



Assisted living lawsuits mounting

By Nora Lockwood Tooher
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After suffering a traumatic brain injury in a car crash in 1996, Earl Scherrer lapsed into a coma.

He wasn't expected to live, but his wife, Lydia, refused to disconnect his life support. After 16 months, he began to emerge from his coma. Using first-grade reading and math texts, Lydia helped him to slowly learn to speak again.

In April 2006, she placed him in Liberty Manor Residency, a Phoenix assisted living facility that promised 24-hour care. A month later, she received a call that her husband had been vomiting.

She rushed over to Liberty Manor, brought Earl, 36, home and gave him a bath. Within minutes, he began vomiting again and died in her arms.

An autopsy revealed a number of foreign objects – plastic bags, catsup packets, candy wrappers and paper towels – in his stomach and small intestine. The medical examiner determined that the objects Earl had swallowed were significant contributing factors in his death.

Linda sued Liberty Manor, alleging negligence, abuse and wrongful death.

After an eight-day trial, a Phoenix jury on March 19 found the facility liable for Earl Scherrer's death, and awarded \$7 million in compensatory and \$4 million in punitive damages.

The \$11 million verdict – the largest assisted living verdict in Arizona history – was unusual for its size. But it reflects the growing number of suits alleging abuse and neglect in the fast-growing assisted living industry

Since 1998, the number of assisted living facilities in the U.S. has grown from 28,000 to 38,000, caring for about 1 million seniors.

Because they are not designated as medical care facilities, assisted living communities are not as regulated as the nursing home industry.

Plaintiffs' lawyers say the lack of regulation has opened the door to elder abuse and neglect.

"There's much more variability in assisted living because the rules are different from state to state, and the rules tend to be loose to accommodate a wide range of facilities," said Eric Carlson, an attorney at the National Senior Citizens Law Center in Los Angeles. "You've got facilities that are really incompetent, but the state may not even have minimum standards."

"They've got more judgment calls, there are no nurses and there's very little training," agreed Craig Knapp, a partner in Knapp & Roberts in Scottsdale, Ariz., Lydia Scherrer's attorney. "We're getting more and more assisted living cases."

He is currently representing the family of an elderly woman who died of heat stroke after she disappeared from an assisted living facility in Phoenix.

Steven Levin, a personal injury lawyer and senior partner at Levin & Perconti in Chicago, said his firm reached a \$2.5 million settlement with an assisted living facility in Chicago last year on behalf of a resident suffering from 20 pressure sores.

"Oftentimes, assisted living facilities are keeping residents that they don't have the capacity to care for, but the family goes along because they prey upon families," he said.

Paul Williams, a spokesman for the Assisted Living Federation of America, a trade group in Alexandria, Va., said the industry supports training requirements for direct-care staff, but said, "There are frail elders that can be cared for in our communities."

Assisted living centers are about 85 percent private pay, but 42 states allow Medicaid funding for residents living in assisted living communities, according to Williams.

He noted that Florida has different licensure categories for assisted living facilities, depending on the level of care they provide.

'Pool of gasoline and a match'

Both plaintiffs' and defense lawyers predict that the number of assisted living lawsuits will continue to increase.

John Supple, a defense lawyer and head of Gordon & Rees' health care practice group in San Francisco, said that the industry's growth makes it an easy target for plaintiffs' lawyers.

"You attach that business growth to the advent and meteoric growth of elder abuse lawsuits out of skilled nursing facilities [and] it goes without saying you are going to see an increase in suits against assisted living facilities," he said.

Liability rules in certain states also encourage lawsuits, he added.

In California, for example, a plaintiffs' lawyer who can prove elder abuse can recover up to \$250,000 for pre-death pain and suffering, plus attorney fees. If the resident is alive, there is no cap on damages, and the attorney still gets fees.

"Now, you've given [plaintiffs' lawyers] a pool of gasoline and you've got a match," Supple commented.

But plaintiffs' lawyers say assisted living centers have the same responsibility as nursing homes to take care of their residents.

"It all boils down to supervision," Knapp said. "Are they supervising the residents appropriately? You've got to have a service plan for each resident and the staff needs to know the service plan and follow it."

Levin agreed: "You need to assess the resident, to have a plan and re-evaluate the plan if it's not working."

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