

Error in Judgment or Breach of Standard of Care?

By L. Renée Lowe, J.D., LL.M. Candidate

lrlope@central.uh.edu

The Louisiana Attorney General in September 2005 brought criminal charges against the owners of St. Rita's Nursing Home in St. Bernard Parish, Louisiana, after a Medicaid fraud investigation into the deaths of 34 nursing home residents after Hurricane Katrina.¹ The owners were charged with 34 counts of negligent homicide stemming from the deaths of residents who drowned after flood waters from the Category 5 hurricane engulfed the facility.² The Louisiana Attorney General charged that the owners "had a duty and a standard of care" and that they breached that duty by failing to evacuate the residents despite repeated requests to do so.³ In addition to criminal liability, the nursing home's alleged failure to act may give rise to civil liability.

Under the common law, a nursing home has a special duty to its patients arising from the nursing home-patient relationship.⁴ The existence and nature of a nursing home's duty to a patient is founded upon the nature and purpose of the nursing home as an institution, upon the undertaking of the nursing home to provide care and protection to its residents, and upon the reliance and dependency of the patient on the nursing home to provide these services.⁵

Generally, a nursing home is under a duty to exercise reasonable care to avoid injuries to its residents, the reasonableness of such care to be assessed in light of a resident's physical and mental condition.⁶ The relationship between a nursing home and its residents, where the nursing home voluntarily assumes an obligation to provide care for those who are unable because of physical or mental impairment to provide care for themselves, gives rise to an affirmative duty owed by the nursing home to exercise reasonable care to protect its residents from all foreseeable harms within the general field of danger that should be anticipated.⁷

Liability may arise because of negligent care, or in the case of St. Rita's, a failure to act. There can be little doubt that St. Rita's Nursing Home owed a duty to its residents. However, should there be a corresponding increase by the nursing home in the care of the

¹ Charles C. Foti, Jr., Louisiana Attorney General, Press Release, *Attorney General Medicaid Fraud Control Unit Investigators Looking For Nursing Home Owners*, Sept. 8, 2005, available at <http://www.ag.state.la.us/ViewPressRel.aspx?RelID=419>. See also *Nursing Home Owners Charged in Storm Deaths*, MSNBC NEWS, Sept. 14, 2005, available at <http://www.msnbc.msn.com/id/9337631> [hereinafter *Storm Deaths*].

² *Id.*

³ *Id.*

⁴ See generally RESTATEMENT (SECOND) OF TORTS § 323, 324 (1965).

⁵ *Id.*

⁶ See *Murphy v. Allstate Insurance Co.*, 295 So.2d 29 (La. App. 1974), cert. den. 299 So.2d 787 (La. 1974); see also *Powell v. Parkview Estate Nursing Home, Inc.*, 240 So.2d 53 (La. App. 1970).

⁷ PROSSER AND KEETON ON TORTS (5th ed.) § 30 (1984).

resident to prevent injury or death if there is a known hazard to the resident, such as with Hurricane Katrina? Nursing homes have the responsibility of the complete and total environment of their residents over an extended period of time. The owners of St. Rita's nursing home are alleged to have failed to evacuate its residents contrary to the facility's own evacuation plan and in violation of St. Bernard Parish's mandatory evacuation.⁸ Subsequent to the mandatory evacuation order, authorities allegedly offered to send two buses and drivers to evacuate residents from the facility, but the owners declined this offer.⁹ These facts are more likely to give rise to liability.¹⁰

However, finding that the nursing home owners failed to conform to the applicable standard of care may be difficult. Because the plaintiff in an action against a nursing home for injury or death to a patient must show that the defendant breached its duty to the patient by failure to conform to the applicable standard of care, a nursing home may assert the defense that its conduct was in conformity with the standard of care and thus failed to breach any duty to the patient.¹¹ Because the standard of care required in a given case will depend on the known condition of the patient and other relevant circumstances, the defendant can prevail on this defense by showing that the conduct complained of did not fall short of the standard of care required in light of those circumstances.

St. Rita's owners contend that the nursing home should be insulated from liability because it was forced to make a difficult decision in an emergency situation, posing a risk to the health of its residents, many of whom were too sick to be moved.¹² This argument may prove meritorious in light of the problems that plagued nursing homes in the evacuation of Hurricane Rita.

The evacuation procedures of nursing homes have been under public scrutiny after Hurricanes Katrina and Rita. Evacuating nursing homes has proven to be one of the most challenging aspects of public health.¹³ In cases involving a response to a state of emergency situation, *i.e.*, a natural disaster, the question will arise as to whether a nursing home will be held to a higher standard of care than that of an ordinary person in the

⁸ Charles C. Foti, Jr., Louisiana Attorney General, Press Release, *Nursing Home Owners Surrender to Medicaid Fraud Control Unit Investigators*, Sept. 14, 2005, available at <http://www.ag.state.la.us/ViewPressRel.aspx?RelID=420>; see also *Storm Deaths*, *supra* note 1.

⁹ *Id.*

¹⁰ *Murphy*, *supra* note 6.

¹¹ See *supra* note 4.

¹² *Storm Deaths*, *supra* note 1.

¹³ No incident illustrated this better than the tragedy that left 24 nursing home resident evacuees dead when their bus exploded trying to evacuate the predicted devastation of Hurricane Rita. In other Rita case, 84 elderly residents of Beaumont's Pine Forest Rehabilitation and Nursing Center were found huddled inside an elementary school where they had been for days without power or working toilets. The residents, several of whom were on breathing machines, had been taken to the school after their un-air-conditioned evacuation bus ran low on fuel. Terry Langford and Melanie Markley, *Evacuations Plagued By Problems*, HOUSTON CHRONICLE, Sept. 27, 2005, available at <http://www.chron.com/cs/CDA/ssistory.mpl/special/05/rita/3371022>.

absence of an emergency. However the outcome, strict adherence to the standard of care provided by nursing homes to its residents will remain a justiciable issue.

December 2005