



U.S. Department of Health and Human Services
Assistant Secretary for Planning and Evaluation
Office of Disability, Aging and Long-Term Care Policy

COMMUNITY SERVICES AND LONG-TERM CARE: ISSUES OF NEGLIGENCE AND LIABILITY

1982

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COMMUNITY SERVICES AND LONG-TERM CARE: Issues of Negligence and Liability

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TABLE OF CONTENTS

ABSTRACT	iii
I. INTRODUCTION	1
II. LIABILITY AND NEGLIGENCE: GENERAL PRINCIPLES	3
What is Liability	3
What is Negligence	3
When is an Agency or its Employees and Agents Liable for Negligence	4
Preventive Law Checklist	6
III. CASE MANAGEMENT: CASE EXAMPLES ILLUSTRATING ISSUES OF LIABILITY AND NEGLIGENCE	8
List of Cases	8
Basic Scenario #1	9
Basic Scenario #2	10
Basic Scenario #3	11
Case Examples	11
IV. COMPETENCY, LEGAL INTERVENTIONS, AND CASE EXAMPLES ILLUSTRATING ISSUES	23
Definitions and Discussion of Terms	23
Case Examples	28

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ABSTRACT

Channeling agencies operating under the National Long Term Care Channeling Demonstration Program had complex assignments to assess the needs of older people requiring long term care, to determine what services met such needs, and to arrange for the delivery of services from a wide and disparate array of resources while continuing to “manage” the case to assure appropriateness of services. Responsibility for what happened to a client was spread across several agencies, organizations, and individuals, some of whom were agency employees, while others were volunteers from structured volunteer programs, neighbors, friends, employees or agencies.

This document was intended to provide case managers, Channeling agencies, social service agencies, volunteer bureaus and others with information about liability to which they, their employees, their agencies, volunteers, agents and others were exposed. It was also intended to furnish guidelines and suggestions for avoiding liability, avoiding or minimizing risks of negligence, and in general demystifying the area of liability, negligency, and many aspects of legal relationships.

Although specific laws vary from state to state, this paper can be used as a guide to general legal principles which should be followed by case management agencies.

I. INTRODUCTION

Changes in attitudes toward social services clients, availability of legal services for the poor and near poor, increased sophistication at all levels of society about human rights, legal doctrines such as charitable immunity, constitutional and other common law interpretations together with increasingly complex social, psychological and medical technologies directed at solving human problems have heightened social awareness about legal duties and obligations owed by health and welfare agencies. Sometimes this “awareness” is delineated by lawsuits.

Lawsuits, or even the threat of lawsuits, conjure up visions of bruising-courtroom confrontations, protracted litigation consuming inordinate amounts of time in preparation, gathering pretrial evidence, being interrogated in lengthy adversarial depositions, and the risk of monumental damage awards assessed against agencies and/or individuals.

Channeling agencies operating under the National Long Term Care Channeling Demonstration Program funded by the Department of Health and Human Services have complex assignments to assess the needs of older people requiring long term care, determine what services can best meet such needs, and arrange for the delivery of such services from a wide and disparate array of resources while continuing to “manage” the case to assure appropriateness of services. Responsibility for what happens to a client may be spread across several agencies, organizations and individuals, some of whom are agency employees, while others are volunteers from structured volunteer programs, neighbors, friends, employees or agents of the client.

Under such circumstances it was natural that channeling Site Directors expressed concern about the liability of channeling agencies, their employees-and others involved in the management and delivery of services to their clients.

The material that follows is intended to provide case managers, channeling agencies, social service agencies, volunteer bureaus and others with information about liability to which they, their employees, their agencies, volunteers, agents and others may be exposed. It is also intended to furnish guidelines and suggestions for avoiding liability, avoiding or minimizing risks of negligence, and in general demystifying the area of liability, negligence, and many aspects of legal relationships.

In general, the material here includes some overall discussion of legal concepts, rules, guidelines and definitions, and hypothetical situations, and questions and answers. The material is presented in looseleaf fashion in order to permit periodic additions, revisions and/or deletions based upon queries, comments and information received from agencies, organizations and individuals engaged in practice.

Please keep in mind that we have attempted to illustrate general legal principles. However, there may be considerable variation from state to state. Where such variation raises question, please don't hesitate to contact Sheyna Wexelberg-Clouser, of the Channeling Staff at (215) 787-6970.

II. LIABILITY AND NEGLIGENCE: GENERAL PRINCIPLES

WHAT IS LIABILITY?

Liability is a broad legal term which encompasses almost every character of hazard or responsibility, absolute, contingent or likely. To be liable is to be exposed or subject to a given contingency, risk or casualty which is more or less probable, or to be responsible for a possible or actual loss, penalty, evil, expense or burden. To be liable is to be bound in law and justice to do something which may be enforced by judicial action.

Liability is not the same thing as being subject to a lawsuit. Agencies and individuals may be sued for imagined wrongs which they are alleged to have committed. Being sued is not the same as being liable. One is liable when one has a duty to someone. If that duty is ignored or breached a court will find that the individual was liable to carry out the duty and will impose a remedy to compensate the wronged party and may go on to impose punitive damages as well. It is practically impossible to prevent people who believe they were injured, whether or not this belief has any basis, from suing if they wish to do so. There are, however, some steps which agencies can and should take to hold frivolous or untenable suits to a minimum. These steps are discussed in this paper.

WHAT IS NEGLIGENCE?

Negligence is a legal term which refers to the omission to do something which a reasonable person, guided by considerations which ordinarily guide human affairs would do, or the doing of something which a reasonable and prudent person would not do. Negligence is characterized chiefly by carelessness, thoughtlessness, inadvertence, inattention and other omissions. Negligence may be thought of as the failure to exercise ordinary care. It does not require willful, malicious, reckless or wanton behavior. Thus, avoidance of negligence is frequently a matter of exercising good common sense.

Avoiding negligence, as the examples in this manual illustrate, can involve providing proper training and supervision to employees, agents and volunteers, giving complete information to clients, family, and helpers, calling in professional help or making referrals when the situation requires it, or making certain that care and/or medication schedules are properly maintained when such are under the control of the agency or its agents.

WHEN IS AN AGENCY OR ITS EMPLOYEES AND AGENTS LIABLE FOR NEGLIGENCE?

Agencies whether private, non profit or governmental, are liable for negligence in administering their respective programs. Their duties and standards of conduct are defined by the scope of these programs and what they have undertaken to accomplish. In the National Long Term Care Channeling Demonstration Program, two types of agencies can be distinguished by program scope. These are the channeling or case management agencies and the direct service providers.

A channeling agency's scope includes assessment of persons who believe they need assistance and case management services such as, construction of a care plan, mobilization of resources to carry out the care plan, recruitment of formal and informal service providers, negotiation of the care plan with the client, follow-up, monitoring and reassessment. It is not within the scope of the channeling agency to undertake direct service, underwrite the safety or integrity of the client, or guarantee the behaviors of all direct service providers.

A direct service agency is responsible for providing services of a given quality and dimension. It has a duty to deliver such services in accordance with generally recognized standards which reflect professional competence. Sometimes these standards are explicitly articulated in professional codes, procedure manuals, official rules, texts and treatises, or the common law.

The term, "agency," used in this manual refers to both types of organizations, those providing case management or those providing direct service. Sometimes channeling agencies may be the subject of illustrations while at other times direct service providers are referred to.

For agencies or individuals, liability for negligence takes place when there is:

1. A duty or obligation or care which requires a certain standard of conduct;
2. A failure to conform to that standard of conduct;
3. A reasonable causal connection between the failure to conform to that standard of conduct and
4. An actual loss or injury.

The discussion which follows presents a number of situations in which an agency and/or its employees and agents may be liable for negligence.

An agency is liable for the inadequate training or supervision of its staff, for the provision of faulty equipment, or for the inappropriate use of non-professionals or inadequately trained staff. Of critical importance to home care agencies is the potential

liability of the agency for the negligent approval or provision of an inappropriate level of care.

An agency is also liable for the negligence of its staff members as long as they are acting within the scope of their employment. Thus, both the agency and the employee can be held liable in some situations. However, if an employee performs acts outside of the scope of employment, the agency will not be liable for such acts. At which point the employee steps out of the scope of employment is often difficult to determine. For example, an aide who stays after hours to provide further assistance to an aged patient, although initiated out of the employee's own voluntary act, may well be held to be in the scope of employment. A negligent act performed by the employee after hours but performed while carrying out the agency's program or objectives would lead to agency liability.

A different situation arises when a staff member acts outside the scope of employment. Suppose a home care aide decides to earn some extra income by tutoring high school students in the afternoon while the home care client naps. During the course of a tutoring session, one of the students injures the client. Since the tutoring of high school students is clearly outside the scope of the aide's employment, the agency is not liable under these circumstances but the home care aide will be.

Agencies will also be liable for the negligence of supervisory staff who, while in the scope of employment, are negligent in the supervision or instruction of junior staff. The agency therefore, can be found negligent in three ways stemming from the same act. One, the agency's failure to supervise or properly choose its supervisor; two, the negligence of the supervisor acting in the scope of his employment, and three, the negligence of the employee also acting in the scope of his employment who follows the supervisor's instructions.

The agency may also be liable for the negligence of volunteers or employees of other agencies. A volunteer or other employee who is trained, directed, placed or otherwise controlled by the agency will be considered as if he/she were an employee of the agency. If such an individual is negligent in the scope of the agency's work, the agency will be found liable.

The employees or volunteers of the agency will, of course, be personally liable for their own negligence. In addition, the agency may be liable as an employer for the same negligent act, as well as any contributorily negligent acts of its own, such as the failure to adequately supervise the negligent employee.

The agency will not be liable for negligent acts of the client or persons under the client's control unless the agency has explicitly or implicitly agreed to, and failed to adequately monitor the client's actions.

The health, mental status or number of hours of care received by a client may lead a court to conclude that the agency had a duty to adequately safeguard his/her

behavior. The health and mental status of the recipient affects the duty of care which the agency must provide. It is to be expected that a physically or mentally frail client, is owed a greater duty of care than one who is less frail.

A home care agency may be responsible for the safety and adequacy of the premises where its staff works. Here, reasonableness will prevail. If the premises are patently hazardous, and the agency neither warns the employee or volunteer nor takes steps to remove, or assist the client in the removal of the hazard, it may well be liable for damages which result from the hazard. Note, however, that typically injuries which are work related are covered by Workmen's Compensation. It may also be that the client and/or the landlord will be liable to the employee or volunteer depending upon the nature of the hazard and whose act or failure to act produced the hazard.

It is impossible to administer a program totally free from risk. Some below-standard conduct may occur, and it might be determined to be negligent. Obviously, the agency should make every effort to ensure adequate hiring, training, placement and supervision of staff and volunteers. The best form of protection will be the purchase of liability insurance which covers acts of negligence of the agency and all its employees. Agencies can contact Health and Welfare Councils, professional organizations such as the National Association of Social Workers, state nursing associations and individual insurance carriers to find out about the types of insurance coverage that can be purchased.

Additional safeguards such as professional review of service plans and supervisory systems will demonstrate, if a negligence suit should arise, the high degree of care exhibited by the agency. Although the degree of duty of care owed to a frail elderly person is high, the standard the agency will be judged by will be the reasonable level of professional service which similar agencies provide to such clients.

PREVENTIVE LAW CHECKLIST

The following is a checklist of questions an agency should address to protect itself, its employees and agents against exposure to liability. Much of it represents a common sense approach to agency management.

- Does the agency carry liability insurance for itself, its employees, its agents and its volunteers?
- If not, has this been explored with the agency's insurance broker or community health and welfare planning council in its area?
- Does the agency bond its employees, volunteers or agents against losses from theft or embezzlement?

- Does the agency have formal training programs with proper procedure manuals or other documents appropriate to the tasks and duties of service workers, volunteers and agents?
- Does the agency have appropriate review protocols and procedures necessary to monitor direct service tasks and duties of service workers, volunteers and agents?
- Does the agency have procedures and written materials that provide necessary information for clients, families and helpers who participate in care and services?
- Does the agency have procedures and criteria for involving specialists or making referrals when problems arise that are beyond the competence of agency staff, volunteers or agents?
- Does the agency have systematic quality control mechanisms to check on the quality of services provided by agency staff, volunteers or agents?
- Does the agency have review mechanisms to assess quality of services provided by family or by the client where self-care is part of the care plan?
- Does the agency have procedures for assessing medication and treatment compliance when such are the responsibility of agency staff, volunteers or agents?
- Does the agency have a procedure to periodically review consents received from clients?
- Does the agency have clearly understood procedures for emergency care and subsequent reassessment?

III. CASE MANAGEMENT: CASE EXAMPLES ILLUSTRATING ISSUES OF LIABILITY AND NEGLIGENCE

This section uses case examples to illustrate the issues of liability and negligence which were discussed in Section 2. Three basic scenarios at the beginning of the section present the conditions for the case material which follows. The case examples can be accessed through the case list below.

LIST OF CASES

- Injury to client involving informal helper: [The Bathtub Slip, Trip and Fall Case](#)
- Helper steals client's property: [The Stolen Ming Vase Case](#)
- Helper is felon: [The Ming Vase Conspiracy Case](#)
- Helper accused of theft; [The Ming Vase Case #2](#)
- VNA trains helper to administer medication, adverse drug reaction: [The Drug Reaction Case](#)
- Helper administers incorrect medication: [The Hasty Helper Case](#)
- Helper lifts client improperly/client hurt: [The Dropped Client Case](#)
- Helper lifts client/helper hurt: [The Helper's Hernia Case](#)
- Helper moves furniture/client injured: [The Tidy Helper Case](#)
- Helper leaves door open: [The Frozen Pipes Case](#)
- Helper assists client with finances: [The Checkbook Assistance Case](#)
- Client's pet is injured: [The Pet Dog Case](#)
- Reduction of formal service/informal helper fails to follow medication protocol: [The Eyedrops Case](#)
- Reduction information service/shift to informal helper/client's condition worsens: [The Reduced Service Case](#)

- Volunteer damages car, injures self on route to client's home: The Volunteer Driver Case #1
- Volunteer damages car and injures self on errand for client: The Volunteer Driver Case #2
- Informal helper mugged while leaving client's home: The Mugged Informal Helper Case
- Volunteer in accident while transporting client: The Volunteer Driver Case #3
- Volunteer escorts client/client falls: The Stumbling Client Case
- Formal Provider/injury to client: The Rough P.T. Case
- Client initially agrees to participate in client payment program, then refuses: The Deadbeat Client Case
- Emergencies after channeling agency hours: The After Hours Emergency Case
- Responsibility at hospital admission: The Hospital Admissions Papers Case

BASIC SCENARIO #1

Case Manager Good assesses the needs of Client Smith using the Baseline Assessment Instrument. Good prepares a care plan in conjunction with Client Smith that incorporates the services of informal and formal providers. The care plan is reviewed by Good's supervisor. Client Smith agrees to and signs the care plan.

In general, case managers will not be personally liable for their acts carried out within the scope of their employment. This is true whether or not they have been granted broad discretionary powers and latitude in making arrangements for care and assistance to their clients. This is not to say that they will be insulated from liability for wanton or reckless disregard of their clients' needs or interests. If case managers keep the client's need and interests uppermost in their decision making and undertake reasonable and prudent care plans, even if imaginative, they will be protected from liability.

What constitutes "within the scope of their employment" is a function of both explicit and implicit guidelines. Implicit guidelines are defined by common standards of professional practice and rules of reasonableness. If, for example, a case manager is concerned about the high rates of youth unemployment without regard for the ability of such youth to carry out the tasks required in the care plan, he or she would probably be

held to have acted outside the scope of his/her employment if an injury was visited upon a client as a result of the youth's inexperience. Similarly, a case manager who, responding to admonitions to conserve scarce dollars, entered into an arrangement with a migrant labor crew chief for workers at a low hourly price, would be held to have acted outside the scope of his employment if a client were harmed by the inability of the worker to read or speak English, the language of the client.

This is not to say that the reasonable and prudent case manager performing in accordance with generally accepted professional standards will not be named as a defendant in a suit. It is only to say that care and prudence will yield an excellent defense.

BASIC SCENARIO #2

Case Manager Good arranges for Helper Jones to prepare meals for Client Smith 3 times per week. As a result, Client Smith's services from Meals on Wheels, a formal provider, are reduced from 5 deliveries per week to 2 deliveries per week.

Case managers in complex model channeling agencies, have the authority to limit or deny services. They may reduce the amount of services a client was receiving prior to becoming a channeling client or replace a formal care provider with a volunteer or paid but nonagency connected individual (contracted individual).

For this discussion, a volunteer is defined as one who gives his or her services without any express or implied promise of remuneration. There is a difference, however, between and among volunteers. In the context of liability it makes a difference whether the channeling or provider agency made arrangements for the volunteer or whether the client made the arrangements. The important question is, "Whom does the volunteer work for?"

A contracted individual is defined as one who performs a service for a client for remuneration but who is not an employee of the agency. For example, a client's neighbor who agrees to prepare the client's meals for remuneration is a contracted individual, so is the client's housekeeper. Contracts may be written or unwritten but the services to be offered by the contracted individual are specified in the care plan. The contracted individual is an individual, self-employed entrepreneur. The respective liabilities are defined, therefore, in terms of the contract, written or otherwise.

BASIC SCENARIO #3

Client Mrs. Smith identifies her neighbor Mrs. Jones as someone who can help her with personal care. Mrs. Jones is not an agency employee. The case manager writes Jones into the care plan and assigns her specific personal care tasks.

The liability depends on the relationship of Helper Jones to the channeling agency and/or Client Smith.

1. The agency is liable for its representatives' acts carried out within the scope of its direction whether these representatives are paid by the agency or not.
2. If the helper is an agent of the client, there is no liability to the agency which only acts as a broker, i.e., one who does no more than bring the client and the helper together to strike their own bargain.
3. If the helper is a volunteer she assumes the risk for herself.
4. If Mrs. Jones is a guest in Mrs. Smith's house and not a volunteer worker, some liabilities may attach to Mrs. Smith.

CASE EXAMPLES

The Bathtub Slip, Trip and Fall Case

Client Smith slips, falls and is injured while being helped into the bathtub by Helper Jones. Is the agency liable if Helper Jones is not at fault? Who is liable if Helper Jones is at fault?

Where the helper is not at fault:

There is little likelihood of liability to either the helper or the agency.

Where the helper is at fault and, therefore, negligent:

1. Liability will increase as the degree of negligence increases;
2. Liability will more likely be the agency's if helping the client into the bathtub was an expected duty of the helper;
3. Liability will be less if the client asked or urged the helper to assist her.

The Stolen Ming Vase Case

Helper Jones conspires with Accomplice Green to have Green steal Client Smith's valuable antique Ming Vase. In what way is the case manager who arranged for Helper Jones liable?

Ordinarily, civil liability (in addition to criminal liability) would be limited to the helper unless there was some showing of gross negligence on the part of the agency or, worse yet, complicity of the agency in the theft. Careful screening of helpers would foreclose any possibility of negligence. Screening workers can be a relatively simple task. Questionnaires, interviews and requests for references which seek to elicit information about knowledgeability, handicaps which may limit service, experience, and criminal record can go a long way toward protecting the agency and its case managers.

The Ming Vase Conspiracy Case

Helper Jones, steals Client Smith's Ming Vase and disappears. Investigation in the case reveals that Jones is a felon who has been convicted of stealing from sick elderly people living alone. Is the case manager or the agency liable for Client Smith's loss? Is the case manager or the agency responsible for screening informal workers prior to assignment?

It does make a difference whether the helper is an employee of the agency or if the agency is a "broker" that brings the client and the helper together. Even as a "broker" good practice would dictate that the agency: a) give the client information about the helper, and b) make some inquiry about the helper's interest, abilities and past history.

However, if the client identified her neighbor, and chose her as a helper, and assuming the client is legally competent and is aware of the helper's history, the agency is not liable.

The Ming Vase Case #2

Client Smith discovers that her valuable antique Ming vase is missing and accuses Helper Jones of stealing it. Jones is arrested, tried and convicted for the theft. Who is liable for the loss?

If the helper is accused and convicted of theft and has indeed stolen something from the client, then the helper is liable both civilly and criminally. If the helper is accused of theft and is innocent, the victim of the theft is like all other victims and will stand the loss himself or herself. It would be very hard to assess any liability on the part of the agency.

The Drug Reaction Case

The VNA which serves Client Smith, trains Helper Jones to administer medication to Mrs. Smith who suffers an adverse reaction to the drugs Jones administered. What are the liability issues?

In general, the administration of medication for non-institutionalized patients is a matter under the control of the patient. The client may be unable to self-administer medications. If so, in designing a care plan which arranges for the VNA to train the helper to regularly administer medications to the client, it is the responsibility of the case manager in the channeling agency to contact the client's physician and explain that the client cannot self-administer medication and that the service will be provided by a helper. The case manager would then obtain information from the physician detailing the administration of the medication including side effects, dosages, and anything else. The case manager would then send a written confirmation of this conversation to the physician detailing the agency's understanding of the administration of the medication, side effects, and other important information.

The physician could be asked to advise whomever would be directly administering the medication to the client. As part of normal practice, the physician should explain the risks of the medication to the client, take notice of any changes in the client's condition, and alter the medication accordingly. If this type of procedure is followed in cases in which helpers are trained to administer medication, the agency will have good defense against charges of negligence.

The Hasty Helper Case

Helper Jones goes to the medicine chest, grabs a bottle of pills, does not read the label and mistakenly gives Client Smith a massive dose of a laxative while believing it is Mrs. Smith's diuretic. As a result, Mrs. Smith suffers terrible diarrhea, causing her to become incontinent, to suffer pain and embarrassment and to become dehydrated, febrile and disoriented.

Helper Jones may be liable herself if she has negligently given Client Smith the wrong medicine thereby causing the client harm. If the VNA has properly trained Helper Jones in administering medications, the agency will be protected. If, however, the case manager has arranged for an illiterate or blind helper, and even if the VNA has given proper training, the channeling agency and the case manager may well be liable.

The Dropped Client Case

Helper Jones improperly lifts Client Smith from his chair causing Smith to fall and suffer a broken leg. Who is liable?

Again, ordinary principles of negligence apply. If the helper was grossly negligent and lifted the client incorrectly, despite reasonable screening and training by the case management or provider agency or despite appropriate instructions and supervision by either agency, about what the worker could or couldn't or should or shouldn't do, the client would have a course of action against the helper. The agencies would have a reasonable defense against suit by the client by virtue of the screening, training, and supervision they provided.

The Helper's Hernia Case

Helper Jones lifts Client Smith, an obese man, from his chair and suffers a hernia as a result thereof. Who is liable?

It will make a difference whether Jones was contributorily negligent or not, whether Jones had any instruction or warning about how to lift Smith, or whether Jones is an agent of Smith's, an agency volunteer in a formal program, or a neighbor or friend selected by Smith and included in the care plan. If the injured helper is a volunteer or family member and there is no employer/employee relationship to the channeling agency, there would be little claim against the agency. The volunteer has assumed the risk.

If the volunteer is covered by some kind of general insurance policy by the agency, his injury may be covered.

To avoid confusion about the risks assumed and insurance coverage related to voluntarism, the agency should, in its initial agreements with all volunteers, be totally clear regarding the rights, responsibilities, and risks carried by the volunteer and the agency. The agency should prepare a handout which summarizes pertinent facts about the liability of volunteers and an agency staff member should be assigned the responsibility of reviewing this information with volunteers.

The Tidy Helper Case

Helper Jones in cleaning Client Smith's apartment moves a footstool from its regular place and Client Smith trips over it and breaks her arm. Who is liable?

If the helper moved a piece of furniture and this action was not malicious, deliberate or grossly negligent, it falls into the category of an accident. If it were malicious or grossly ignorant, as for example, moving furniture in the path of a blind client, then, it would seem, that a suit might be possible against the helper. If the agency instructs volunteers and helpers about predictable hazards it will go a long way toward protecting itself. Once again, it depends upon the exercise of prudence and care one the agency has taken on responsibility for a care plan.

The Frozen Pipes Case

Helper Jones leaves the door to Client Smith's home open in the dead of winter just before taking Smith to the airport for her departure to her nephew's home in Florida where Smith will visit for a week. All the pipes in Smith's home freeze. Who is liable?

There may be some liability on the part of the helper, although it is doubtful that any liability would attach to the agency. This, of course, will depend on the relationship between the agency and the helper and the understanding of the client. Once again, a rule of reason is a good rule to apply. People are expected to be reasonably careful and attentive. In this world one frequently has to pay for stupid mistakes. Reasonable

mistakes, whatever they may be, are dealt with more rationally, and are more apt to be forgiven. How much the repair cost and how grievous the error is will make the difference. Whether Smith owns her home or not may make a difference, as will the presence or absence of a homeowner's insurance policy covering the premises.

The Checkbook Assistance Case

Helper Jones (either a volunteer or worker under contract to the client) assists Client Smith in drawing cash from the bank, depositing checks, paying bills, and balancing Smith's checkbook. Helper Jones does this "informally", i.e., outside of any formal agency care plan. Client Smith is an alert elderly woman who appreciates the help. What kind of liability arises for the helper?

If the volunteer or contracted individual helps a client with money management without a formal arrangement it would depend, in large part, whether the helper was an agent of the client or not. The best arrangement is for the client to understand that he or she is entering into an agreement of agency¹ with the volunteer or contracted individual and that the volunteer or contracted individual works at the direction of the client. If the client is not competent to make such delegation then the volunteer or contracted individual is proceeding without authority unless he has received it from some other person who holds control of the client's funds. If the individual is a representative payee,² for example, and absconds or misapplies the money, then he or she has breached his/her duty to the client and probably to the Social Security Administration and would be liable for restitution, and probably liable in a criminal action as well.

The Pet Dog Case

Client Smith has a dog who has been her constant companion for four years. Helper Jones negligently permits the dog to play in the street. The dog is hit by a car and is killed. What is Jones' or the agency's liability?

It depends on the degree of negligence, what the helper has agreed to do, and at whose direction the helper proceeds. Helpers and agencies are not generally liable for the well being of pets unless they assumed a duty to care for such pets and had failed in that duty in very obvious ways.

The Eye Drops Case

Case manager Good reasonably reduces services and arranges for the replacement of formal caregiver Brown by an informal caregiver, Jones. Client Smith is properly informed about the change, agrees to the new arrangement and signs the care plan. The care plan

¹ The term agency is used here in the legal sense where it refers to the relationship in which one individual, the agent, acts on behalf of and at the direction of another individual. It does not refer to the social agency concept.

² A representative payee is an individual named and approved by the Social Security Administration to be the recipient of a person's Social Security check.

includes giving Client Smith eyedrops for an eye infection. Jones, although carefully and explicitly instructed in the administration of the drops and the importance of giving the medication in timely fashion, negligently does not do so. This omission results in exacerbation of the infection, pain and an ultimate reduction in Client Smith's visual acuity. Who is liable under these circumstances?

Liability Depends On:

1. The degree of negligence, if any, visited on the client by the helper;
2. The kind of knowledge the case manager might reasonably have been expected to have;
3. The degree to which the client can be said to have "assumed the risk";
4. The nature of the helper's fault;
5. The relationship between the helper and the client and/or the agency;
6. Expectations of the informal helper.

If there is good faith effort made by the case manager (and the formal provider) to provide reasonable assistance through an informal helper, the case manager and both channeling and provider agencies will probably be insulated from a successful suit by the client. That would seem to be the case here. If, on the other hand, to use an extreme example, the case manager arranges for a neighbor to help the client with her bathing and the neighbor is known to have violent outbursts of temper resulting in assault, and/or suffers from some disability which would impede her ability to help the client in and out of a bathtub, then the agency and the neighbor must be liable.

The Reduced Service Case

Following the reduction in service and the shift from a formal caregiver to an informal caregiver, Client Smith's condition worsens, even though the care plan was adequately carried out. Is the case manager or the agency liable?

If the care plan were carried out but the client died of something that should have been identified but wasn't, then it is conceivable that negligence might be established. If, however, everything was in order and the client died despite the best and reasonable efforts of those charged with his or her care then it is highly unlikely that liability will lie against either the agency or the case manager. In fact, liability would only result from negligence in the assessment, the care plan and the delivery of services. The reality of the situation with the elderly is that there frequently are intervening variables which are not predictable. The best guideline is to make reasonable efforts to assess needs and resources, develop a suitable care plan, follow-up on and monitor services and

periodically reassess the client's needs. The agency's duty depends upon the agreements between the agency and the client, the state of the art and the resources available.

The Volunteer Driver Case #1

Volunteer Jones is driving his own car to Client Smith's house and accidentally hits a telephone pole causing damage to his car and himself. To what extent is the agency liable?

In general, volunteers in transit to or from clients' homes will be responsible themselves for damages and/or injuries incurred on such trips. However, if volunteers are brought into the agency's office for the purpose of receiving instructions for the day's visits to various clients and the accident occurs between the agency office and the client's home, then liability may lie against the agency. In other words, if there is a gathering analogous to a labor "make-up", or morning call at a police precinct, and the informal workers are proceeding to "duty" from place to place, the agency may have some liability. The issue is whether the travel is at the direction of the agency.

The Volunteer Driver Case #2

Volunteer Jones goes to the supermarket in her car to buy groceries for Client Smith. On the way she hits a telephone pole damaging her car and injuring her arm. Is the agency liable?

Any injuries sustained while the volunteer is on an errand for the client is the responsibility of the volunteer, unless the agency has specifically undertaken to designate the volunteer as its representative doing its bidding. Where volunteers use their automobiles to carry out tasks in formally organized volunteer programs, many agencies have secured blanket insurance policies to protect their volunteers or have made sure that volunteers carry their own insurance coverage for use of their automobiles for volunteer activities. In some urban areas with Volunteer Bureaus and/or Health and Welfare Councils, arrangements have been made for health and social agencies to secure such policies from a single broker or insurance agency.

The Mugged Informal Helper Case

Informal Helper Jones assists Client Smith who lives in what is known to be a high crime area. Upon leaving Smith's home one afternoon, Jones is mugged suffering both property loss and personal injury. Is the agency liable?

Liability will depend upon the relationship between the informal helper and the agency and/or the client. Ordinarily, neither the agency nor the client will be liable for injuries or losses suffered by the helper in transit to or from home (but see response to The Volunteer Driver Case #1). However, given the knowledge of a high crime area, the risks (and their assumption) ought to be a matter of explicit discussion between the agency and the helper. If possible, the agency may seek to secure a blanket insurance policy to cover such risks.

The Volunteer Driver Case #3

Volunteer Jones is driving Client Smith to an appointment with Smith's physician. Enroute they are involved in an automobile accident with another car. What are the liability considerations if:

- 1. Jones was clearly negligent because he ran a stop sign?**
- 2. Jones was clearly not at fault?**
- 3. In (1.) and (2.) Jones was driving an agency car? His own car? The client's car?**
- 4. In (1.), (2.) and (3.) Jones is injured? Smith is injured? The other driver is injured? A pedestrian is injured and/or the other driver's guest is injured?**
- 5. There is neither property nor personal injury as a result of the accident, but Smith falls to the ground getting out of the car as a result of Jones' negligence? As a result of Smith's negligence? As a result of their combined negligence? As a result of a defect in the car door?**

The questions posed above indicate that the variety of possible scenarios and hence outcomes is enormous. In addition to the factors suggested by the questions, one must take into account the particularities of the law in the respective states. These include whether or not the state is a "no fault" state, a contributory negligence state, a comparative negligence state, or a "guest statute" state, to list some examples.³ Thus, one must look to some general principles and actions which will do most to protect the agency.

First, the agency should make certain that all persons who may be driving automobiles and transporting clients are (a) licensed, (b) insured by their own insurance carriers (c) careful drivers with good driving records, and (d) instructed in the special considerations of transporting those who may be frail, disabled, disoriented, or may have other special characteristics requiring attention.

Second, if possible, the agency should arrange for the state highway department or Automobile Association of America to set up a training session on defensive driving for these drivers.

Third, the agency should contact its insurance broker, the volunteer bureau and/or the Health and Welfare Council about automobile insurance policies which cover

³ "No Fault," "contributory negligence", "comparative negligence" and "guest statute" are terms which reflect a state's laws governing insurance.

volunteers who drive their own cars to transport clients or who otherwise drive in behalf of the agency.

Fourth, the agency should check its automobile policy to ascertain coverage of volunteers driving an agency car.

As for where liability lies in any number of the situations, proper insurance protection is crucial. Liability can be assessed against the driver, the driver's employer or principal (e.g. if the driver was an agent of the agency as opposed to being its employee), the owner of the vehicle, or a negligent party such as a driver of another vehicle. When suits are brought and claims made, plaintiffs will go for what is colloquially called, "the deep pocket". Sometimes juries make awards because they believe "the deep pocket" can afford it. Thus, insurance is important.

Obviously, volunteers deserve protection as much as clients do. Insurance coverage for them should be clear.

In general, while the variety of automobile accident scenarios is awesome, it is an area in which insurance coverage will take care of virtually all situations. These can be held to a minimum by good driver training and instruction in what to do in the event of an accident.

The Stumbling Client Case

Volunteer Jones accompanies Client Smith to the doctor's office. Client Smith is ambulatory with a cane but trips at the curb, falls and breaks her arm. Jones was next to Smith but did not have hold of her and could not prevent the fall. Is the agency liable? Is Jones liable?

For escort services there is a difference between a volunteer and a paid worker. Volunteers will not be held liable unless they are willfully and grossly negligent. If the volunteer is injured he will be liable for injuries to himself unless he can fix liability on account of negligence on a third party. In general, the agency is not responsible to underwrite or insure the safety of the volunteer. Should it wish to do so, the agency may wish to secure blanket accident or medical payment insurance policies for its volunteers.

Injuries suffered by paid employees are generally covered under Workman's Compensation laws if those injuries occurred in the course of the employee's work.

If the client is injured while in the company of a paid employee, and if the injury was a result of the employee's negligence, both the employee and the agency would be subject to suit. If the injury was the result of someone else's negligence, for example, the driver of another car, under ordinary circumstances, no liability would attach to the agency or the employee.

The Rough P.T. Case

The case manager arranges with Physical Therapist Brown, a formal provider, to evaluate Client Smith's need for physical rehabilitation and then for Brown to provide these services. Client Smith is an obese patient suffering from multiple sclerosis and severe osteoporosis. Therapist Brown, ignoring Smith's complaints of pain, negligently exercises Smith's arm which, as a result, suffers a simple fracture. Who is liable?

If the provider was a professional and the case manager made an assignment that was beyond the capabilities of the provider, then the provider would be responsible to decline to take on the assignment, or at least give notice to the channeling agency. If the case manager's role was simply to refer a client to a physician, or other worker or therapist not under contract, and primary relationship was between that individual and the client, the failure of that individual to adequately perform would not be the responsibility of the channeling agency. There might be an exception depending upon organizational arrangements. If the channeling agency were a large umbrella type agency and made the referral to an internal unit then it is conceivable that the agency might be included in some kind of legal action.

The Deadbeat Client Case

Client Smith, a competent person, agrees to participate in the client payment program for services and signifies such agreement by signing the appropriate client payment form and the care plan. Client Smith then refuses to make the agreed upon payments. Who is liable?

The client is liable and judgment can be sought against the client. The client payment program (also called the out-of-pocket-payment program) is a requirement of the channeling demonstration complex models. In this program, clients who meet specified income criteria are expected to pay for, or share in, the cost of certain services. The client payment program coordinates health insurance co-payment with those social services/income maintenance concepts which assure that client payments reflect available income and individual service needs.

A reasonable method for agencies to follow in order to avoid problems with the payment program is to:

1. Encourage full discussion with clients on how the payment program works;
2. Prepare a simple form which the client can sign acknowledging his obligation to participate in the payment program;
3. Develop a simple and humane client payment billing system, which includes the above signed statement on each client payment bill as a reminder to the client;

4. Develop a mechanism by which clients who are delinquent in their accounts can rectify the situation.

These recommendations have been incorporated into the procedures adopted by channeling complex models. In these agencies, case managers are responsible for offering a full explanation to clients of how the client payment program works including information on when payments are due and when termination will occur as the result of failure to make payments. In addition, case managers must secure client agreement for payment in writing and determine, in conjunction with the client, the monthly payment amount as well as when initial payments will begin. Case managers are responsible for negotiating with the client a new payment amount should there be any change in the cost of the care plan, the client's income or the protected income amount.

It is the role of case managers to make a clear to clients that they are expected to make payments on a fixed schedule and that when outstanding payments are equal to or greater than a period of 60 client days in the channeling demonstration, service must be terminated.

Case managers participate in termination case conferences should termination for non-payment be anticipated and inform the client of termination due to non-payment. In cases of extreme hardship, administrative exception to termination can be sought by case managers. Finally the case manager is expected to participate in the appeals process resulting from termination due to non-payment.

Adherence to these procedures will in all likelihood, free the agency from findings of liability in cases where client services are terminated as the result of non-payment and harm results therefrom.

An additional safeguard built into the channeling demonstration is the separation of functions. Case managers carry the responsibilities outlined above. The direct handling of payments and the establishment of payment schedules for clients who are delinquent in payment are activities which fall to the financial staff of the channeling agencies. This separation of activities frees case managers from any findings of conflict of interest or any liability findings connected with the mishandling of client funds.

The After-Hours Emergency Case

Caregiver Jones arrives at Client Smith's home on Saturday morning and finds Smith feverish, short of breath and somewhat incoherent. The channeling agency is closed for the weekend and Jones cannot reach anyone from the agency. What is the channeling agency's responsibility to Smith for emergency services?

The duty of the channeling agency is determined in part by what it, as a professional care agency, should be able to anticipate. Providers, formal or informal, should be furnished (unless the formal provider already has developed procedures) general instructions on how to proceed in the event of an emergency, including what to

do during and after channeling agency regular hours. The course of action may vary from contacting the emergency service of the mental health agency, to admission to an emergency room at a general hospital, or any other reasonable approach. What should be done is that which would be done by a reasonably informed care provider in the absence of a channeling project. Ordinarily, the channeling agency would be insulated from liability if it had made some reasonable provisions for emergencies where emergencies can be anticipated. Obviously, the agency cannot anticipate all emergencies or be held liable for their consequences (e.g., earthquake, airplane crash into the dwelling, boiler explosion, volcanic eruption, etc.).

The Hospital Admissions Papers Case

Client Smith suffers an acute attack of persistent abdominal pain and upon advice of her physician is taken to the hospital. The hospital requires that a family member sign admission forms before Client Smith is admitted to the hospital. Family members are all out of town and cannot be reached. The hospital admissions worker insists upon the case manager signing the admission forms. Should the case manager do so?

The general rule should be that case managers should not sign any hospital admission forms, unless the channeling agency is prepared to underwrite hospital costs which go beyond Medicare or other insurances. The hospital, in most instances, is required to admit a patient for emergency care. Where there is serious conflict with hospital personnel, the case manager should attempt to involve higher hospital authority.

IV. COMPETENCY, LEGAL INTERVENTIONS, AND CASE EXAMPLES ILLUSTRATING ISSUES

Case managers may have caseloads that include elderly individuals who exhibit varying degrees of mental acuity. Some will have been found to be incompetent and will have a court appointed guardian. Since such individuals have been stripped of most rights and are unable to enter into agreements or contracts, the case manager will have to deal with the individual's guardian in all matters relating to assessment, care planning and other case management protocols. At the other extreme are clients who are fully cognizant of all around them and in full control of their living situations. There are gradations between these two extremes. For example, an elderly client may be mentally alert one day and the following day not remember the case manager, the care plan, or that a home health aide would be coming into the home to help with personal care. A client who was mentally alert when he or she first became a channeling client may, over the course of time, become mentally impaired.

This section has been included because of the probability that case managers will have to deal with issues of competency in the course of the channeling program. The first half of this section defines and discusses relevant terms. The second half presents case examples and responses illustrating legal issues.

DEFINITIONS AND DISCUSSION OF TERMS

The following definitions are relevant to the discussion. Legal interventions and their consequences for elderly people are discussed in detail because caring people often initiate legal action in the best interests of older people and are unaware of the possible harm that might arise from such intervention.

Incompetency. Incompetency is the condition or legal status determined by a court that a person is unable or unfit to manage his affairs because of mental or physical impairment or because of an inability to communicate with others to give direction for such management. In some jurisdictions the definition extends to include individuals who may be the objects of designing persons, i.e., those subject to exploitation by unscrupulous individuals. The definition of "incompetency" is not a universal one and varies according to the language of each state's statutes as interpreted by the courts. Adults who have been adjudicated as incompetent are stripped of most rights. They are not free to enter into contracts, buy and sell property, be responsible for torts or crimes committed, vote, marry, engage in a professional practice if licensed, decide where to live or travel, control their bank accounts or investments, use charge cards, apply for public benefits or otherwise exercise normal autonomy. Channeling clients who are adjudicated as incompetent cannot sign their own care plans. In some jurisdictions they may not have the power to grant or withhold

consent for medical treatment. A declaration of incompetency by a court will result in the imposition of a guardianship.

Guardianship. Guardianship is a legal device imposed by a court to provide protection of the estate (i.e., the property including both present and future interests and/or claims) and person of an individual adjudged to be incompetent. The imposition of a guardian involves the appointment of an individual or agency to take charge of the incompetent's property and/or claims, to manage such for the sole benefit of the incompetent.

Where the court appoints a guardian of the person, the guardian takes custody of the individual. The guardian is responsible to the court appointing him/her and makes periodic reports to the court. Some states have offices of public guardians for incompetents who are indigent. Because guardianship necessarily flows from a finding of incompetency the standards for guardianship will vary from state to state and are a function of individual state statutes as interpreted by the courts.

The history of incompetency and guardianship is grounded in the concern for protection of property interests. The statutory standards for a finding of incompetency are generally vague, referring to an inability to manage one's affairs because of "insanity", "feble-mindedness", "idiocy", "imbecility", "infirmities of old age", "senility", "drunkenness", or similar terms.

Because guardianship is such an intrusive and invasive legal device resulting in virtual loss of autonomy in many spheres, judicial definition has sought to keep the boundaries narrow. The guardian may, in some jurisdictions, admit an adjudged incompetent "voluntarily" to a mental hospital, and most certainly can confine him in a nursing home.

Courts have held inability to manage property as the fundamental test. However, the inability must stem from a mental impairment such that it renders the subject incapable of understanding and acting with discretion in ordinary affairs of life. Guardians may be appointed without a finding of insanity. Conversely, a finding of insanity is not necessarily an indicator of incompetency (McAuliffe v. Carlson), 377 F. Supp. 896). Incompetence to manage property may be concurrent with some degree of mental illness.

In this regard, the courts have held that eccentricity or inability to manage large sums of money because of inexperience (In Re Porter's Estate 345 A2d. 171) are not sufficient to deprive an individual of his civil rights:

A man may do what he pleases with his personal estate during his life. He may even beggar himself and his family if he chooses to commit such an act of folly (Bryden's Estate 211 PA 633, 61 A 250, 251 (1905)).

Even chronic alcoholism is not enough for a finding of incompetency and appointment of a guardian where there is no evidence that over-indulgence interfered with capability to manage affairs. (Van v. Van 14 Or App. 575, 513 P.2d 1205.)

Unwise gifts, foolish investments and lack of business sense are generally insufficient to support a finding of incompetency. Ordinarily, one looks for reckless waste or dissipation, gross confusion, lack of knowledge of one's holdings or affairs. Even temporary impairment as from insulin shock may not be sufficient to warrant a guardian (Re Nelson's Guardianship 12 Wash.2d 238). And guardianship cannot be imposed because the individual may become incompetent in the future.

All of the above notwithstanding, courts have held that an 80-year-old widow, living alone, illiterate, unable to speak English but not mentally ill was incompetent because she could not manage her property without help (Re Guardianship of Melnick 180 Neb. 748, 145 NW2d 339). In actual practice, courts are more apt to grant guardianships on weak grounds than not.

This occurs in spite of the fact that the one major study undertaken of over 400 guardianships imposed on the elderly did not find a single case where any benefit accrued to the elderly ward as a result of the guardianship.⁴

This lengthy discussion is a way of warning agency staff to be cautious in seeking findings of incompetency and instituting guardianship proceedings. Case managers will be serving very old and impaired people and may be under great pressure to initiate guardianship proceedings for their clients. Less restrictive alternatives are available which protect both the property and civil rights of the elderly. Agencies should explore alternatives such as conservatorship, powers of attorney, trusts, joint bank accounts and property ownership or special agency.⁵ They should choose the one that has the greatest feasibility of maximizing the client's independence. Such a choice is consistent with the goals of case management.

Conservatorship. Conservatorship is a form of guardianship which, in the states where it is available, relates to a guardianship of property and typically does not require a finding of insanity to have it imposed. It is, in many ways, a "junior guardianship" and is supposed to carry less stigma with it. If property and money and income are controlled then, surely, the comings and goings of the ward are controlled. "Who controls my purse, controls my person".

Representative Payee. Representative payee is a term of art limited to Social Security payments made to an individual in behalf of another. The recipient of the check is the representative payee. This does not require a due process hearing and is, in many ways, a "junior junior guardianship", acquiesced in by the Social Security

⁴ Alexander, G.J. and Lewin, T.H.D. The Aged and the Need for Surrogate Management, New York: Syracuse University, 1972.

⁵ Agency is used in the legal rather than the organizational sense. In the legal sense, agency refers to the relationship in which one individual, the agent, acts on behalf of and at the direction of another individual.

beneficiary. It is based, usually, upon affidavits of physicians or others and has as its beneficent purposes the payment of rent, and assurance that food is being bought, etc. While it is somewhat less formal in its requirements for imposition, similarly, its lifting is somewhat more informal.

Power of Attorney. A power of attorney is a document executed by one granting powers he/she holds to another, which authorizes the other person to act on one's behalf when making various legal, financial, and/or business decisions. The power of attorney can set out the varying amounts of control which the agent may exercise over income and access. An individual must be competent to sign a power of attorney authorizing another to act. A power of attorney may be limited in time as well as in substance. The power of attorney may be good for one day, one week, one month or may be valid indefinitely. In the latter case, the power of attorney will automatically expire if the principal, i.e., the maker of the power of attorney, becomes incompetent or in any way is in a condition where it is impossible for him to revoke the power. A power of attorney, once granted may be revoked at will at any time.

Some states have what is called a "durable power of attorney" provided by special legislation to permit use of such a legal device. The durable power of attorney will continue even though an individual may become incompetent, lapse into a coma, or otherwise be unable to revoke or reaffirm the power. Generally, a durable power of attorney may be granted only to certain people such as members of the family and may be accompanied by certain people such as members of the family and may be accompanied by certain special ritualistic elements such as additional witnesses or acknowledgment in certain terms that the instrument is a durable power of attorney. It should be noted, however, even a durable power of attorney may be revoked at any time that the maker of the power of attorney is competent to do so. The advantages of a durable power of attorney is that in some ways it has the effect of permitting an individual to select his own "guardian".

Informed Consent. Informed consent is legally effective consent. The elements of informed consent include:

1. Comprehension by the client of all relevant information plus the ability to convey a decision regarding the information to another individual such as the case manager/ assessor;
2. Knowledge of the risks involved;
3. Voluntariness of the consent.

In summary, this is "knowing consent of an individual or his legally authorized representative, so situated as to be able to exercise free power of choice, without undue inducement or any element of force, fraud, deceit, duress or other form of constraint or coercion." (HEW Regulations, 45 CFR 46 (1975)).

Channeling projects have research and service components. The research often involves the participation of clients, informal helpers, formal helpers and others as well as the personnel and materials of the channeling agency itself. Research carries with it varying degrees of risks of harm to the participant. Liability arising from research activities is the result of a failure of the research agency, the investigator(s) and/or their agents to fulfill statutory, regulatory and common law duties owed to research subjects. Fortunately, this is one of the areas where formal procedures and protocols offer excellent protection against a finding of liability. Furthermore, the bulk of research undertaken as part of the channeling project poses minimal risk of physical and/or psychological harm, although there may be substantial risks involving invasion of privacy. However, channeling agencies and/or provider agencies may participate in other research projects which may pose substantial risks and for which preventive steps may be taken.

Liability does not arise simply because of exposure to risk. Competent individuals can assume risks provided they understand what they are and what benefits and/or detriments may flow from such exposure to risk. Furthermore, some risks, while different from the risks of ordinary everyday living, do not differ in degree from that which the individual might encounter if she/he didn't participate in the research.

Because channeling projects all involve federal funds they are subject to the constraints of Part 46 of Title 45 of the Code of Federal Regulations governing protection of human subjects. Such regulations are concerned with a formal assessment of risks to which subjects are exposed, establishing procedures to safeguard the rights and welfare of the subjects, obtaining voluntary informed consent, and timely periodic review of the research activity.

The regulations required that an Institutional Review Board (IRB) be convened for each research program. The role of the IRB is to evaluate risk to participants and to review the mechanisms built into the research design for protecting participants' rights.

The IRB for the Channeling Demonstration reviewed and approved of the informed consent procedures which are currently followed by channeling agencies. These procedures assure that participants are aware of the research nature of the program, the possibility of assignment to a control group, the time limited nature of services if provided, and the possibility that services can be changed or terminated as circumstances change. Informing the participant is important throughout the channeling project. It assures that clients receiving services and members of the control group understand the procedures and practices of the demonstration and assures that they assent to the terms of the participation. Informed consent is indicated by signing a standard informed consent form at the time the baseline assessment is conducted. During care planning, the client signs a copy of the care plan signifying agreement with the prescribed services. Careful compliance with the informed consent procedures will protect channeling agencies from findings of liability.

LIST OF CASES

- Validity of informed consent: The Do-It-For-Me Case
- Validity of informed consent: The Forgetful Client Case
- Client refuses service: The Reluctant Client Case
- Care Plan Disagreement/Family: The Hip Fracture Family Fracas Case
- Care Plan Disagreement/Guardian: The Hip Fracture Guardian Case
- Witnessing Signing of the Care Plan: The X Marks the Spot Case
- Collaterals As Sources of Information and Authority: The Collateral Case
- Nursing Home Admission Against Will: The Nursing Home Case #1
- Too Ill to Stay at Home: Nursing Home Case #2

CASE EXAMPLES

The Do-It-For-Me Case

Client Smith has lived independently in an apartment at the Golden Acres Senior Citizens Housing for six months. She is frail but manages to get along with provision of transportation, shopping, light housekeeping services together with monitoring her cardiovascular condition. Two months ago she blacked out and was discovered by the housecleaning crew on their regular rounds. She apparently suffered no ill effects and after a visit to the doctor returned home. She had a repeat episode three weeks ago with similar results and then four days ago blacked out again. Dr. Pringle, concerned for her safety and well-being convened a meeting including Social Worker Fine, Nurse Bagley, from the VNA, Recreational Therapist Joy and Chief Housekeeper Clenly both of Golden Acres to discuss Smith's removal from her apartment to a personal care home where she will have closer supervision. Pringle is genuinely concerned that Client Smith will suffer a blackout and die because she may not be discovered if this occurs over a weekend. He advances his arguments and the others go along. Pringle suggests that Smith be invited to this meeting to agree to a change in her care plan. Pringle, Nurse Bagley, Recreational Therapist Joy and Chief Housekeeper Clenly are wearing white uniforms. Social Worker Fine is wearing civilian clothes. When Pringle gently lays out the facts of her condition and suggests she

move to a personal care home, Smith protests that she likes it the way it is and says, "if I die, well, then I die. I don't want to go to any home." Pringle reminds her of his concern for her and how he wants to continue giving her the same good care he has always given her, saying, "Have I ever given you bad advice? Would I do anything bad for you. Would Nurse Bagley ever hurt you? We've taken good care of you. And Chief Housekeeper Clenly's crew has revived you three times. Imagine how they'd feel if they found you dead. Please, Mrs. Smith - do this for us...do this for me."

Smith looks around her for an ally, and finding none says, "O.K. I guess you're right. It's time for me to make the change. You've all been very good to me." Later that day Smith signs the consent forms modifying her care agreement. At all times Smith is well-oriented to time, place and person. Has Smith signed a valid informed consent?

Informed consent requires that the giver of the consent (1) comprehend the risks and benefits of alternative courses of action together with all other relevant information (2) be able to convey a decision, and (3) give the consent voluntarily. In this case, Smith clearly understands the risks and benefits, and is able to give or withhold the consent. However, there is serious questions about the voluntariness of the consent. To be sure, she was in no way threatened or coerced by any suggestion of deliverately inflicted harm, of withdrawal of benefits, or penalty of any sort. However, voluntary consent means that the person involved should be so situated as to be able to exercise free power of choice, without the intervention of any element of force, fraud, deceit, duress, over-reaching or other ulterior form of constraint or coercion. Here, Smith, a dependent old lady was surrounded by people cloaked in the garb of authority; she was without anyone who would take her part. Her physician and others who had saved her life, not once but three times, were urging her to do something and if she rejected their urgings, she would put herself in the position of being an ingrate. The situation was one of being in an inherently coercive environment where a voluntary consent was impossible. This is particularly the case where the doctor-patient relationship is involved. This is a confidential relationship of the highest sort and the reaction of a client when confronted by her physician may preclude a truly voluntary stance. Understanding this suggests that caretakers should not, except in extraordinary circumstances, be those who urge the signing of consent forms. Where possible, an independent supporter should be available to assist an individual in making consent decisions.

The Forgetful Client Case

Client Smith is marginally oriented to time, place and person. He does not hallucinate but is increasingly forgetful and unaware of his condition and surroundings, although from time to time he is very much aware and reacts very appropriately to his situation. Seven months earlier when he became a channeling client and entered into

the service and care arrangements (which included some health care services) he signed the necessary consent forms. It is generally agreed that at the time he signed them he understood what he was signing and what they implied. At that time, they were clearly valid consents. Now, he does not recall signing them, doesn't recognize them when they are shown to him, and has no idea of what they signify. Are the consents currently valid and what is the impact of the passage of time on consents given earlier?

The threshold question is: Was the client, at the time he signed the consent form, capable of understanding the information provided to him by the case manager, physician, or other therapist regarding the risk of the procedure, and the nature of the procedure, and was the consent entered into voluntarily, without the presence of coercive atmosphere or actual coercion?

If the elements of competence, information and understanding of risk, and voluntariness are present, or at least were at the time of signing, the consent form may not be significant. However, this depends upon the length of time between the signing of the form and the time at which the question is raised.

Some consideration must be given to the current competence of the individual. It is not entirely clear under what circumstances an informed consent will persist into a period of incompetency. There is also the consideration that someone might well not remember signing a consent form at time 1, and being legally competent may decide at time 2 that he or she does not want to give consent. For example, a client may have signed a consent form in January of 1981 and may, in fact, have received treatment for some condition during January, February, and March. He goes into remission and is fine until January 1982. At that point he has a recurrence or activation of the disease, and forgets that he had given consent. In 1982, he decides that life is not worth living, that things have gone downhill, and that he would just as soon not have any treatment. He says to his physician or his agent, "Keep the doctors away. I don't want any more treatment." At that point it can be said that he has effectively revoked his consent knowingly and voluntarily. There is nothing to prevent others from trying to persuade him so long as they stay free of coercion or of producing a coercive environment. One must look at the facts of each situation. If the client is clearly disoriented and unable to give or withhold consent the previous consent may well be invalid.

The Reluctant Client Case

Client Smith is marginally oriented to time, place and person. He does not hallucinate and has periods of forgetfulness although he is often quite mentally alert. At the time he became a channeling client seven months ago, he was alert and was able to sign the informed consent papers, respond to the Baseline Assessment Instrument himself and agree to the care plan providing health services as well as homemaker assistance. He has stated that he no longer wants the health services and doesn't much care for the homemaker

coming around and snooping. Case Manager Good has visited Client Smith in an attempt to reassess his needs and his desires. What is the agency's liability if services are withdrawn and Smith's condition worsens as a result.

If the agency concludes that Smith is knowingly (even if unwisely) withdrawing consent and therefore withdraws services after clear efforts in person and in writing to secure consent, liability will not attach to the agency unless the agency was negligent in arriving at the conclusion. If the agency concludes Smith is not competent to give or withhold consent at this point it should contact family (or if none is available, the court) to initiate proceedings for incompetency and guardianship. Providing services in the meantime will not expose the agency to liability unless (1) the court finds that Smith was not incompetent; and/or (2) the services of the agency were furnished negligently and inflicted harm. In the case of (1), criminal liability may lie if the service involved physical contact with the client which may produce a technical battery, i.e., an unlawful touching.

The Hip Fracture Family Fracas Case

Client Smith suffers a fractured hip. After hospitalization, a care plan is worked out by the channeling case manager for Smith to return home and receive assistance from both formal and informal caregivers. Smith, a competent person, approves the plan. His adult son and daughter disagree feeling that he should not be alone at any time and that he should have the protection that 24 hour care in a nursing home provides. They warn the agency that if harm comes to their father they will hold the agency responsible. What should the agency do and what are its liabilities in the situation?

The primary considerations are what is in the client's best interest, what is it the client prefers and the feasibility, reasonableness and prudence of the care plan. To some extent, it will depend upon the extent to which the care plan relies on the adult children for its success. If the care plan does not involve the adult children, then the wishes of the adult children would have to give way to the wishes of the competent self-determining client and be carried out without the cooperation of the adult children. However, if, for example, they are to provide a certain kind of service then obviously the wishes of the adult children would have to be taken into account, either through modification of the plan or a "renegotiation" of the plan. The agency will not be liable if the care plan was reasonable and prudent and reflects good practice related to the client's circumstances.

The Hip Fracture/Guardian Case

Client Smith, a channeling client, suffers a fractured hip. After hospitalization, the channeling agency care plan provides for Smith to return home. However, Smith is now an adjudicated incompetent and has a court appointed guardian. Smith is delighted with the plan. His guardian disapproves of the plan believing it is in Smith's

best interests to be in a nursing home and refuses to sign the care plan. How shall the agency proceed?

The effect of a legal guardian depends on whether the legal guardian is a guardian of the person, the estate, or both. Some jurisdictions make a distinction while others do not. Where the care plan involves areas in which the legal guardian has the power to decide, then the wishes of the client must fall in the face of the wishes of the guardian unless the guardian is recommending something that is not in the best interest of the client. Here, what is required is the best effort of the agency/and or case manager to persuade the legal guardian to acquiesce in the elements of the care plan that the client wishes and which are reasonable, prudent and in the client's best interests. But ordinarily, the legal guardian will have the last say in approval. The agency does have the option of going to the court that appointed the guardian to secure an order requiring the guardian to proceed with the care plan. However, this can be difficult, and courts which deal with guardianships, e.g., orphan's courts and probate courts, may take very considerable persuading to issue such an order.

The X Marks The Spot Case

A care plan is worked out for Client Smith. As a result of the stroke Client Smith suffered, he is unable to sign his name but signifies his agreement with an "X". Case manager Good has arranged for Smith's son, John, to witness the signing. Can John sign the plan? Can John subsequently appeal the plan if he signs it?

Standard procedures in the Channeling Demonstration call for the client to sign the care plan as an indication of his agreement and consent. Legally, only the client or the client's legal guardian can sign. In cases where clients are unable to sign the care plan, a witness is required. A witness can do nothing more than observe the signing of a paper by a client. The witness does not give assent and has absolutely no function beyond being able to say, "I observed Mr. Smith making his mark," whether it is an X, a circle or a squiggle. Witnesses have no right of appeal, or for that matter, anything else. Their function is very limited. If the person was competent to sign the document, any kind of mark by him, (assuming that he is not capable of signing his name) is sufficient authorization. However, since X's and squiggles are not readily identified, somebody must watch and say "I witness Smith making his X." That is what will give validity to Smith's mark.

If Smith had been incapacitated to the extent that he could not even make an "X" or a squiggle, his hand could have been guided. It is the client's willingness rather than the physical act of signing that is witnessed.

The Collateral Case

In order to complete the Baseline Assessment, Client Smith suggests to Case Manager Good that she contact Client Smith's daughter who will know all the answers to the financial questions. The daughter has been paying Smith's bills and making deposits in

his bank accounts for the last two years. This has been an informal arrangement. The daughter is feeling overburdened with her family commitments and her recent election to the State Senate. After answering Good's questions, she tells Good to apply Smith's savings to hiring a housekeeper for him. Is the agency/case manager liable if case manager Good follows the daughter's instructions without discussing them with Smith.

Except for specified parts of the Baseline Assessment Instrument, assessors/ case managers can use information obtained from other individuals such as a clients' adult children, physician, and others. We refer to these individuals as "collaterals" here. While collaterals are generally free to share such information that they may have, lawyers, physicians and clergyman may be constrained by client/patient communicant privilege unless a specific waiver has been obtained from the client. As a matter of respect for a client's privacy, good practice dictates obtaining a client's consent to make collateral contacts. In this case, the case manager received the client's permission to ask his daughter specific financial questions. Collaterals who are not court appointed guardians, guardians ad litem, conservators, attorneys-in-fact or trustees for the client have no authority to commit a person's property or person to a given course of action. An agency acting on specious authority of a collateral could find itself liable for harms suffered by a client resulting from such action. Thus, in this case the agency would be liable if it proceeded to commit Smith's assets solely on his daughter's say-so and without his authorization.

The Nursing Home Case #1

Client Smith suffers a hip fracture and, following an open reduction of the break and a two-week hospital stay, is placed in a nursing home after his son and daughter authorize the hospital discharge planner to do so. Smith protests mildly and is not presented with any consent forms. The case manager attempts to dissuade the son and daughter from placing Smith in a nursing home. Smith is competent, but acquiesces in the placement. The nursing home provides Smith with minimal care but no rehabilitation therapy to help restore mobility. Smith loses his ability to walk and becomes depressed and apathetic. His old friend Jones, angered at the neglect of the home, assists Smith in retaining a lawyer who now seeks to secure rehabilitation services for Smith and to return Smith to the community. Who is liable for damages for the harms to Smith? Suppose Smith had contacted the case manager and asked her to get him out of the nursing home or at least to get him legal representation. Suppose the case manager had been the initiator of the activities directed at returning Smith to the community.

This kind of case has not been adjudicated, or if it has, has not been reported. It would appear, however, that the hospital discharge planner acted without adequate authority, and together with the nursing home and the son and daughter might well be

liable. Care must always be taken by an agency not to exceed the authority it has. All older people are adults, suffer no legal disability and are presumed competent. Sons and daughters, no matter how beneficent, do not have decision-making power simply by virtue of the filial relationship. Acting on their say-so, without more, is decidedly risky. If Smith had contacted the case manager about getting a lawyer, the case manager should have tried to do so. Similarly, if Smith wants to return to the community and is a client of the agency, efforts to formulate a reasonable plan should be undertaken.

The Nursing Home Case #2

Client Smith trips on the staircase in her home and suffers a fractured hip. Prior to hospital discharge, Case Manager Good prepares a new care plan that permits Client Smith to return home. Despite a well designed care plan, Smith's condition deteriorates to the point that she can no longer be cared for at home. Case Manager Good discusses the option of nursing home placement with Client Smith. Mrs. Smith is adamant that she will not go to a nursing home or any place other than her home. It becomes increasingly difficult for Case Manager Good to maintain Mrs. Smith at home as her health care needs escalate. Is the agency liable if it continues to provide case management services to Mrs. Smith with the knowledge that Mrs. Smith requires more care?

The issue here is whether or not Smith is competent to decide. If Smith is oriented to time, place and person, and understands, even in a most rudimentary way, the consequences of remaining at home, the likelihood of a finding of incompetence is not great. If the situation deteriorates, however, to the point where Smith's behavior approaches the state's legal standard of incompetence, then a petition may be filed in court for such a finding and appointment of a guardian. However, the agency should attempt to mobilize formal and informal resources which will honor Smith's position. Smith has a right to make some foolish decisions, even to the point of refusing treatment which may be life-saving. If the agency continues working with Smith under the above circumstances of Smith being competent it will not be liable. A harder question is, "Can the agency walk away from Smith because she is intransigent?" The answer here is equivocal. It depends upon the past relationship with Smith, what the agency has undertaken to do, and the hard facts of the situation. The agency must take care not to place Smith in a position of danger simply because it is "fed up". Negotiating situations like these involves the highest art forms of case management and will not involve liability issues when the agency has exercised high levels of care and effort.