The Nursing Home Systems Case, By the Numbers

Nursing Home Cases are Always Systems Cases

You've probably heard, "Truck crash cases aren't just big car crash cases." Why? Because of federal regulations governing trucking companies, and the big corporate, unsympathetic, insured defendants.

Nursing home cases are the same: they're not just medical negligence cases with older people.

Nursing home cases are against big, dangerous, greedy, and insured (or asset-rich) corporations who put their profits ahead of resident safety in a way that would make the most cut-throat, for-profit hospital chain blush.

So if you're litigating the occasional nursing home case focusing on a particular nurse or aide, or even a particular facility, you're missing all the fun--and the case value, and the chance to make a big impact--by focusing on the wrong people.

We've never had a nursing home case that wasn't a "systems" case. If you have, you likely either missed it, or you had a mediocre case.

The Systems Case is Always in the Numbers

For nursing homes, the system is in the numbers. There are only two numbers that drive nursing home corporate profits: residents (income) versus staff (expenses). These are the two big levers that drive long term care profits for corporate chains.

Everything else is a rounding error.

So, the issue becomes staffing: packing the beds (often with the more lucrative, and assistance-needing, rehab patients), while not increasing the staffing levels to accommodate them.

Choking case? It isn't about one aide making an innocent mistake, or that bad things happen. Where were the staff to monitor the person eating, or evaluate their ability to eat and swallow safely, or making sure the right food was delivered to the resident with dysphasia? They were taking care of the other 15, 20, 25, or more residents they must care for, alone, every day.

This is true of every common nursing home case type:

- **Falls**--what was the fall risk, how many people needed to assist with the transfer, or provide supervisory assistance with toileting, or provide interventions to prevent the fall? Was the person left waiting to be brought to the bathroom, or abandoned on the toilet?
- **Pressure Ulcers**--where were the people to provide turning and positioning to allow healing? Changing the dressings? Assessing the wound and alerting physicians and family? Where was the wound specialist consult or hospital trip? Why didn't they see the person's decline--fever, sweating, decreased intake and output, visibly looking sick--before it was an emergency case of respiratory failure, sepsis, death?
- **Dehydration**--why wasn't anyone monitoring input and output, assisting someone with drinking, seeing the signs of dehydration before the crash? (Or listening to the family raise alarms?)

Infections, elopement, direct abuse--the list goes on, and for each of these there are federal regulations because of how commonly systemic failures are the root cause of these events (For an overview of the more recent federal regulations, you can see Will's article "How Recent Changes to Nursing Home Regulations Affect Nursing Home Abuse Cases," here: https://goo.gl/8tjRZw)

What staffing Levels are Required for Nursing Homes?

The federal regulations regarding nursing home staffing are vague, requiring "sufficient staff." As vague as this may sound, it is actually better than a minimum staffing level that does not address the care needs of the residents (like Ohio's minimum staffing hours per patient day, which are abysmally low).

The new regulations still require "sufficient" staff, but they have—for the first time—described specific factors nursing homes must consider in staffing decisions during the at-least-annual facility assessment:

1. The number, acuity, diagnoses, and care required for their residents; and
2. the staff training, experience, and skills.

Specific language from § 483.70(e) adds specific elements few poorly-staffed facilities will be evaluating properly, including:

(ii) The care required by the resident population considering the types of diseases, conditions, physical and cognitive disabilities, overall acuity, and other pertinent facts that are present within that population;

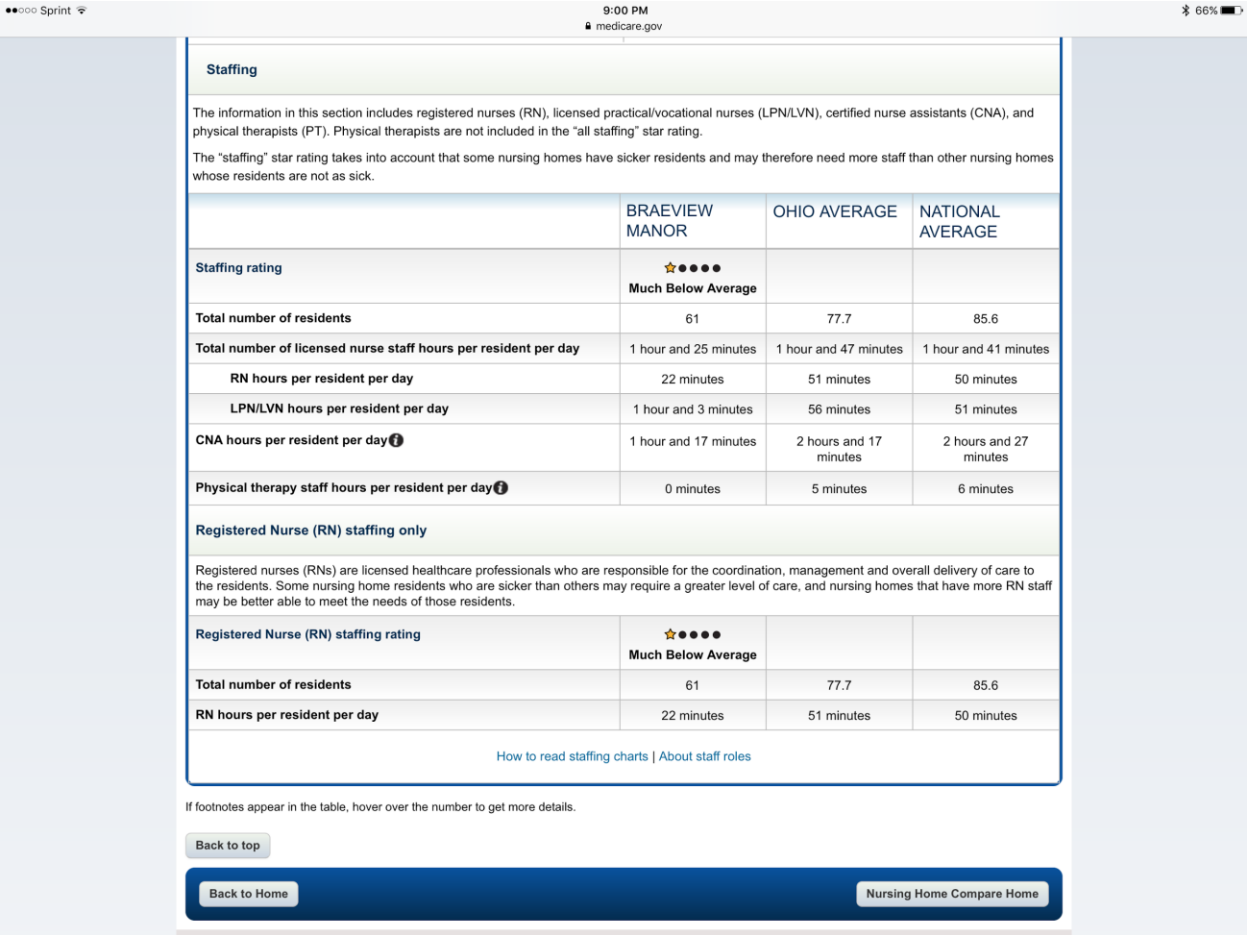
(iii) The staff competencies that are necessary to provide the level and types of care needed for the resident population;

Generally, the in-facility staff supposedly responsible for setting staffing levels (like the Director of Nursing or Facility Administrator) do not have real authority. Nor are the real people with control at the corporate level taking any of this into account. They're being handed a budget that basically sets their ability to staff—usually too low—then triage as best they can to minimize the harm from the inevitable understaffing.

There is a handy formula Medicare commissioned that provides a guidepost nursing homes are well aware of but thoroughly ignore: "expected staffing." Expected staffing gives us the aide, RN, and LPN hours per patient day based on resident care needs as evaluated in assessments using the Minimum Data Set evaluation tool (called "MDS").

The Minimum Data Set evaluations create a care need score--called Resource Utilization Group, or "RUG" score--which categorizes people based on how much care they need from staff. Medicare takes the RUG scores for each resident's MDS in a facility, uses the formula to calculate the expected staffing levels for the facility, then (after curving for the regional variances), using that to score the nursing home on Medicare's 5-star scale.

You can get a snapshot of your target facility's staffing picture on Medicare's nursing home compare site, www.medicare.gov/nursinghomecompare, under the staffing tab. Medicare even breaks down the specific types of staff and compares them to the state and national averages. Here's what a facility we're suing in a preventable choking death case, Braeview Manor, looks like for staffing:



Here's the catch: that facility is probably even worse than it looks. Why? Even though Medicare has data on resident RUG scores at minimum every 90 days, and even though Medicare has almost-real-time staffing data for the facility, it doesn't use that data for the star rating.

Instead, Medicare uses a separate form the nursing home completes as part of its inspection that only accounts for two weeks before the inspection. And even though these are supposed to be "surprise" inspections, most nursing homes know when they're coming and "bump" their numbers.

But the real data is in Medicare's database, which you can download. So not only are they understaffed, you can show they're gaming the system, too.

Getting to the Dollars

Medicare makes the data from nursing homes available in massive data sets that allow you to compare staffing levels versus expected staffing on a quarterly basis.

Add in the cost-report data that tells us exactly how much the nursing home is spending on each type of nursing staff member, and you have a recipe to put together a financial profit figure: how much is the nursing home pocketing in profit from understaffing?

When you cover a few years, for every resident in the facility, the nursing home might be making hundreds of thousands or even millions of dollars annually by providing fewer nursing staff members than needed to care for residents.

When you have a corporate chain, you can bet the chain is pulling in millions across multiple poorly-staffed facilities through understaffing.

Remember, too: all of this is the nursing home's own self-reported data, submitted under penalty of perjury. They can't run from it.

While establishing corporate control over the staffing picture--through controlling the dollars--is beyond the scope of this article, rest assured the local facility administrator and director of nursing have zero authority to control the budget or staffing. If they did, they'd have a better-staffed facility, and you wouldn't be suing them.

We've also been issuing Freedom of Information Requests ("FOIA") requests to get down to the detailed RUG levels so we can show on a particular date (or range) the precise snapshot of resident needs in the facility. This definitely requires an expert to analyze the data, but it can get you much closer to direct causation in a specific-injury case.

Leave the Nurses Alone

Now that you've delved into the data, found the systems case through understaffing, and traced it to the money, you have a big, bad, greedy, corporate defendant in the crosshairs.

So, you cannot blame the nursing staff. If you aren't thinking, "well, of course not," then repeat after us: "I cannot blame the nursing staff."

Because they're a victim in the story, too. No one got into nursing because they don't want to help people. Whether their reaction to systemic understaffing--which means not being able to give adequate care to everyone by definition--is to work faster (making more mistakes), stay late off the clock (all too common and illegal), shut down and stop caring, false charting of care they didn't give, or even snap and abuse people, it's only happening because of the greedy company putting them in an impossible position and the frustration that naturally accompanies it.

Having said that, the nursing staff should be a major part of your case.

Not surprisingly, nursing staff that still works at the nursing home usually won't dish on the facility. You know, they want to keep their job. They will rarely, in our experience, say "we're understaffed."

But they will be happy to discuss how hard their job is. Tell you about how many things they have to do for everyone. (The nursing home's own policies often times list a nearly impossible number of tasks that staff are expected to complete for each resident at various times during the day.) Admit to triaging between toileting programs and call lights and alarms and transport. Sometimes they even tell us how they stay late to chart. (Check out the charting times, too--often end-of-shift, because, no time to chart!)

But now you can be their friend. When they tell you how much they care, how hard they work, that's not a problem, it makes sense. And you don't have to play the bad guy, or prove some nurse doesn't care about their residents, to win your case at trial.

Of course they care. That's one more person who is collateral damage to the corporation's insatiable need for profits.

While current staff may be reluctant to say they are understaffed, former employees are often more than willing to explain the actual conditions and work environment at the facility. With the high amount of turnover at these facilities, finding former employees should not prove difficult.

Here are four of the simplest ways we use to find former employees. First, gather any names from family members. Family members can also provide you with the names of other residents – whose family members can bolster your understaffing case with their own stories.

Second, you can commonly find people who have listed the nursing home or its corporate parent as an employer on LinkedIn. Third, there are numerous investigators who can quickly and efficiently find contact information for former employees. Finally, once the case is filed, request the contact information for all former employees over a given date range. At this point, you should at a minimum of many names of former employees. We use some variation of the following chart in our discovery requests.

INTERROGATORY:

For the following individuals, identify the person's name (if not provided), relationship to You (e.g., employee, former employee, independent contractor, loaned servant, shareholder, executive, board member, etc.), title, dates the individual was employed by or otherwise affiliated with You, and, if no longer employed by you, state such individual's last known contact information (residential address, telephone number, email, and place of employment, if known):

RESPONSE:

Name	**Relationship**	**Current / Last Tile**	**Dates of Employment / relationship**	**Last known contact information**
Jane Doe, LPN				
John Doe, RN				
Jane Doe, CNP				
Jane Doe, DTR				
All Nursing Aides / CNAs / STNAs assigned to care for the Resident (add rows as necessary)				

Rub Their Noses in It

When we turn our attention to a nursing home after getting a new client, we pull the Medicare information, track down the corporate structure (a separate adventure entirely), and pull inspection reports (they disappear in 3 years, so download them!).

Then we pore over their website.

Why? Because the greedier the nursing home company, the more they don't just cut staffing, they fill the beds. That's the other lever for profiteering. They fill the beds by selling lies, advertising how wonderfully staffed and attentive they are.

So print the website marketing to PDFs, so you have record of all their promises (which will invariably mirror what your clients / family are telling you they were promised). Then request marketing materials in discovery. This is the promise they're breaking

when they know perfectly well they need more nursing staff to care for everyone, but choose not to pay for them.

There is often a desire to blame the victim in these cases. Why wasn't the family more attentive? How did the family allow this to happen? Why would the family put their mom or dad in this terrible place? The facility's broken promises and lies minimize the blame on your clients. They didn't have the necessary information to keep their loved one safe because of this corporate greed.

Share the Love

If you are regularly filing nursing home cases, consider joining the AAJ nursing home section, or at least associating with counsel who do as well to share insights. If you only handle them occasionally, definitely associate with someone who does. With rare exceptions, most of the nursing home abuse lawyers I've met are more than happy to help you out.

After all, if you have a great result, that helps us all. Anyone who would hold back assistance to a local lawyer with such a case is not just selfish and unprofessional, they're short-sighted, too. Because if the case fails, or settled cheap, everyone's case value goes down.

If you'd like some example transcripts and materials from when we've used these techniques at trial, we posted some here: https://www.eadiehill.com/cata/. Also, feel free to call.

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