

NURSING HOME CARE ACT

INTRODUCTION

The Nursing Home Care Act, 210 ILCS 45/1, *et seq.*, was adopted “amid concern over reports of ‘inadequate, improper and degrading treatment of patients in nursing homes.’” *Eads v. Heritage Enters., Inc.*, 204 Ill.2d 92, 97, 787 N.E.2d 771, 272 Ill. Dec. 585 (2003) (citing *Harris v. Manor Healthcare Corp.*, 111 Ill.2d 350, 357-58, 489 N.E.2d 1374, 95 Ill. Dec. 510 (1986) (quoting Senate Debates, 81st Ill. Gen. Assem., May 14, 1979, at 184 (statements of Senator Karl Berning)). A principal component of the Act is the residents’ “bill of rights,” under which nursing-home residents are guaranteed certain rights, including, *inter alia*, the right to be free from abuse and neglect by nursing home personnel. *See* 210 ILCS 45/2-101 through 2-113; *see also Eads v. Heritage Enters., Inc.*, 204 Ill.2d at 97, 787 N.E.2d at 774; *Harris v. Manor Healthcare Corp.*, 111 Ill.2d at 358, 489 N.E.2d at 1377.

To ensure that nursing homes comply with the Act, the legislature invested the Department of Public Health with expanded regulatory and enforcement powers and created civil, as well as criminal, penalties. *See, e.g.*, 210 ILCS 45/3-119, 3-301 through 3-318; *Eads v. Heritage Enters., Inc.*, 204 Ill.2d at 97-98, 787 N.E.2d at 774-75; *Harris v. Manor Healthcare Corp.*, 111 Ill.2d at 358-59, 489 N.E.2d at 1377-78. The legislature also expressly granted nursing-home residents a private cause of action for damages and other relief, including attorneys’ fees, costs, and injunctive relief, against nursing-home owners and operators who violate the Act’s provisions. *See* 210 ILCS 45/3-601, 3-602, 3-603; *Eads v. Heritage Enters., Inc.*, 204 Ill.2d at 98, 787 N.E.2d at 774 (citing *Fisher v. Lexington Health Care, Inc.*, 188 Ill.2d 455, 461, 722 N.E.2d 1115, 243 Ill. Dec. 46 (1999)).

Article II of the Act enumerates the statutory rights of residents, *see* 210 ILCS 45/2-101, *et seq.*, and the statutory responsibilities of owners and facilities. *See* 210 ILCS 45/2-201, *et seq.* For example, under the Act, facilities shall establish clear and unambiguous written policies and procedures, available for inspection by any person, to implement the responsibilities and rights set forth in Article II. *See* 210 ILCS 45/2-210. In addition, the trial court may instruct and jurors may consider the Department of Public Health’s administrative regulations promulgated by the Act, along with the Act’s statutory language, in determining whether a facility violated a resident’s rights. *Graves v. Rosewood Care Ctr., Inc.*, 968 N.E.2d 103, 360 Ill. Dec. 24 (5th Dist. 2012).

The Act provides, *inter alia*, that the owner and licensee of a nursing-home facility are liable to a resident for any intentional or negligent act or omission of their agents or employees that injures the resident. *See* 210 ILCS 45/3-601. Among the wrongs that the Act is designed to deter, are “abuse” and “neglect” of residents. As defined by the Act, “[a]buse’ means any physical or mental injury or sexual assault inflicted on a resident other than by accidental means in a facility.” 210 ILCS 45/1-103. As defined by the Act, “[n]eglect’ means a facility’s failure to provide, or willful withholding of, adequate medical care, mental health treatment, psychiatric rehabilitation, personal care, or assistance with activities of daily living that is necessary to avoid physical harm, mental anguish, or mental illness of a resident.” 210 ILCS 45/1-117.

Unlike in cases of abuse and neglect, the Act does not necessarily extend vicarious liability to facility owners and licensees in cases where the violation of the Act only relates to misappropriation of a resident’s property, as opposed to an “injury” to the resident, because “the legislature did not intend to make nursing homes insurers of their residents’ personal property.” *Starr v. Leininger*, 198 Ill. App. 3d 622, 625, 556 N.E.2d 266, 144 Ill. Dec. 799 (3rd Dist. 1990). In contrast, in cases involving any intentional or negligent act (e.g., abuse and neglect) resulting in physical or mental injury to a resident, the typical exculpatory defenses (e.g., scope of employment)

are not available to nursing-home facilities. *See Maplewood Care, Inc. v. Arnold*, 2013 IL App (1st) 120602, ¶¶64, 991 N.E.2d 1, 371 Ill. Dec. 914; *see also* IPI 190.8 (Notes on Use).

To encourage the ability of facility residents to file complaints with the Department of Public Health or to bring private civil actions, the Act makes it illegal for a licensee of a facility, or its agents and employees, to transfer, discharge, evict, harass, dismiss, or retaliate against a resident, a resident's representative, or any employee or agent who makes a report, files a complaint, or brings a legal action. *See* 210 ILCS 45/3-608. Generally, the Act also renders null and void any “waiver” of a resident’s right to sue or right to a jury trial. *See* 210 ILCS 4/3-606; 4/3-607. However, where a valid and otherwise enforceable contract is shown to exist between the resident and the facility, the Federal Arbitration Act, 9 U.S.C. § 2 (2000), preempts the “anti-waiver” provision of the Act and provides for enforcement of an arbitration clause contained within a resident/facility service agreement. *Carter v. SSC Odin Operating Co., LLC*, 237 Ill.2d 30, 927 N.E.2d 1207, 340 Ill. Dec. 196 (2010).

In addition to the rights of living residents, an executor of the estate of a deceased resident may bring the decedent's cause of action against a nursing home for statutory violations of the Act pursuant to the Survival Act. *Myers v. Heritage Enters., Inc.*, 332 Ill. App. 3d 514, 773 N.E.2d 767, 266 Ill. Dec. 32 (4th Dist. 2002). However, dependent next of kin of a deceased resident may not bring an action under this Act for wrongful death, but must do so under the Wrongful Death Act, 740 ILCS 180/1, *et seq.*; *see Pietrzyk v. Oak Lawn Pavilion, Inc.*, 329 Ill. App. 3d 1043, 769 N.E.2d 134, 263 Ill. Dec. 932 (1st Dist. 2002). Unlike a Survival Act claim, a Wrongful Death Act claim is not an asset of the deceased’s estate. Thus, a facility cannot compel arbitration of a claim brought under the Wrongful Death Act. *Carter v. SSC Odin Operating Co., LLC*, 2012 IL 113204, ¶¶ 56-61, 976 N.E.2d 344, 364 Ill. Dec. 66.

An action under the Act is not an action for “healing art malpractice” within the meaning of 735 ILCS 5/2-622, and therefore, a plaintiff who asserts a private right of action under the Act is not required to comply with the mandates of section 2-622. *Eads v. Heritage Enters., Inc.*, 204 Ill.2d at 108-09, 787 N.E.2d at 779-80. Although claims under the Act may sometimes involve a resident’s medical care, they do not directly implicate the individual health-care providers. *Id.* Rather, the only defendants liable for damages, costs, and attorneys’ fees under the Act are the owners and licensees of the nursing home. *Id.* Medical malpractice lawsuits against the individuals who actually provided the care must be asserted independently of the Act. *Id.* at 109.

The Act allows residents to recover common-law punitive damages upon proof of willful and wanton misconduct on the part of defendants. *Eads v. Heritage Enters., Inc.*, 204 Ill. 2d at 104, 787 N.E.2d at 777-78. However, because the Act does not provide for statutory punitive damages, a resident’s right to common-law punitive damages is extinguished when the patient dies. *Vincent v. Alden-Park Strathmoor, Inc.*, 241 Ill. 2d 495, 948 N.E.2d 610, 350 Ill. Dec. 330 (2011).

The Act’s allowance for the recovery of attorneys’ fees, *see* 210 ILCS 45/3-602, is intended to encourage lawyers to take cases that may be of little monetary value. Fees need not be proportional to the verdict because fees in direct proportion to the damages would discourage private enforcement of the Act. *Berlak v. Villa Scalabrini Home for the Aged, Inc.*, 284 Ill. App. 3d 231, 671 N.E.2d 768, 219 Ill. Dec. 601 (1st Dist. 1996). Although attorneys’ fees are not recoverable under either common law or the Wrongful Death Act, they are recoverable if the wrongful death claim is “intertwined” with a survival action pursued under the Act. *Id.*

Introduction approved July 2014.

190.01 Nursing Home Care Act – Statutory Provisions

There was in force in the State of Illinois at the time of the occurrence a statute known as the Nursing Home Care Act which provided that the owner and licensee of facilities that provide personal care, sheltered care or nursing care to residents are liable to any resident for [any intentional act or omission] [and] [or] [any negligent act or omission] [of their agent or employee] that injures the resident.

Instruction, Notes and Comment approved May 2014.

Notes on Use

The bracketed language should be selected to fit the allegations of the specific case. For example, in cases involving abuse, the bracketed language referencing intentional acts or omissions should be utilized. Cases of neglect involving the failure to provide adequate care should use the bracketed language referencing negligent acts or omissions. Cases involving negligent acts or omissions should be accompanied by IPI 10.01. Cases involving intentional or willful conduct should be accompanied by IPI 14.01. If agency is an issue in the case, IPI 190.08 and IPI 190.09 should be submitted.

Comment

This instruction paraphrases the pertinent portions of 210 ILCS 45/3-601. Unlike professional negligence cases in which doctors and nurses are liable for violations of the standard of care, in a Nursing Home Care Act case owners and licensees are liable for intentional or negligent acts. Because a cause of action under the Act is distinct from a cause of action for medical malpractice, no report under 735 ILCS 5/2-622 is required. *Eads v. Heritage Enters., Inc.*, 204 Ill.2d 92, 787 N.E.2d 771, 272 Ill. Dec. 585 (2003). Negligence and neglect under the Act have been defined as the failure to provide adequate care which has been found to be synonymous with ordinary care, due care, and reasonable care. *Harris v. Manor Health Care Corp.*, 111 Ill.2d 350, 489 N.E.2d 1374, 95 Ill. Dec. 510 (1986). For this reason, IPI 10.01 defining negligence should be utilized instead of IPI 105.01 for negligence allegations made under the Act. If the claim alleges willful conduct, IPI 14.01 should be submitted. If a claim for professional negligence is made under a separate count, IPI 105.01 should also be submitted.

190.02 Nursing Home Care Act – Issues Made by the Pleadings – No Issue as to Agency

[1] [The plaintiff claims that the defendant(s) (was) (were) the (licensee) (and) (or) (owner) of _____].
name of facility

[2] [The plaintiff claims that _____ was a resident of _____].
name of resident
name of facility

[3] The plaintiff claims that _____ was injured and sustained
name of resident
damage and that the defendant[s] violated the Nursing Home Care Act in that:

A. [The defendant negligently]

B. [The defendant intentionally]

[Set forth in simple form without undue emphasis or repetition those allegations of the complaint asserting abuse or neglect under the Act or violations of federal or state regulations that have not been withdrawn or ruled out by the court and are supported by the evidence.]

[4] The plaintiff further claims that one or more of the foregoing was a proximate cause of _____ injuries.
name of resident

[5] The defendant(s) (denies) (deny) [that it violated the Nursing Home Care Act] [and] [that (it) (they) (was) (were) an (owner) (licensee) of a facility covered under this Act] [and] [that _____ was a resident of _____].
name of resident name of facility

[6] [The defendant(s) (denies) (deny) that any claimed act or omission on the defendant's part was a proximate cause of _____ claimed injuries].
name of resident

[7] [The defendant(s) further (denies) (deny) that _____ (was injured) (or) sustained damages (to the extent claimed)].
name of resident

[8] [The defendant(s) (claims) (claim) that _____ was contributorily negligent in one or more of the following respects].
name of resident

[Set forth in simple form without undue emphasis or repetition those allegations of the answer as to the plaintiff's contributory negligence that have not been withdrawn or ruled out by the court and are supported by the evidence].

[9] [The defendant(s) further claim(s) that one or more of the foregoing was (a) (the sole) proximate cause of the _____ injuries].
name of resident

[10] [The plaintiff (denies that _____ did any of the things
name of resident
claimed by defendant) (denies _____ was negligent in
name of resident
doing any of the things claimed by the defendant to the extent claimed by the
defendant) (and denies that any claimed act or omission on _____
name of resident
part was a proximate cause of _____ claimed injuries)].
name of resident

Instruction and Notes approved May 2014.

Notes on Use

The bracketed material in paragraphs 1 and 2 should only be utilized if the defendant raises these issues as defenses. Similarly, the bracketed language in paragraph 8 should only be utilized if the defendant claims the resident was contributorily negligent and the plaintiff's allegations involve negligent or reckless acts or omissions. Allegations involving intent are not subject to contributory negligence. *Poole v. City of Rolling Meadows*, 167 Ill. 2d 41, 656 N.E.2d 768, 212 Ill. Dec. 171 (1995).

190.03 Nursing Home Care Act – Burden of Proof – No Contributory Negligence

The plaintiff has the burden of proving each of the following propositions:

[First, that _____ was injured and sustained damages [while
name of resident
_____ was a resident of _____];
name of resident name of facility];

[Second, that the defendant[s] [were] [was] the [owner] [and] [licensee] of a covered facility];

Third, that the defendant[s] [negligently] [and] [or] [intentionally] violated the Nursing Home Care Act in one of the ways claimed by the plaintiff as stated to you in these instructions;

Fourth, that the defendant’s violation of the Nursing Home Care Act was a proximate cause of the injury to the plaintiff.

If you find from your consideration of all the evidence that each of these propositions has been proved, then your verdict should be for the plaintiff. On the other hand, if you find from your consideration of all of the evidence that any of these propositions has not been proved, then your verdict should be for the defendant.

Instruction and Notes approved May 2014.

Notes on Use

If the allegations in the case involve negligence, IPI 10.01 should be given. If the allegations involve willful conduct, IPI 14.01 should be given.

190.03.01 Nursing Home Care Act – Burden of Proof – Contributory Negligence an Issue

The plaintiff has the burden of proving each of the following propositions:

[First, that _____ was injured and sustained damages [while
name of resident
_____ was a resident of _____];
name of resident name of facility];

[Second, that the defendant[s] [was] [were] the [owner] [and] [licensee] of a covered facility];

Third, that the defendant[s] violated the Nursing Home Care Act in one of the ways claimed by the plaintiff as stated to you in these instructions;

Fourth, that the defendant’s violation of the Nursing Home Care Act was a proximate cause of the injury to the plaintiff.

If you find from your consideration of all the evidence that any of these propositions has not been proved, then your verdict shall be for the defendant. On the other hand, if you find from your consideration of all the evidence that each of these propositions has been proved, then you must consider the defendant’s claim that the plaintiff was contributorily negligent.

As to that claim, the defendant has the burden of proving both of the following propositions:

A. That _____ acted or failed to act in one of the ways claimed
name of resident
by the defendant as stated to you in these instructions and that in so acting, or failing to act,
_____ was negligent;
name of resident

B. That _____ negligence was a proximate cause of [his] [her]
name of resident
injury.

If you find from your consideration of all of the evidence that the plaintiff has proved all the propositions required of the plaintiff and that the defendant has not proved both of the propositions required of the defendant, then your verdict shall be for the plaintiff and you shall not reduce plaintiff’s damages.

If you find from your consideration of all the evidence that the defendant has proved both of the propositions required of the defendant, and if you find that _____
name of resident
contributory negligence was more than 50% of the total proximate cause of the injury or damage for which recovery is sought, then your verdict shall be for the defendant.

If you find from your consideration of all the evidence that the defendant has proved both of the propositions required of the defendant, and if you find that _____
name of resident
contributory negligence was 50% or less of the total proximate cause of the injury or damage for which recovery was sought, then your verdict shall be for the plaintiff and you shall reduce the plaintiff's damages in the manner stated to you in these instructions.

Instruction and Notes approved May 2014.

Notes on Use

This instruction should only be utilized if plaintiff's allegations involve negligent or reckless conduct and should be accompanied by IPI 10.01 and IPI 11.01 and/or IPI 14.01 and IPI 14.02 or IPI B14.03. Contributory negligence is not a defense to intentional acts and for this reason this instruction should not be utilized in cases where only intentional acts are alleged by the plaintiff. *Poole v. City of Rolling Meadows*, 167 Ill.2d 41, 656 N.E.2d 768, 212 Ill. Dec. 171 (1995). This instruction will need to be modified if the plaintiff is presenting to the jury theories of recovery that allege both purely intentional acts and acts that amount to negligent or reckless conduct. In such cases, this instruction should be modified so that the jury is instructed that there should be no reduction for those allegations involving intentional conduct.

190.04 Abuse – Definition

Abuse means any physical or mental injury or sexual assault inflicted on a resident other than by accidental means in a facility.

Instruction and Notes approved May 2014.

Notes on Use

This instruction should only be given if abuse is an issue in the case.

190.05 Neglect – Definition

Neglect means a facility’s failure to provide, or willful withholding of, adequate medical care, mental health treatment, psychiatric rehabilitation, personal care, or assistance with activities of daily living that are necessary to avoid physical harm, mental anguish, or mental illness of a resident.

Instruction and Notes approved May 2014.

Notes on Use

This instruction should only be given if neglect is an issue in the case.

190.06 Licensee – Definition

Licensee means the individual or entity licensed to operate the facility.

Instruction and Notes approved May 2014.

Notes on Use

This instruction should only be given if the defendant disputes that it is a licensee.

190.07 Owner – Definition

Owner means the individual, partnership, corporation, association or other person [who owns] [operates] a facility.

Instruction and Notes approved May 2014.

Notes on Use

This instruction should only be given if the defendant disputes it is an owner.

190.08 No Issue as to Agency

_____ was the agent of the defendant _____ at [and before]
Agent's name [owner's] [licensee's] name

the time of this occurrence. Therefore any act or omission of the agent at that time was in law the act or omission of the defendant _____ .
[owner's] [licensee's] name

Instruction, Notes and Comment approved May 2014.

Notes on Use

This instruction should only be used when there is no issue as to agency. If the defendant disputes agency, the Committee is of the opinion that a modified version of IPI 50.04 should be utilized. Specifically, it is the Committee's position that because the Nursing Home Care Act provides that owners and/or licensees are liable for all negligent and intentional acts of their agents without stating any limitation, requiring proof that the agent was acting within the scope of his or her authority is not required.

Comment

The language of 213 ILCS 45/3-601 provides that owners and/or licensees are liable "for any intentional or negligent act or omission of their agents or employees which injures the resident." Because the Act places no limitation on this liability, the Committee's position is that IPI 50.04 should be modified to remove the requirement that the agent or employee was acting within the scope of authority. For the same reason, the Committee's position is that IPI 50.06 should not be used in these cases.

190.09 [An Owner] [A Licensee] Acts Through Its Employees

The defendant is [a nursing home owner] [a nursing home licensee] and can act only through its officers and employees. Any act or omission of an officer or an employee is the action or omission of the defendant [owner] [licensee].

Instruction and Notes approved May 2014.

Notes on Use

This instruction should be used when a nursing home's alleged liability is based on the acts or omissions of its officers or employees.