

Collateral Deaths From COVID-19 Create Additional Exposure for Nursing Homes and Long-Term Health Care Facilities

By Charles Kellett, New Jersey attorney

COVID-19's effect has been felt universally, but perhaps nowhere more than in nursing homes and long-term care facilities. These impacts extend beyond fatalities directly attributable to COVID-19. Collateral deaths – those related to COVID-19 but not resulting directly from a coronavirus infection – may have exceeded more than 40,000 from March to November 2020 alone.^[i] The nation's COVID-19 death toll has now well surpassed 500,000. Long-term care facilities and their insurers are already in the midst of defending against lawsuits attributable to COVID-19 and collateral deaths. They would be well advised to seek guidance about their exposure and potential defenses for lawsuits from both COVID-19 infected residents and collateral deaths.

Liability Issues Presented by Collateral Deaths

Collateral deaths are attributable to a variety of causes and factors. The negative impact on mental health caused by the prolonged isolation necessitated by the need to slow the spread is one recognized cause.^[ii] Another potential alleged cause of collateral deaths is neglect due to reallocation of care to residents infected with COVID-19.^[iii] Lawsuits are beginning to arise under a variety of circumstances, as plaintiffs and their attorneys argue that the decrease in the quality of care precipitated by COVID-19 caused collateral deaths, and they seek to render long-term care facilities liable for damages. These lawsuits present unique issues and considerations that will vary jurisdictionally due to differing legislative responses to the pandemic.

Legislative Immunity

Many states, including New Jersey, New York and Pennsylvania, have enacted civil liability protections for long-term care facilities in response to COVID-19.^[iv] Other states, such as California, have thus far rejected calls for pandemic-specific liability protections.^[v] Florida's legislature, meanwhile, has introduced legislation providing specific liability protections for long-term care facilities after first introducing COVID-related liability protections for non-health care related businesses.^[vi] Federal legislation providing for civil liability protection remains an ongoing possibility.

These protections could also apply to claims arising from collateral deaths. For instance, New York provided limited immunity to healthcare providers from lawsuits where the treatment of the plaintiff "was impacted by the health care facility's or [] professional's decisions or activities in response to or as a result of the COVID-19 outbreak."^[vii] This language could be interpreted as providing immunity to long-term care facilities from collateral death lawsuits so long as the facility in question can tie its actions to its COVID response.

The potential for lawsuits arising from collateral deaths will vary by jurisdiction as we move forward and these lawsuits become more prevalent. It will be important to review any applicable immunities when responding to collateral death lawsuits. Even if an immunity does apply, the scope of that immunity – both in terms of the applicable timeframe and the nature of the claims impacted – will likely vary by jurisdiction.

Considerations When No Immunity Applies

In the absence of an applicable immunity, a jurisdiction's existing statutory framework and general tort principles will govern collateral death lawsuits and the duty the facilities will owe to their residents.^[viii] A lawsuit arising from a collateral death will require a plaintiff to prove that the long-term care facility in question deviated from an applicable standard of care it owed to its residents.

Professional malpractice and negligence lawsuits generally require the factfinder to consider the underlying factual circumstances when assessing whether a defendant breached a standard of care.^[ix] This is particularly true in emergency situations, like those faced by healthcare providers during the pandemic.^[x] Also, while causation burdens will vary by jurisdiction, collateral death lawsuits will likely require the plaintiff to establish that the long-term care facility's failure to provide the requisite level of care was the proximate cause of the collateral death. This requirement may prove difficult for plaintiffs to establish.

Given the unprecedented nature of this pandemic, litigants may require numerous experts, including doctors and long-term care industry veterans to establish whether a facility's care was deficient and whether it caused the collateral death. Percipient testimony, or lack thereof, may also be a factor in assessing causation in collateral death cases. Restrictions put into place during the pandemic have curtailed visitations at long-term care facilities. Relatives and friends, who normally would have been present to witness the decline in a resident's health and advocate on their behalf, may not be able to provide the type of testimony that frequently is presented in support of such lawsuits. Conversely, reduced visitation and socialization stemming from the COVID response has, according to some doctors, likely fueled many collateral deaths due to the corresponding deterioration of residents' mental state.^[xi] This, combined with the fact that many long-term care residents already faced serious health challenges prior to the pandemic, likely means that proximate causation will be a hotly contested issue in collateral death lawsuits.

Conclusion

COVID-19 has created unprecedented challenges for long-term care facilities. It now presents a host of novel legal issues, considerations and challenges, which these facilities will have to navigate in the years to come. These issues will inevitably include collateral death lawsuits. As they accrue, it is incumbent upon facilities to examine the still-changing legislative landscape in their jurisdiction and ensure that all relevant legal considerations are explored. Kaufman Dolowich Voluck LLP has 13 offices nationwide with attorneys in its Health Care/Managed Care Practice Group who are well qualified to provide advice and counsel on COVID-19, collateral exposure, or any other healthcare-related issue.

[i] Sedensky M., Condon, B. (2020, Nov. 19). "Not just COVID: Nursing home neglect deaths surge in shadows." The Associated Press. Retrieved from <https://apnews.com/article/nursing-homes-neglect-death-surge-3b74a2202140c5a6b5cf05cdf0ea4f32>

[ii] Paulin, E. (2020, Sept. 3). "Is Extended Isolation Killing Older Adults in Long-Term Care?" AARP. Retrieved from <https://www.aarp.org/caregiving/health/info-2020/covid-isolation-killing-nursing-home-residents.html>

[iii] Sedensky and Condon, "Not just COVID."

[iv] New Jersey's S-2333/A-3910; New York's Emergency Or Disaster Treatment Protection Act ("EDTPA"), codified as Public Health Law Article 30-D; May 6, 2020 Executive Order of Pennsylvania Governor Tom Wolfe, "Order of the Governor of the Commonwealth of Pennsylvania to Enhance Protections for Health Care Professionals."

[v] Sharma, A. (2020, June 24). "California Nursing Homes Likely Won't Get Legal Immunity During Pandemic." KPBS. Retrieved from <https://www.kpbs.org/news/2020/jun/24/california-nursing-homes-likely-wont-get-legal-imm/>

[vi] Florida Senate Bill 74 (2021): "COVID-19-related Claims Against Health Care Providers"; Florida Senate Bill 72 (2021): "Civil Liability for Damages Relating to COVID-19."

[vii] EDTPA, New York Public Health Law 30-D (Section 3082).

[viii] See, e.g., California Health and Safety Code section 1417 et seq., known as the Long-Term Care, Health, Safety, and Security Act of 1973.

[ix] See generally Restatement (Second) of Torts § 283.

[x] See generally Restatement (Second) of Torts § 296, cmt. a (1965) (Recognizing that emergency circumstances impact standard of care analysis).

[xi] Sedensky and Condon, "Not just COVID."