“She was going to die anyway.”

Lawyers can be a cynical bunch. “No life expectancy; no lost wages; no future medicals.” “Where is the pecuniary value?” “You know you can’t get any punitive damages?” “The government will take away your client’s recovery.” “It’s just not worth it, where are the damages?”

Take on a nursing home negligence case in Nebraska and you will hear some or all of these comments from your fellow members of the bar. I know because I heard them all when I talked to other attorneys about my plan to develop a nursing home negligence plaintiff’s practice in Nebraska.

I also heard these comments while working for the family of a 95-year-old former nursing home resident who died an agonizing death 12 days after suffering a fall from her bed that broke both her femurs at mid-shaft and left her weakened body defenseless from the ravages of the traumatic injury and inattention of the staff.

Margaret Mills1 was a devoted wife, mother and grandmother. She participated in the lives of her loved ones at every available opportunity. She was wheeled down the isle at her great grandchildren’s weddings. She attended her beloved county fair the summer before her fatal fall. She regularly greeted the children and grandchildren of long since deceased peers at church gatherings.

If anyone deserved justice, the services of a zealous advocate, and validation for a peace-filled life, it was Margaret Mills. By aggressively litigating Margaret’s claim using nursing home regulations, statutes and strategy described in this article I was able to secure a fair and just settlement for the pain Margaret unnecessarily suffered and for the loss her next of kin experienced following her avoidable death.

Nursing home negligence occurs when a nursing home resident is abused or neglected by the nursing home staff. Nursing home negligence can result in nursing home deaths, broken bones caused by avoidable falls, malnutrition, dehydration, decubitus ulcers and residents wandering off the nursing home premises and injuring themselves.
Negligence and the resultant injuries that occur inside Nebraska nursing homes, which could rile even the most conservative Nebraska juror, would seem to be custom-made for high verdicts in our state. Unfortunately, Nebraska lawyers fall back on old notions that without future medicals and lost wages, nursing home cases are too hard to win for too little potential recovery.

There needs to be a different approach to these important cases. Insurance carriers must begin to appreciate their exposure to risk and the strength of the plaintiff’s position when a justifiable nursing home negligence case is filed.

The defense must realize that a good nursing home negligence attorney is committed to bringing the case to a jury. The decision-makers for the insurance companies must know that you are prepared to expose the corporate decisions of the nursing home to the jury. This message is not conveyed through demand letters; it is conveyed through the nursing home negligence attorney’s aggressive preparation. Deliberate, forceful discovery efforts should be designed to alert the defense that you know the law and you are focused not on the “he said—she said” of what happened on the day of the incident, but instead will keep up the constant drum beat of why were the circumstances of the incident allowed to occur.

Plaintiffs’ attorneys must expose more than just the injuries suffered by the elderly resident. Damages alone are not the key factor in the value of the case. The nursing home lawyer must expose the corporate nursing home’s bad conduct and broken promises to the plaintiff. Nursing homes charge $2,000 - $4,000 a month for their services. Marketing departments provide families with glossy flyers and slick advertising to entice families to choose their institution over others. A nursing home negligence lawyer will force the home to square their promises to the unfortunate reality.

The plaintiff’s attorney must not focus on the negligent act alone. Jurors will not be sufficiently motivated by a nursing assistant’s accident or mistake. The light must shine on the negligent or indifferent act of the corporate nursing home. There are many questions that must be asked. Whose decision was it to allow the nursing home to be understaffed and/or under trained? Who made the decision to request a waiver from the state to avoid having a registered nurse on every shift? Why wasn’t the staff adequately trained to respond to incidents as described in the policy and procedure manual? Why wasn’t there an order to turn and reposition a resident to avoid pressure sores of a clearly susceptible resident? If there was an order, why wasn’t the doctor’s order followed?

Exploring these questions early will reveal the underlying corporate malfeasance and/or administrative indifference that allowed the negligent act to occur.

The insurance company that provides coverage for negligent acts of the nursing home must be convinced the plaintiff’s lawyer will let the jury become aware that unless the jury acts, other residents are going to suffer similar injuries. Unless they act, the next injury will happen to someone else’s loved one or maybe even their own.

A quick study of the jury verdicts and publicized settlements in the United States shows a thriving niche practice and an excess of potential clients. Yet, when you search the jury verdicts in Nebraska, nursing home negligence claims are nearly absent from our courtrooms. Could this mean that nursing homes in Nebraska are exceptional in their care of our elderly population? I hope that is the case, but it appears unlikely.

Nebraska nursing homes will soon become crowded with our loved ones and perhaps us. Forcing the nursing home industry to change its priorities now may save many families the pain and anguish of unnecessary injuries and premature death in the future.

In the last 100 years, the elderly population (persons 65 years old and over) has greatly exceeded the growth rate of the population of the United States as a whole. About one in eight Americans were elderly in 1994, but about one in five will be elderly by the year 2030.²

The oldest of the old (persons 85 years and over) are a small but rapidly growing group of our citizenry. Compromising just over 1% of the American population in 1994, this population was 28 times larger than the same 85 years and over population measured in the 1900 census.⁴

From 1960 to 1994, the oldest old population increased 274%, compared with an increase of 100% for persons 65 years old and over, and an overall increase of 45% for the country’s total population.⁵ Overall, these statistics indicate,
the oldest old are projected to be the fastest growing part of the elderly population into the next century.

Why aren't there more nursing home negligence practitioners in Nebraska? Nebraska ranks sixth in the nation when considering the percentage of its older population in the 75-plus age group. Nebraska ranks fourth nationally when considering the percentage of its older population who are 85-plus. While overall, 18.4% of the state's population is comprised of people 60 and older, some counties in Nebraska have much higher rates of older citizens. The top five Nebraska counties with the highest over 60 years old populations are: Pawnee-35%, Webster, Franklin and Furnas-33% and Thayer-32%. Interestingly, all five of these counties are located on the Nebraska-Kansas border.

As our population grows, the need for personal assistance with activities of daily living grows proportionally. Data for 1991 and 1992 from the Survey of Income and Program Participation revealed a strong relationship between age and the need for personal assistance. This data revealed 4.5 million elderly persons needed assistance with one or more activities of daily living. In 1990, the proportion of our elderly requiring personal assistance ranged from 9% for those 65-69 years old to 50% for those 85 years old and over.

As the need for assistance with daily activity increases, the population turns to nursing homes to assist our aged citizens. There are approximately 17,000 nursing homes in the United States caring for over 1.6 million elderly Americans. There are 228 nursing homes in Nebraska. Until the mid-1980s nursing homes were one of the few housing options the elderly had to manage activities of daily living. In 1990, the proportion of our elderly requiring personal assistance ranged from 9% for those 65-69 years old to 50% for those 85 years old and over.

Nursing homes have become big business. Nursing home revenues will top 55 billion dollars this year. One of the largest for profit nursing home corporations, Beverly Enterprises Inc., owns over 520 facilities in about 30 states ($2.8 billion in revenues, $2.1 billion from taxpayers through Medicaid and Medicare guaranteed payments). Mariner Post-

### Trends in Nursing Homes by Bed Size

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<tr>
<td>Fewer than 50</td>
<td>40.8</td>
<td>42.3</td>
<td>33.2</td>
<td>16.8</td>
<td>12.9</td>
<td>11.5</td>
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<tr>
<td>50-99</td>
<td>35.0</td>
<td>30.7</td>
<td>32.5</td>
<td>35.6</td>
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<td>100-199</td>
<td>20.4</td>
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<td>28.1</td>
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Acute Network Inc. operates over 430 facilities in 40 states. In fact, the 10 largest publicly traded nursing home chains control 1/4 of this country's nursing home beds. Nursing homes have a steady flow of residents, with the government as the primary source of their income. These corporations have a virtually guaranteed cash flow. Therefore, their duty to the shareholders is to increase profits by decreasing costs.

The nursing home industry is one of America's fastest growing health care industries. Today nursing homes and personal care facilities employ about 1.6 million workers at 21,000 work sites. By the year 2005 industry employment levels will rise to an estimated 2.4 million workers.

With the growth of our senior population, and the continued expansion of nursing homes and assisted living facilities, it is a sure bet that you or someone you love will eventually live in such a home. While most of the homes and facilities offer their residents fine care, financial pressures and lack of training cause conditions at an increasing number of nursing homes to be unacceptable.

As the “baby boomer” generation enters their golden years, lawyers will be asked by a concerned public to help them address the unacceptable care their loved ones suffered while in a nursing home.

Nursing homes are one of the most regulated industries in this country. There is no substitute for knowing the law as it relates to nursing homes. A lawyer responding to the call of a potential client to discuss the possible negligent care of a family member in a nursing home must be thoroughly familiar with both case law and the copious state and federal statutes and regulations that govern today's nursing homes.

In response to reports of widespread neglect and abuse in nursing homes in the 1980s, the U.S. Congress enacted legislation in 1987 to require nursing homes participating in the Medicare and Medicaid programs to comply with certain requirements for standardized quality of care. This law was included in the Omnibus Budget Reconciliation Act of 1987 (OBRA 1987) known as the Nursing Home Reform Act. A lawyer intending to do any litigation in the nursing home negligence field must have a thorough knowledge of this Act and the corresponding regulations contained in Title 42, Part 483 of the Code of Federal Regulations.
NURSING HOME NEGLIGENCE

Any nursing home that receives federal funding, which is virtually all nursing homes via Medicaid, must comply with these regulations. While case law is unclear if or when federal and state regulations establish the standard of care for nursing home care, proving breaches of these regulations is a dramatic and compelling way to prove negligence in your case.

A sample of the most significant regulations at both the federal and state level provide a nursing home must:

- Have sufficient nursing staff to provide nursing and related services. 42 CRR 483.30. “The facility must assign a sufficient number of qualified nursing personnel who are awake, dressed and assigned to resident care duty at all times.” 175 NAC12-006.04.
- Ensure that residents do not develop pressure sores and, if a resident has a pressure sore, the nursing home must provide the necessary treatment and services to promote healing, prevent infection and prevent new sores from developing. 42 CFR 483.25 and 175 NAC 12-006.09D2.
- Conduct an initial and periodic comprehensive and accurate assessment of each resident’s functional capacity. 42 CFR 483.20 and 175 NAC 12—006.09B.
- Provide for review a copy of their permanent record, within two working days of a request. 42 CFR 483.10 and 175 NAC 12-006.05(18).
- Prevent the deterioration of a resident’s ability to bathe, dress, groom, transfer and ambulate, toilet, eat and communicate. 42 CFR 483.25.
- Provide, if a resident is unable to carry out activities of daily living, the necessary services to maintain good nutrition, grooming, and personal oral hygiene. 42 CFR 483.25.
- Provide appropriate treatment and services to incontinent residents to restore as much normal bladder functioning as possible and promote personal hygiene. 42 CFR 483.25.
- Provide each resident with sufficient fluid intake to maintain proper hydration and health. 42 CFR 483.25.
- Ensure that residents are free of any significant medication errors. 42 CFR 483.25.
- Maintain dignity and respect of each resident. 42 CFR 483.15 and NAC 12-006.05(21).
- Provide pharmaceutical services to meet the needs of each resident. 42 CFR 483.60.
- Maintain accurate, complete and easily accessible clinical records on each resident. 42 CFR 483.75.

These are just a few of the regulations both the federal government and the state of Nebraska require nursing homes to follow. The aggressive nursing home negligence attorney will identify each and every deviation from these well-articulated regulations and incorporate them into the complaint at the time of filing.

A nursing home negligence lawyer can play a unique role in the nursing home industry. We are not only advocates for our clients, but we also may be the watchdogs of the nursing homes and the government agencies tasked with policing them. By prosecuting the individual nursing home negligence claim, we not only protect the individual client but we play an important role in keeping the corporations who run these institutions compliant with the high standards the legislature has placed on individual nursing homes.

Nursing home cases must be vigorously prosecuted to encourage the industry to pump adequate resources back into the homes in order to protect the residents, before pulling out profit to pay dividends to their shareholders.

It is important that a lawyer handling a nursing home negligence case consider the following tips immediately following the decision to take a nursing home case:

Request the records now!—As discussed above, the law requires a nursing home to provide a copy of the resident’s permanent record within two working days of a request. 42 CFR 483.10 and 175 NAC 12-006.05. It is important to request and review the nursing homes’ records before the records have been reorganized, reviewed and Bates stamped by the nursing home.

Request the records from the primary care physicians and/or hospitals that have treated your patient during the relevant time period involved with your claim.

Request records from the health care providers who treated your client following the injury suffered at the nursing home. Request any pictures and film studies that were taken of your client. Request copies of the ambulance or emergency response unit records. Request a copy of an autopsy report and/or death certificate, if appropriate.

Empower your potential client or his/her family with the knowledge that federal and state regulations allow for the quick gathering of the nursing home records even before retaining an attorney. By requesting the records as soon as possible after an incident, family members will have the records in their possession at the earliest opportunity. Request the records a second time once retained by your client. Request the records a third time as part of the discovery process. This may result in three identical sets of records, or you may find interesting deviations in each set of records.

Have the client report the incident to the Nebraska Department of Health and Human Services—The Nebraska Department of Health and Human Services has been charged
by the legislature to regulate, license and police the nursing homes in this state. If you have a family member requesting to consultation with an attorney about concerns regarding the treatment and care of their loved one, the next call should be to the NHHS.  

Request the following records from the Nebraska Department of Health and Human Services:

- Copies of all Statements of Deficiencies for the appropriate period.
- Plan of Corrections and attachments in response to all Statements of Deficiencies.
- Copies of any Order prohibiting new admissions from the Department.
- Copies of any correspondence between the Department and the Nursing Home.
- Disclosure of Ownership
- Copies of any investigations/complaints pertaining to resident care.
- Copies of OSCAR 3 and 4 reports for the relevant time period.

Retain a qualified medical doctor to establish causation—
In Nebraska, a physician is necessary to testify to causation. Get a powerful jump on any Daubert issues by locking down your expert. Experts must be able to testify, in their opinion(s), the nursing home failed to use such care a reasonably prudent nursing home and/or physician would have used under similar circumstances in caring for your client, and this failure to use such reasonable care directly caused or contributed to cause the damages claimed in the complaint.

Know and use the OBRA and state statutes. Focus discovery on gaining an admission that OBRA and Nebraska regulations ‘set’ the standard of care for the nursing home.—
There is a good chance that the nursing home involved is a “licensed” nursing home. Therefore to maintain the license, the nursing home must follow the minimum government standards pursuant to OBRA legislation if they receive government funds. Your expert should be able to testify and explain the importance of the regulations and describe where there was a deviation from these regulations and link them to the injury of your client.

Certainly, there are many more issues the nursing home negligence attorney must understand and anticipate when litigating a nursing home case, but it is clear these cases are important and should not be ignored.

We should not leave the duty of protecting Nebraska’s elderly nursing home population to the overworked and underfunded Nebraska Department of Health and Human Services alone. A Nebraska lawyer who takes a nursing home negligence case has the opportunity to call attention to a nursing home that is not following its own procedures.

Nursing home negligence cases are difficult but can be rewarding to the practitioner if you are prepared to work hard and serve your client zealously.

Endnotes

1 This example is a composite of stories from actual clients, client referrals and plaintiffs from the reported case law. Any resemblance to a particular individual is completely coincidental.
4 Id.
5 Id.
6 Id.
9 National Center for Health Statistics, www.cdc.gov/nchs/fastats/nursingh.htm
10 Id.
11 Id.
12 Source: CDC/NCHS, National Nursing Home Survey, selected years. www.cdc.gov/nchs/about/major/nnhsd/nhshschart.htm
14 Nebraska Administrative Code Title 175 Health Care Facilities and Services Licensure, Chapter 12 Skilled Nursing Facility, Intermediate Care Facility
15 Individuals that wish to lodge a complaint with Nebraska Department of Health and Human Services Regulation and Licensure, Credentialing Division should call (402) 471-0316 attn: Health Facility and Service Investigations
16 The Health Care Financing Administration has an Online Survey Certification and Report (OSCAR). Data is gathered from mandatory reports of each nursing home. OSCAR 3 report summarizes a facility’s regulatory compliance history and also provides some information on complaint surveys. OSCAR 4 reports contain a facility’s most recent survey results and compares them to state, regional, and national averages.