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TRIAL BRIEFS

The newsletter of the Illinois State Bar Association's Section on Civil Practice & Procedure

Nursing Home Care Act jury instructions—A trial lawyer's experience

By Terrence S. Carden, III; Myers Carden & Sax, LLC, Chicago

In May 2014, the Committee on Pattern Jury Instructions issued the I.P.I. 190 series relating to causes of actions premised upon the Nursing Home Care Act (210 ILCS 45/1-101 *et seq*.) ("the Act"). These ten instructions were supplemented by an Introduction issued in July 2014.

A group of instructions relating specifically to the cases brought under the Nursing Home Care Act is a welcomed development. Prior to the introduction of these instructions, trial lawyers were left to cobble together a series of instructions hoping to adequately instruct on the appropriate standard of care, as well as the statutory nature of the cause of action.

Frequently, stipulations were made during the instruction conference that the jury would be instructed on the standard of care (I.P.I. 105.01) and any finding of a deviation from the standard of care would be considered a finding of a violation of the Nursing Home Care Act. This was con-

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A constitutional question about reduced jury size

By Robert T. Park, Califf & Harper, P.C., Moline

Public Act 98-1132 ("the Act") was passed during the General Assembly's fall veto session and signed into law by Governor Quinn on December 19, 2014. The Act goes into effect June 1, 2015.

The Act increases juror pay from $4 per day plus mileage to a flat $25 for the first day's service and $50 for each day's service thereafter.[1] The Act provides jurors no additional compensation for travel, and allows each county board to set a higher level of compensation.[2] The Act does not change current law that allows a juror to be reimbursed "for the actual cost of day care incurred by the juror during his or her service on a jury."

While more fairly compensating jurors for their service is a matter of general concern, trial lawyers will be more keenly interested in the Act's change to 735 ILCS 5/2-1105(b), which provides: "All jury cases shall be tried by a jury of 6."

Under existing law, a case involving a claim for damages under $50,000, may be tried by either a jury of six or 12 members, while a case involving a claim for more than $50,000 is tried to a jury of 12 persons.[3]

The Act further provides: "If alternate jurors are requested, an additional fee established by the county shall be charged for each alternate juror requested." The Act does not specify when the party must request alternate jurors or pay the fee set by the county.[4] It is also uncertain what will happen if a party requests alternate jurors in a county that has not adopted an alternate juror fee.

There are also state constitutional concerns about the Act. The Illinois Constitution, Article I, Section 13 says: "The right of trial by jury as heretofore enjoyed shall remain inviolate."[5] Accord-

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Nursing Home Care Act jury instructions—A trial lawyer's experience

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sidered to be consistent with the definition of "neglect" under the Act, found at 210 ILCS 45/1-117.

Although seen generally as a step forward, either the application of these instructions must change or there appears to be clear error involved in strictly following the comments and notes on use in many cases.

Recently, in *Beckman v. SSC Mount Vernon Operating Company, LLC*, 12 L 21, Jefferson County, the court and the trial lawyers involved were faced with the application of these new instructions.

The *Beckman* lawsuit was pled in two counts. Count I alleged violations of the Nursing Home Care Act and sought damages for the injuries experienced by the resident before her death, as well as reasonable attorneys' fees as provided for in the Act (210 ILCS 45/3-602). Count II was brought under the Wrongful Death Act, alleging the same acts of negligence by the nursing staff and seeking to recover for grief and loss of society experienced by the decedent's next-of-kin.

Both plaintiff and defendant presented expert nursing testimony to establish the applicable standard of care and either deviation from or compliance with the standard of care by the nursing staff. However, the definition of the applicable duty instructions created a strong disagreement between the litigants and the court was left with notes on use for I.P.I. 190.01, which likely created error in the application to the facts of this case.

I.P.I. 190.01 provides as follows:

> 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.

There is nothing particularly controversial or problematic for either plaintiffs or defendants with this instruction in these types of cases. However, within the Notes on Use is the following language: "Cases involving negligent acts or omissions should be accompanied by IPI 10.01."

Also, in the Comments section, the following direction is given to our courts:

> 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.

It is conceivable that some actions brought under the Nursing Home Care Act can fall under the rubric of an ordinary care standard. Specifically, in *Myers v. Heritage Enterprises, Inc.,* 354 Ill. App. 3d 241, 820 N.E.2d 604 (4th Dist. 2004), under the factual scenario where the negligence alleged related to a Certified Nursing Assistant's transfer of a resident from a bed to a wheelchair, the court held that it was error to instruct on a professional standard of care (I.P.I. 105.01) even when both sides presented expert testimony on the topic.

The *Myers* court noted that the act of a CNA moving a nursing home resident does not constitute skilled medical care requiring the professional negligence instruction. However, the court continued – stating that "a professional is a person who belongs to a learned profession or whose occupation requires a high level of training and proficiency."

Clearly nursing care would fall under the definition of a professional. This has been acknowledged by our Supreme Court in *Sullivan v. Edward Hospital*, 209 Ill. 2d 100, 806 N.E.2d 645 (2004), which held that a physician is incompetent to testify regarding the standard of care for the nursing profession. Clearly, if a physician is not competent to comment upon the propriety of the actions of a nurse, a lay jury should not be asked to

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apply an ordinary care standard to the conduct of nurses.

Unfortunately, the Committee on Pattern Jury Instructions has set out a blanket statement within the Comments on I.P.I. 190.01 that for all cases alleging violations of the Nursing Home Care Act, courts must instruct on ordinary care.

In the recent *Beckman* case in Jefferson County, this led to I.P.I. instructions 10.01, 10.02 and 10.04 all being given in a case premised upon alleged negligent application of nursing judgment in monitoring and assessing a resident following a colonoscopy procedure. In essence, the jury was instructed to apply a reasonable person standard to the nursing care rendered rather than to apply the correct standard of professional negligence.

The committee has placed trial judges in a difficult position where they must give the ordinary care instruction to be consistent with the intent of the committee – even when the facts and allegations make it clear that the conduct at issue relates to the higher level of training which a nurse possesses.

Additionally, in the *Beckman* case, using these instructions, plaintiff's wrongful death count was not based upon the Nursing Home Care Act. Therefore, over plaintiff's objection that it would be (a) confusing to the jury to define two different standards for the same alleged conduct; and (b) that the only standard used should be ordinary care since the wrongful death claim was based upon the same conduct, the court concluded that it was bound to give both the ordinary care instructions as well as I.P.I. 105.01, the professional negligence instruction, in order to be consistent with the committee comments. Because of this, we had a situation where the jury was instructed on two different definitions by which the care was to be judged.

Additionally, the court determined that it would be even more confusing to specifically direct the ordinary care instructions to Count I and the professional negligence instructions to Count II. In the end, we still don't know which standard the jury actually applied in reaching a defense verdict.

While development of a set of jury instructions specific to actions premised upon the Nursing Home Care Act has been needed for a long time, the committee comments, which include a blanket statement that all cases must have the ordinary care instructions, are just plain mistaken.

To conclude that all permutations of claims under the Act are judged by ordinary care ignores the fact that the application of nursing care in most situations involves the application of professional skill and judgment based upon specialized education, training and experience. In this trial lawyer's opinion, this blanket application will eventually lead to error during a trial and will have to be considered by our courts of review.

As a point of practice, all attorneys representing defendants in these types of cases must submit I.P.I. 105.01 as an alternative to the ordinary care instructions; otherwise, the objection to the ordinary care instruction may be waived. ■

A constitutional question about reduced jury size

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ing to Merriam-Webster on-line, inviolate means "not harmed or changed."[6]

Where Illinois has had 12-member civil juries for almost 200 years does cutting the number of jurors in half "harm" or "change" of the "right of trial by jury as heretofore enjoyed?"

The Illinois Supreme Court looked at the quoted constitutional provision protecting the right to a jury trial in *Sinopoli v. Chicago Railways Co.*,[7] where it said (emphasis added):

> The essential thing in the right of trial by jury is the right to have the facts in controversy determined under the direction and superintendence of a judge by *12 impartial jurors* having the qualifications and selected in the manner required by law, whose verdict must be unanimous and shall be conclusive, subject to the right of the judge to set it aside, if in his opinion it is against the law or the evidence and to grant a new trial.[8]

From a policy standpoint, a jury composed of 12 persons is twice as representative of the community and likely twice as diverse as a six-person jury in terms of age, sex, race and other demographics. Further, as a matter of group dynamics, the larger the jury, the less likely one strong juror will control or dominate the deliberation process.

With these considerations in mind, will the Illinois courts hold that substantially reducing the number of jurors leaves the jury trial "as heretofore enjoyed" inviolate?

Federal law and the law of many states allow juries of less than 12 members. Rule 48(a) of the Federal Rules of Civil Procedure provides: "A jury must begin with at least 6 and no more than 12 members, and each juror must participate in the verdict unless excused…"

In Iowa, for example, civil juries of eight members are sworn. If not all selected jurors are able to serve due to illness or other cause, the remaining jurors with a minimum of six can decide the case. After six hours of deliberation, a case may be decided by a majority consisting of all jurors but one.[9] Likewise, Wisconsin allows for civil juries of six to 12 members[10] with less-than-unanimous verdicts.[11]

Of course, the Illinois Constitution applies to neither the federal courts nor the courts of Iowa, Wisconsin or other states.[12]

In future litigation the Illinois courts will undoubtedly determine whether the Act is consistent with or a violation of the requirement of Article I, Section 13, regarding the inviolate preservation of the civil jury trial. ■

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1. Counties Code §4-11001 (55 ILCS 5/4-11001).

2. According to an article in the January 7, 2015, issue of the Aurora Beacon-News, Kane County expects the increased juror fees in the new law will cost the county millions. http://beaconnews.chicagotribune.com/2015/01/07/kane-deals-state-decision-increase-jurors-pay-rate/ (last visited Jan. 9, 2015).

3. Under current law, either plaintiff or defendant may elect a 12-peson jury upon payment of the appropriate fee. Under the Act, if a party to a case tried after June 1, 2015, has paid the fee for a 12-member jury, that party can demand a 12-person jury upon presenting proof of payment. (735 ILCS 5/2-1005(b).)

4. Most likely the request must be made and the fee paid either when a jury demand is filed or at the time of trial, although another alternative could be specified by statute or rule.

5. The Illinois Constitution of 1870 contained exactly the same language. The Illinois Constitutions of 1818 and 1848 contained the same provision but without the phrase "as heretofore enjoyed." *People v. Pittman,* 326 Ill.App.3d 297, 761 N.E.2d 171, 173-74 (1st Dist. 2001).

6. http://www.merriam-webster.com/dictionary/inviolate (last visited Jan. 8, 2015).

7. 316 Ill. 609, 619-20, 147 N.E. 487 (1925).

8. The *Sinopoli* court held that changes in the manner of appellate review of orders granting or denying motions for a new trial did not impermissibly change the right of trial by jury as constitutionally guaranteed. 316 Ill. at 621-22.

9. See Rules 1.915(9), 1.917(2) and 1.931 of the Iowa Rules of Civil Procedure.

10. Wis. Stat. § 756.06(2)(b).

11. Wis. Stat. § 805.09(2).

12. The 7th Amendment to the U.S. Constitution provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved,…." In *Minneapolis & St. Louis R.R. v. Bombolis*, 241 U.S. 211, 219, 36 S.Ct. 595, 60 L.Ed. 961 (1916), the Supreme Court held that it was well settled that the 7th Amendment does not apply to the states. In *Hardware Dealers' Mutual Fire Ins. Co. of Wisconsin v. Glidden Co.*, 284 U.S. 151, 158, 52 S.Ct. 69, 76 L.Ed. 214 (1931), the Supreme Court held that the due process provision of the 14th Amendment does not require civil jury trials.

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