly complex for many reasons. Nursing home and hospital nurses, more so than assisted living facilities staff, have become more adept at charting to give the impression the patient is receiving aggressive preventative care. The medical and nursing literature has moved in the direction of distinguishing pressure sores, stasis ulcers, deep tissue injury, and the debatable “terminal ulcers” also called “Kennedy ulcers” in the medical literature (Black et al., 2009). Consequently, it has become much more complex to prove that a pressure ulcer was due to malpractice than even a decade ago.

The legal nurse consultant (LNC) can play an invaluable role in reviewing these cases and assisting throughout litigation. The LNC must have an understanding of the federal nursing home regulations, the various scientific theories behind prevention and treatment of pressure sores, and nursing home documentation. These federal regulations require unique charting that differs from hospital records, including the Minimum Data Sets (MDS) and Resident Assessment Protocols (RAP sheets). In addition to understanding the medical, nursing, and charting issues, the LNC should have a basic understanding of the legal aspects of a pressure sore case.

## Legal Consequences for Breaching Duties to Prevent and Treat Pressure Sores

A pressure sore case, at the most basic level, requires the plaintiff to prove the same elements of any case of negligence against a health care provider:

1. The health care provider owed a duty of care to the patient (i.e. patient-health care provider relationship);
2. The health care provider breached or violated the duty owed to the patient (i.e. the provider was negligent or committed malpractice);
3. The patient suffered an injury; and
4. The injury was caused by the provider's breach of the duty owed to the patient.

(Prosser, Keeton, Dobbs, & Keeton, 1984; *Morrison v. MacNamara*, 1979; *Weimer v. Hetrick*, 1987; *Mitchell v. Parker*, 1984).

Although nursing home residents and acute care patients are older and weaker than the general population, the health care provider's duty to the patient does not diminish. Under the *eggshell skull doctrine*, “tortfeasors (wrongdoers) take their victims as they come” (*Landman v. Royster*, 1973). In other words, a health care provider's liability for breaching the standard of care is not avoided because the injuries would not have resulted had the patient been in better health.

## Federal and State Regulations

Nursing homes are among the most heavily regulated businesses in the country. In 1987, Congress passed the Omnibus Budget and Reconciliation Act (OBRA) also called the Nursing Home Reform Act. It, along with the interpretive regulations, set forth how nursing homes must provide for the health, medical care, and general well-being of their residents. The regulations both generally and specifically address a nursing home's duties to prevent and treat pressure sores.

In general, a “nursing facility must provide services and activities to attain or maintain the highest practical mental and psychological well-being of each resident in accordance with a written plan of care” (Health Care Financing Administration, 2001a). Upon admitting a resident, the nursing facility must have its staff conduct a complete assessment of the resident identifying the resident's skin

condition and develop an appropriate plan of care for the resident (Health Care Financing Administration).

The regulations impose a high standard on nursing facilities regarding the prevention and proper treatment of pressure sores. The facility providers have a duty to ensure:

A resident who enters a facility without pressure sores does not develop pressure sores unless the individual's clinical condition demonstrates that they were unavoidable; and

A resident having pressure sores receives necessary treatment and services to promote healing, prevent infection and prevent new sores from developing (Health Care Financing Administration, 2001b)

Additionally, the regulations specifically require nursing homes to provide adequate and competent staffing, provide incontinence care, and provide for the nutritional needs of their patients (Health Care Financing Administration). Unfortunately, the federal regulations do not specify a staffing ratio that would be deemed adequate. It is well known that pressure sore prevention is labor intensive. This author has found cases where a certified nursing assistant (CNA) was caring for 24 patients on a shift with the majority of them needing to be turned and repositioned and requiring incontinent care at least every 2 hours. Therefore, it is not surprising that many lawsuits against health care providers allege that staffing deficiencies contributed to the development of pressure sores.

In most states, the federal regulations are not necessarily admissible as evidence that the nursing home breached the standard of care. The nursing home will usually argue that the regulations are too vague or that they were never intended to be the standard of care in a malpractice case (*Stogsdill v. Manor Convalescent Home, Inc.*, 1976). However, the plaintiff's nurse expert should be thoroughly prepared before his or her deposition regarding the role of the regulations in providing patient care. The regulations may become admissible if the nursing home nurses acknowledge that the regulations are the blueprint for providing patient care.

It is critical that when investigating a pressure sore case against a nursing home that the LNC review at least three years of surveys by the state's health department. These surveys may reveal a pattern of neglect. While most of the regulations are federal, not state, the routine surveys and complaint investigations are conducted by state agencies. If the state surveys identify deficiencies, the nursing home is required to respond to them with a "plan of correction (POC)."

It is equally important to scrutinize how the nursing home has responded to past violations. The responses often lead to documents that are otherwise withheld by a nursing home in response to a Health Insurance Portability and Accountability Act (HIPAA) request for medical records. For example, a nursing home may respond to a past violation by implementing a POC that identifies a particular person by title who will monitor weekly skin logs. In litigation these documents can be obtained through a Request for

Production of Documents or subpoena *duces tecum*. Likewise the persons responsible for carrying out corrective actions can be deposed. Failing to implement the POC can be used to prove negligence and notice of the risk of harm to patients.

The survey reports may be the foundation for building a punitive damage claim. Punitive damages, also called exemplary damages, are an additional recovery for the plaintiff. They are intended to punish the defendant for egregious conduct and to deter similar egregious conduct in the future (*Kemezy v. Peters*, 1996). In many states, to recover punitive damages the plaintiff must show that the defendant had knowledge of the employee's pattern of wrongful conduct or management ratified the wrongful conduct. A LNC can assist the lawyer in proving notice by tracking a pattern of preventable and inadequately treated pressure sores.

## Expert Witnesses

Cases involving pressure sores almost always require expert witnesses because the nursing and medical issues are beyond the common knowledge of lay persons. In federal court the admissibility of expert testimony is governed by Federal Rule of Evidence 702 (2011):

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

In state courts, the standard for admissibility of evidence in a malpractice case varies. For example, in Virginia, a standard of care expert in a malpractice case must have an active clinical practice in the same field or related field as the defendant within one year of the alleged malpractice (Virginia Code Ann. § 8.01-581.20, 2008). In Tennessee, the expert must practice either in Tennessee or a border state (Tennessee Code Ann. § 29-26-115, 2011).

Multiple experts are usually required to prove the different aspects of breaches of the standard of care and injuries. Nurses may be required to testify regarding whether the defendant breached the standard of care, but a physician typically must testify that the patient's injuries were caused by the breaches of the standard of care. A medical director of a nursing home can often testify regarding the injuries with a better understanding of the operation of a nursing home than other physicians. If there is evidence of malnutrition and dehydration, consider consulting with a dietician. A plastic surgeon with a sub-specialty in wound care can provide invaluable testimony regarding whether the sore was caused

by pressure or other conditions like diabetes, peripheral vascular disease, or end stage illnesses.

## Damages in Pressure Sore Cases

Like most medical malpractice actions, these cases are expensive to pursue and defend. From the plaintiff's perspective, the LNC can be very useful in assessing whether there are sufficient damages to warrant pursuing the case.

The starting point is assessing the physical harm to the patient. The defendant is liable for all harm proximately caused by the breaches of the standard of care. A stage IV pressure sore is of course a serious injury. However, if the patient arrived from the community with a stage III sore, the damages probably are insufficient to support an adequate award. This is because the defendant is only responsible for the worsening of the condition. Likewise, damages may be insufficient if the patient recovered from the pressure sore promptly without additional hospitalizations or surgery. In some cases, damages may not be sufficient if the patient had a very limited life expectancy due to cancer, advanced Alzheimer's disease, etc. While there is no rule of thumb, if the patient was already on hospice care, damages probably are not sufficient to pursue the case.

If the patient subsequently dies, determining whether the patient's death resulted from the pressure sore or an unrelated medical condition is critical and unfortunately often unclear. The LNC should obtain all the pertinent medical records for several years prior to the injury and up until death. A death certificate is a useful but often an unreliable means of determining cause of death. In many cases the physician signing the death certificate is not adequately informed of the patient's complex medical history. In some states, the death certificate is not admissible to prove cause of death (*Edwards v. Jackson*, 1970).

Many states now impose caps or limits on recovery regardless of the severity of the injuries as part of tort reform. Some states have a global cap limiting the plaintiff's recovery regardless of the severity of the injury. Others have caps on non-economic damages like pain and suffering without limits on economic damages. Others have both caps on the total award and on non-economic damages (Webel, Chu & Newman, 2011).

For the elderly, economic damages are usually limited to medical bills and funeral expenses. Particularly in those states with caps on non-economic damages, but no cap on economic damages, it is especially important to calculate all related bills. Without substantial medical bills, the case may not make economic sense to pursue.

According to reports from the Center for Medicare and Medicaid Services the average hospital cost for treating pressure sores is \$43,180 (Donner, et al, 2009). The LNC should obtain itemized bills from all providers recognizing that physicians often bill separately from hospitals and nursing homes. Since all patients with pressure sores have co-morbidities, those unrelated charges must be separated and removed from the claim.

Non-economic damages for pressure sore patients can be tremendous. Pressure sores are painful in themselves. They increase a patient's nutritional demands, often require surgical treatment, and may lead to loss of mobility and independence. Proving non-economic damages to skeptical jurors is challenging especially if the patient is deceased or unable to testify. While lay witnesses can be helpful, a LNC can find the hard data in the medical records to prove these damages. A detailed flow chart of all complaints of pain, administration of pain meds, and non-verbal signs of pain like grimacing can be used to effectively prove the severity of the injury. Similar charts can graphically show changes in activity level, signs of depression, and other consequences of pressure sores.

## Examples of Verdicts and Settlements

In the 7 years following the enactment of OBRA the average award in nursing home negligence cases nearly doubled to approximately \$525,000 (Felsenthal, 1995). The increased awards may be due to three factors: First, nursing homes are required to document injuries under OBRA so fewer injuries go unreported and plaintiffs have more information to pursue their claims. Second, the violation of federal law by a provider makes a verdict in favor of the plaintiff more likely. Third, the cost of medical care has increased faster than inflation which in turn increases the damages claimed in these cases.

While there are no comprehensive studies assessing the percentage of preventable pressures sores resulting in litigation, six and seven figure settlements and verdicts are not unusual. The following are illustrative examples of notable, certainly not average, settlements and verdicts:

In a Georgia case, the jury awarded \$1.25 million to the estate of a 67 year old nursing home patient who developed a stage IV pressure sore on his left buttock and became malnourished and dehydrated. The plaintiff alleged that the nursing home staff failed to prevent and treat the pressure sore by failing to turn and reposition him, failing to keep him clean and dry, and by the nursing home's failure to provide adequate staffing (*Mosby v. Tucker Nursing Ctr. Inc.*, 2008).

In a case filed in Cook County, IL, a quadriplegic patient developed multiple Stage IV pressure sores on his coccyx, hips, and heels after being admitted to the nursing home for rehabilitation. The suit alleged that the nursing home was understaffed, and the staff failed to turn him at appropriate intervals, to keep his skin clean and dry, and to appropriately assess his condition. The parties settled for \$1 million (*Wazydrag v. Alden N. Shore Rehab. & Health Care Ctr., Inc.*, 2007).

A Virginia jury returned an \$850,000 verdict against a nursing home finding the nursing home negligently caused or contributed to the patient's death due to pressure sores, malnutrition and dehydration. The plaintiff introduced evidence that the nursing home staff charted care on the patient when he was not in the facility and even after he died.

In a Texas trial, the jury awarded the plaintiff \$83 million including \$70 million in punitive damages against



a nursing home after an 83 year old resident who entered the facility alert but unable to walk allegedly died from infected pressure sores. The plaintiff also asserted that the nursing home failed to provide water due to insufficient staffing causing the decedent to suffer severe dehydration. The plaintiff introduced evidence of other medical problems at the facility and evidence of 18 other residents who were hospitalized during the weeks before the decedent's death. Perhaps most damaging to the nursing home, the plaintiff alleged that the facility fraudulently concealed that the staff was not licensed and the staffing was inadequate. Following the verdict the parties settled for an undisclosed sum (*Holder v. Beverly Enterprises Texas, Inc.*, 1995).

While most pressure sore lawsuits appear to arise in nursing homes, a Las Vegas, N.M. jury recently awarded \$10.3 million to the estate of a patient who developed bed sores at a regional medical center following hip surgery with \$595,000 designated as compensatory damages and \$9.75 million as punitive damages. According to the plaintiff's lawyer, the hospital failed to follow its own protocols for screening and preventing pressure ulcers (Haywood, 2011).

## Conclusion

The staggering number of preventable pressures sores has numerous health care and legal implications. As the vast majority of pressure sores are preventable, health care providers who fail to acquaint themselves with developments in the prevention and treatment of pressure sores subject their patients to unnecessary risk of serious injury or premature death. They also subject themselves to a range of legal consequences including sizable verdicts, civil penalties, and in the most egregious cases criminal penalties. When these cases result in litigation, a well-informed LNC can play a critical role in ferreting out the meritorious from the defensible and preparing the case for a successful trial.

## References

- Black, J. M., Edsberg, L. E., Baharestani, M. M., Langemo, D., Goldberg, M., McNichol, L.,... Npuapv, N.P. (2011). Pressure ulcers: Avoidable or unavoidable? Results of the National Pressure Ulcer Advisory Panel Consensus Conference. *Ostomy Wound Management*, 57(2), 24-37.
- Donner, B., Posthauer, M. E., & Thomas, D. (2009). The role of nutrition in pressure ulcer prevention and treatment: The National Pressure Ulcer Advisory Panel White Paper. Retrieved from [http://www.npuap.org/Nutrition White Paper Website Version.pdf](http://www.npuap.org/Nutrition%20White%20Paper%20Website%20Version.pdf)
- Federal Rules of Evidence, Rule 702. (2011).
- Felsenthal, E. (1995, Sept. 5). Jury awards rise for improper care of elderly. *Wall Street Journal*, p. B1.
- Edwards v. Jackson, 210 Va. 450, 453, 171 S.E.2d 854, 856 (1970).
- Haywood, P. (2011, Feb. 18), Christus St. Vincent Regional Medical Center slapped with \$10.3m penalty in bed sore lawsuit. *The New Mexican*.
- Health Care Financing Administration. (2001a). Requirements for States and Long Term Care Facilities, 42 C.F.R. § 483.20.
- Health Care Financing Administration. (2001b). Requirements for States and Long Term Care Facilities, 42 C.F.R. § 483.25.
- Holder v. Beverly Enterprises Texas, Inc., 95437 (Dist. Ct. Rusk Co., Texas) (1995). Retrieved from <http://marksfirm.com/results.php>
- Kemezy v. Peters, 79 F.3d 33, 34 (7th Cir. 1996).
- Landman v. Royster, 354 F.Supp. 1302, 1315 (E.D. Va. 1973).
- Mitchell v. Parker, 315 S.E.2d 76 (N.C. App. 1984).
- Morrison v. MacNamara, 407 A.2d 555, 560 (D.C. 1979).
- Mosby v. Tucker Nursing Ctr., Inc., Ga., DeKalb Co. St., No. 04A28531-2, Dec. 19, 2008.
- National Pressure Ulcer Advisory Panel. (n. d.). Pressure ulcer research: Etiology, assessment and early intervention. Retrieved from <http://www.npuap.org/prevmon.htm>
- National Pressure Ulcer Advisory Panel. (1992). Statement on pressure ulcer prevention. Retrieved from <http://www.npuap.org/positrn1.htm>
- Omnibus Budget and Reconciliation Act of 1987 (OBRA) 42 U.S.C.A. § 1396r et seq. and 42 U.S.C.A. 1395i-3 et seq.,(1987).
- Prosser, W. L., Keeton, W. P., Dobbs, D. B., & Keeton, R. E. (1984). *Prosser and Keeton on Torts* § 30 (West 5th Ed.).
- Stoghill v. Manor Convalescent Home, Inc., 343 N.E.2d 589 (1976)
- Tenn. Code Ann. § 29-26-115 (2011).
- Va. Code Ann. § 8.01-581.20 (2008).
- Wazydrag v. Alden N. Shore Rehab. & Health Care Ctr. Inc., Ill., Cook Co. Cir., No. 03 L006079, June 14, 2007.
- Webel, B., Chu, V., & Newman, D. (2011, May 18). Medical malpractice: Background and legislation in the 112th Congress. Congressional Research Service, Congressional,(Report No. R41693). Retrieved from <http://www.aapmr.org/advocacy/health-policy/federal/Documents/MedicalMalpracticeBackgroundLegislationCongress.pdf>
- Weimer v. Hetrick, 525 A.2d 643, 651 (Md. 1987).

**Joshua Silverman Esq.** is a partner with Williamson Petty LC in Richmond, Virginia. He is a 1998 graduate of Case Western Reserve University School of Law in Cleveland, OH. Mr. Silverman is a member of the Board of Governors and an officer of the Long Term Litigation Section of the Virginia Trial Lawyers Association. His practice areas include medical malpractice, nursing home abuse and neglect, products liability, and general civil litigation.