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Introduction: Our Client's Story

Hi, my name is Christina Martinez, and I am an attorney at Mangan Ginsberg. Let me tell you about one of our clients, who was a resident at a multiple hundred- bed nursing home in NYC. He was a former administrative head of a well-respected, major NYC executive agency, and at the time he entered the nursing home, he had mild dementia. His children entrusted their beloved father's care to this nursing home. Three out of his four children were licensed professionals – two MDs and one lawyer. In less than one year, from the overuse and improper use of Haldol, he ended up comatose, with organic brain injury, and riddled with pressure sores. Let me explain how this came to pass.

The nursing home documented that they prescribed our client with Haldol due to "agitation and psychosis." However, when going through his medical records, we could not find one documented instance of psychosis. We did find some notes of negative interaction with staff. These notes in his chart contained conclusory statements like "combative and aggressive," with no specific instances of behavior. These notes in his chart would not pass muster under Medicare guidelines F-Tag 329, which provides that there must be documentation of specific behavior to justify the use of these drugs. The one or two events in our client's chart certainly did not justify the use of this powerful medication.

From what the nurses described in his chart, we inferred that our client was displaying classic signs of neuroleptic malignant syndrome[1], a life-threatening neurological disorder. He started cogwheeling, which is a jerky or pullback effect when a doctor moves a patient's rigid limb. He also had stiff posture and rigidity. While the presence of these adverse consequences to Haldol indicated that the dose should be discontinued or at the very least tapered, the nursing home staff ignored these signs, and actually increased the dosage of Haldol our client was receiving. They did not provide a pharmacological review, and failed to implement a program for monitoring our client's Haldol use for adverse consequences and efficacy.

One day our client's son went to visit him and he was slumped over and uncommunicative. When he alerted staff, they told him "you're father never speaks, he only grunts." The staff failed to realize that our client had suffered a significant change in condition. The staff is so unfamiliar with him as an individual they do not even realize that being non-verbal is a change from his baseline. In the meantime, the prescribing doctor is continuing to sign off on this prescription every month, and his children are never advised of this.

Shortly after his son found him in this state, he slipped into an irreversible and lengthy coma, and died.

The year before our client entered this nursing home, there was a change of ownership. In that year, according to the OSCAR profiles, the amount of residents that received a behavioral management program decreased by more than half. In turn, the use of antipsychotic medications increased to amounts that were above national and state standards. Behavioral interventions are costly for nursing homes to implement because they are very staff-intensive. The nursing home administered Haldol to our client in lieu of providing meaningful activities in an effort to prevent episodes of agitation or aggression, which go hand in glove with impaired mental function such as dementia. Behavioral

[1] A life-threatening neurological disorder which typically consists of muscle rigidity, fever, autonomic instability, and cognitive changes.

interventions are costly for nursing homes to implement because they are very staff-intensive. The new owners of the nursing home willfully chose to provide insufficient staff in order to increase their profits, which deprived the nursing home of the ability to perform necessary behavior modification, and implement non-pharmacological interventions. It became quite clear that the nursing home was administering Haldol to keep our client quiet, and prevent him from complaining.

The Issue from a Litigation Viewpoint

Thank you for the opportunity to speak regarding this important issue, and to tell our client's story. As I said earlier, I am an attorney with Mangan Ginsberg. We are a litigation firm in lower Manhattan, and I am proud to say our focus includes advocacy for seniors, who, in our view, are an underserved population. We have seen firsthand how antipsychotic drugs are used by nursing homes as a cheap alternative to adequate staff and behavioral interventions, and the great harm that can arise from the overuse and misuse of these powerful chemical agents.

We have seen how our clients who were prescribed these drugs suffer from falls, dehydration, kidney failure, neuroleptic malignant syndrome, and premature death. Although the FDA issued a black box warning related to antipsychotic drug use in older adults with dementia, we have come to learn that these drugs are still routinely used.

So how do we protect nursing home residents from the misuse of these drugs? From a lawyer's point of view, a lot of the mechanisms needed to protect these residents are already in place. The problems that we come across when trying to prosecute these cases are a lack of enforcement and education.

The New York City Rules and Regulations provide that nursing homes must care for residents in a manner that maintains each resident's dignity. (10 NYCRR 415.5 (a)). So the law is in place in order to bring an action based solely on the use of chemical restraints as a violation of the resident's dignity. However, cases with dignity violations alone, where the improper use of these drugs does not cause a serious physical injury, are rarely brought by torts lawyers, for obvious reasons.

So, we have a couple of tools, located in the Public Health Law, which we can try to use in order to bring lawsuits for violations of residents' dignity. Under Section 2801-d of the Public Health Law, injuries of unknown origin should be reported to the Department of Health as potential abuse and neglect. However, in our experience, it seems as though they are not being reported this way. This brings us to the Department of Health – The Department of Health is charged with regulating these nursing homes. However, in our experience we have found that the Department of Health is providing lax oversight. Our office has looked at thousands of pages of Department of Health records and we have found that there is a problem with the reporting by nursing homes, and even when injuries are reported, it seems as if, based on our limited experience downstate, they are not being perceived as neglect by the Department of Health.

As an example, I point to a publicized case going on right now, against Medford Multicare for the Living in Suffolk County. We have brought cases against Medford in the past, and we have cases against them right now. The Attorney General brought criminal charges against employees of Medford. If you read the court documents, I can tell you, it is a parade of horribles, but what shines through is that there were rampant, widespread violations in a facility that the Department of Health was actually focusing on. According to the Attorney General, 5,000 incidents occurred at Medford since 2008, and only 60 of these 5,000 were reported to the Department of Health as required by law. So, clearly we have a problem here.

Another tool in the Public Health Law, is section 2808-a, which makes controlling persons of the nursing home jointly and severally liable. Controlling persons must register ownership with the Department of

Health. However, when we request the home addresses of these controlling persons from the Department of Health, in order to serve them with legal papers, they refuse to disclose this information. These people are listed in the Department of Health's own records as controlling persons, and the Department of Health will not give this information to plaintiff's attorneys. Our firm has even brought an Article 78 proceeding challenging the Department of Health for their refusal to provide these home addresses, and we were still unable to obtain them.

And it is not just the addresses of controlling persons that are kept from us, the documents that we receive back from our Freedom of Information Law requests to the Department of Health are heavily redacted, and not only for the purpose of redacting protected health information in accordance with HIPAA laws. They even redact the names of nursing home personnel who are described in the complaint as acting negligently. They redact the facts that they find in their investigations, even though such facts are admissible in evidence. We can actually obtain more information online than we can as parties of a lawsuit requesting information from the Department of Health. This is not the transparency we want in a democratic society.

Closing: Enforcement and Education

Given the inappropriate use of these dangerous antipsychotic drugs, from what we have seen, the relative low quality of health professionals overseeing their use in deficient nursing homes, the lax oversight of regulatory agencies, the profit and organizational incentive of owners of nursing homes to continue misusing these drugs, and the challenges associated with incentivizing lawyers to bring cases where there is no physical injury and only an injury to dignity, it is evident that a change is needed.

Earlier, I told you a story about a nursing home resident who lost everything from the misuse of antipsychotic medication – from his speech, to his personality, to his life. This was a man with as sophisticated a family as one can hope for as his advocate, and it still happened to him. If this can happen to a family as attentive and sophisticated as his family was, imagine those with no voice, the vulnerable thousands with no family who are exposed to this dangerous combination.

These issues call for strong interventions by the legislature with due deliberation to keep the vulnerable safe from the harms presented by the threat of institutional (and not individualized) care administered in an institutional manner. We need strengthening of the regulatory system so that noncompliance by facilities is more effectively and consistently sanctioned. And we need to sufficiently incentivize members of the tort bar to take on these cases and fight for the rights of our state's most defenseless citizens.

So if it is true that a society is best judged by how it treats its weakest members, then it is imperative for us to protect nursing home residents from the dangers of antipsychotic drugs.