

The Investigation and Prosecution of Elder Neglect and Abuse in Virginia: Distinctions between criminal and civil cases

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I. Why is elder neglect and abuse rarely prosecuted as a crime in Virginia?

Absent the overt cases of sexual or physical abuse, healthcare providers are rarely prosecuted for neglect or abuse of the elderly. To start with, there is underreporting of institutional neglect, especially in nursing homes. Often, there is insufficient evidence to support such prosecution, especially where the victim is demented and incapable of testifying. In addition, many police and prosecutors, who are not trained healthcare providers, are not in a position to determine whether a bad outcome (i.e. pressure wound or unexpected death) is related to neglect versus the patient's underlying medical condition.

A. Important distinctions between criminal and civil cases.

Although the same conduct may give rise to both criminal and civil liability, there are some important differences to be considered.

1. Criminal cases must be prosecuted by the Commonwealth attorney's office, typically after a police or adult protective services investigation. Civil malpractice cases can be brought by licensed attorneys in Virginia, after they have obtained the necessary expert merit certifications.
2. In a criminal case the prosecution must prove their case beyond a reasonable doubt. In a civil case, the burden of proof is only preponderance of evidence
3. Criminal cases carry criminal penalties – typically jail time and fines. Financial restitution is not widely used. In civil cases the victim is compensated financially based on the injuries and damages sustained. In egregious cases, punitive damages are available, but capped at \$350,000. Va. Code § 8.01-38.1
4. Defendants in criminal cases can decide not to take the stand to avoid incriminating themselves. Non-testimonial evidence like blood tests and photos are not protected. In civil cases, the Defendants can be called as adverse witnesses by the Plaintiff, although they can still assert their fifth amendment rights to remain silent. The privilege in civil cases is construed more narrowly and the failure to answer can result in an adverse inference. *Watts v. Watts*, 40 Va.App. 685, 581 S.E.2d 224 (2003)(Husband invoked privilege in deposition, refusing to answer questions about an alleged extramarital affair. While the Court

did not explicitly apply an adverse inference, it found that the “husband failed to provide a reasonable explanation for his conduct, a matter about which we do take cognizance.”).

5. Criminal cases are pursued by the government at no cost to the victim. In criminal cases an attorney will also be appointed to an indigent defendant. Plaintiffs in civil cases must hire attorneys and typically incur costs and attorney’s fees, although contingency cases allow the attorney’s fees to be paid after the successful conclusion of the case.
6. Criminal cases involve a 12-person jury in a felony case whereas civil cases are usually limited to 7 jurors. Both cases require a unanimous decision.
7. Criminal cases are publicly prosecuted, and the results are also disclosed to the public, which can have a deterrent effect. While civil cases may be public if they are litigated, the egregious cases are often settled without litigation under terms of confidentiality. Even when civil cases are filed in court, facility documents are often cloaked in secrecy due to a protective order and settlements are almost always confidential.

II. Relevant Virginia Criminal Statutes that could apply to elder neglect and abuse

A. Reporting

1. Va. Code 63.2-1606 Mandatory Reporting

Matters giving reason to suspect the abuse, neglect or exploitation of adults shall be immediately reported upon the reporting person’s determination that there is reason to suspect such conduct. (emphasis added) Medical facilities inspectors of the Department of Health are exempt from reporting suspected abuse immediately while conducting federal inspection surveys. . . of certified nursing facilities.

The list of mandatory reporters is broad and includes, *inter alia*, the following

- Any person licensed or certified by health regulatory boards, with the exception of veterinarians.
- Mental health providers as defined in 54.1-2400
- EMTS certified by the Board of Health, unless EMT reports the suspected abuse, neglect or exploitation to the attending doctor at the hospital
- Any guardian or conservator of an adult
- Any person providing full time or intermittent care to adults for compensation for companionship, chores, homemaker, and personal care workers
- Law enforcement
- Any financial institution staff who suspects financial exploitation

2. Va. Code § 63.2-1606.1 - Photographs, X-rays and Imaging

In any case of suspected abuse of an incapacitated person, photographs, X-rays, and appropriate medical imaging . . . may be taken as part of the medical evaluation without the consent of the person responsible for the incapacitated person. This imaging may be introduced into evidence in any civil or criminal proceeding. The Court may impose restrictions as to the confidentiality of such evidence.

3. Recorded Statements – Recordings without permission

8.01-420.2. Limitation on use of recorded conversations as evidence.

No mechanical recording, electronic or otherwise, of a telephone conversation shall be admitted into evidence in any civil proceeding unless (i) all parties to the conversation were aware the conversation was being recorded or (ii) the portion of the recording to be admitted contains admissions that, if true, would constitute criminal conduct which is the basis for the civil action, and one of the parties was aware of the recording and the proceeding is not one for divorce, separate maintenance or annulment of a marriage. The parties' knowledge of the recording pursuant to clause (i) shall be demonstrated by a declaration at the beginning of the recorded portion of the conversation to be admitted into evidence that the conversation is being recorded. This section shall not apply to emergency reporting systems operated by police and fire departments and by emergency medical services agencies, nor to any communications common carrier utilizing service observing or random monitoring pursuant to § 19.2-62.

B. Criminal Statutes

1. Va. Code § 18.2-369 - Abuse and neglect of incapacitated adult

A. It is unlawful for any responsible person to abuse or neglect any incapacitated adult as defined in this section. Any responsible person who abuses or neglects an incapacitated adult in violation of this section and the abuse or neglect does not result in serious bodily injury or disease to the incapacitated adult is guilty of a Class 1 misdemeanor. Any responsible person who is convicted of a second or subsequent offense under this subsection is guilty of a Class 6 felony.

B. Any responsible person who abuses or neglects an incapacitated adult in violation of this section and the abuse or neglect results in serious bodily injury or disease to the incapacitated adult is guilty of a Class 4 felony. Any responsible person who abuses or neglects an incapacitated adult in violation of this section and the abuse or neglect results in the death of the incapacitated adult is guilty of a Class 3 felony.

C. Definitions

"Abuse" means (i) knowing and willful conduct that causes physical injury or pain or (ii) knowing and willful use of physical restraint, including confinement, as punishment, for convenience or as a substitute for treatment, except where such conduct or physical restraint, including confinement, is a part of care or treatment and is in furtherance of the health and safety of the incapacitated person.

"Neglect" means the knowing and willful failure by a responsible person to provide treatment, care, goods or services which results in injury to the health or endangers the safety of an incapacitated adult.

"Incapacitated adult" means any person 18 years of age or older who is impaired by reason of mental illness, intellectual disability, physical illness or disability, advanced age or other causes to the extent the adult lacks sufficient understanding or capacity to make, communicate or carry out reasonable decisions concerning his well-being.

Relevant case decisions:

Correll v. Commonwealth, 591 S.E.2d 712, 42 Va. App 311 (2004)

Ms. Correll was convicted of abusing her elderly mother. Her mother had suffered significant weight loss due to malnutrition. She also suffered from dehydration, bed sores and a fractured hip. Defendant argued that the mother had advanced illnesses and that there was insufficient proof of knowing and willful neglect. Various healthcare providers testified about the alleged neglect and failure to follow care instructions. The court found that there was sufficient evidence to support the fact finder's conclusion of willfulness, including her severe dehydration and emaciated state upon admission to the hospital. It also found that the bed sores (a/k/a pressure sores or decubitus ulcers) contributed to her life-threatening state and would have taken several weeks to develop. The medical examiner also testified that the mother had no condition that would have prevented her from eating or absorbing nutrients from food. Defendant was sentenced to two years in prison with one year and 11 months suspended.

Williams v. Commonwealth, Record No. 1926-08-4 (2009)

Appellant/defendant was convicted of abuse of an incapacitated adult under Va. Code 18.2-369(B) and argued she was not a responsible person under the relevant definition. Paramedics found the victim in a poor state of health in an insect infested unit that smelled of urine and had 10 piles of cat feces. He had a stage III pressure wound on his leg and his feet were infested with maggots. Defendant, a home health aide employed by Sierra Home Health, argued that she was not a responsible person and that her duties were limited to light housekeeping, toileting, meals and bathing. The court found that the home health aide had sufficient relationship with the victim "by contract" that made her a responsible

party and that she also accepted compensation for the victim's care. The fact that a nurse also had care responsibilities for the victim did not impact the Court's decision that Williams was also a responsible person under the statute.

2. Va. Code § 63.2-100 – Adult Abuse, Neglect & Exploitation

"Adult abuse" means the willful infliction of physical pain, injury or mental anguish or unreasonable confinement of an adult as defined in § 63.2-1603.

"Adult neglect" means that an adult as defined in § 63.2-1603 is living under such circumstances that he is not able to provide for himself or is not being provided services necessary to maintain his physical and mental health and that the failure to receive such necessary services impairs or threatens to impair his well-being. However, no adult shall be considered neglected solely on the basis that such adult is receiving religious nonmedical treatment or religious nonmedical nursing care in lieu of medical care, provided that such treatment or care is performed in good faith and in accordance with the religious practices of the adult and there is a written or oral expression of consent by that adult.

"Adult exploitation" means the illegal, unauthorized, improper, or fraudulent use of an adult as defined in § 63.2-1603 or his funds, property, benefits, resources, or other assets for another's profit, benefit, or advantage, including a caregiver or person serving in a fiduciary capacity, or that deprives the adult of his rightful use of or access to such funds, property, benefits, resources, or other assets. "Adult exploitation" includes (i) an intentional breach of a fiduciary obligation to an adult to his detriment or an intentional failure to use the financial resources of an adult in a manner that results in neglect of such adult; (ii) the acquisition, possession, or control of an adult's financial resources or property through the use of undue influence, coercion, or duress; and (iii) forcing or coercing an adult to pay for goods or services or perform services against his will for another's profit, benefit, or advantage if the adult did not agree, or was tricked, misled, or defrauded into agreeing, to pay for such goods or services or to perform such service

Relevant case holdings:

Moore v. Brown, 63 Va.App. 375, 758 S.E.2d 68 (Va. App. 2014)

DSS made an administrative finding that Mr. Moore committed an act of sexual abuse while he acted as a "person responsible for [the child's] care. Moore argued he only lived in the house and was not responsible for the child's care. The Court of Appeals reversed the finding, holding that Mr. Moore's presence in the house, standing alone, was insufficient to establish that he was responsible for the child's care.

A.H. V. Church of God in Christ, 831 S.E.2d 460 (2019).

Plaintiff minor brought charges against a church for failing to prevent sexual abuse by a deacon who was later convicted of sexual abuse. Plaintiff argued that the church was negligent as a matter of law (negligence per se) for failing to report suspected abuse under Va. Code 63.2-100. The Court found that while the reporting statute may have set a standard of care for reporting, it did not create a legal duty sufficient to support a negligence per se claim.

Va. Department of Social Services v. Betts, Record No. 1447-17 (2018) Case involved an appeal from findings of abuse made by DSS against the Defendant/Appellee. The hearing officer determined that the evidence supported a finding of 'level three abuse,' which is defined as 'those injuries/conditions, real or threatened, that result in minimal harm to a child.' 22 V.A.C. 40-700-20." The Court was not persuaded that the General Assembly intended for the language "threatens to create or inflict injury" to apply when there is no evidence that an "actual injury" exists or when vague allegations and mere suggestions of prohibited conduct are claimed, yet are not proven by the applicable evidentiary standard.

§ 63.2-1603. Protection of adults; definitions.

As used in this article:

"Adult" means any person 60 years of age or older, or any person 18 years of age or older who is incapacitated and who resides in the Commonwealth; provided, however, "adult" may include qualifying nonresidents who are temporarily in the Commonwealth and who are in need of temporary or emergency protective services.

"Incapacitated person" means any adult who is impaired by reason of mental illness, intellectual disability, physical illness or disability, advanced age or other causes to the extent that the adult lacks sufficient understanding or capacity to make, communicate or carry out responsible decisions concerning his or her well-being.

3. Va. Code § 18.2-178.1 Financial Exploitation of mentally incapacitated persons

A. It is unlawful for any person who knows or should know that another person suffers from mental incapacity to, through the use of that other person's mental incapacity, take, obtain, or convert money or other thing of value belonging to that other person with the intent to permanently deprive him thereof. Any person who violates this section shall be deemed guilty of larceny.

D. As used in this section, "**mental incapacity**" means that condition of a person existing at the time of the offense described in subsection A that prevents him

from understanding the nature or consequences of the transaction or disposition of money or other thing of value involved in such offense.

C. Practical Considerations

1. Broad Scope of Criminal Adult Neglect

As the above definitions make clear, adult neglect involves any failure to provide services necessary to maintain the physical or mental health of the victim. Unlike adult abuse, intent is not necessary. In fact, an actual injury is not necessary as the neglect need only threaten to impair his well-being.

The definition of neglect of an incapacitated adult is more narrow, as it requires the **knowing and willful** failure by a responsible person to provide treatment, care, goods or services. Such intent can be established through inference, especially where the healthcare provider would have knowledge that the failure to provide care would put the patient at risk.

2. Limited, selective prosecutions.

A survey of Virginia cases shows very limited published cases where providers have been prosecuted under the abuse and neglect statutes. With the exception of sexual abuse or severe neglect as exemplified by the *Correll v. Commonwealth*, prosecutors seem reluctant to prosecute family members or even healthcare providers absent egregious facts showing either physical abuse or severe neglect. In the authors opinion, this reality is a product of multiple factors.

1. Lack of proper investigations and supporting evidence:

The *Correll* and *Williams* cases were unique in that there was ample medical evidence to support the neglect in situations where the victims were found in deplorable conditions. Direct caregivers initiated timely complaints allowing an early investigation and the development of critical medical testimony. The conditions that the medical providers diagnosed: malnutrition, severe weight loss, poor hygiene and pressure wounds, are not uncommon outcomes in some Virginia nursing homes and assisted living facilities. However, criminal cases are rarely prosecuted against long term care facilities, who arguably are more culpable than family members who may not fully understand the implications of prolonged immobility and poor nutrition. In other words, intent is easier to prove against trained healthcare providers as they are educated to understand that if certain care is not provided, the patients will suffer harm.

Investigators handling abuse and neglect cases should always secure the complete facility chart (with audit trails for electronic records) and interview treating providers, especially the direct care nursing staff. They should also secure facility investigative reports, staff information sheets (part of the schedule)

interviews and incident reports.¹ Finally 911 calls and EMT reports and interviews can yield important, incriminating information.

2. Lack of proper and timely reporting

Many healthcare providers who have reporting obligations do not fulfill their duty to report neglect and abuse. An annual report from the Adult Protective Services division shows that in 2020 the groups most likely to report abuse and neglect were relatives (3,979 reports), financial institutions (3,979) and social workers (3,115).² Healthcare providers, who arguably would be in the best position to assess neglect and abuse, had significantly lower reporting, with doctors making only 521 reports and hospital staff making 1,473 reports.

Ironically the doctors and nurses would be in the best position to determine whether an adverse event like a pressure wound or malnutrition was due to the patients' underlying medical condition. However, these providers are often put in a conflict of interest situation, especially where the nurses work in the facility that caused the neglect.

Many hospitals also have ongoing referral relationships with nursing facilities, which could be threatened by a doctor who repeatedly reports a referring facility for criminal neglect. Moreover, many doctors hate being dragged into Court to testify against other healthcare providers. Finally, the relatively small fine (\$500) and rare prosecution of individuals for non-reporting provides little motivation against these competing motivations.

3. Lack of resources and training for investigators and prosecutors.

The author handled a wrongful death dehydration case two years ago where a patient suffered from severe dehydration and died from related complications. The patient's attending doctor made a timely report to the police and wrote a detailed report outlining many of the same neglect issues seen in the *Correll* case. The case was complicated by the fact that the death certificate did not state that dehydration was the cause of death.

¹ Facilities may try and hide behind the peer review privilege in refusing to produce incident reports. Under 22 VAC 40-73-70, every nursing home must "report to the regional licensing office within 24 hours any major incident that negatively affected or threatens the life, health, safety or welfare of any resident." The Virginia Supreme Court has also held that facilities cannot shield incident reports under the quality assure or peer review privileges. See, *Riverside Hosp. v. Johnson*, 272 Va. 518, 532-533 (2006)(Holding that investigative documents, even if they were produced to a peer review committee, could not be shielded from discovery).

² Department of Aging and rehabilitation services, fiscal year 2020 annual report.
(https://www.vadars.org/downloads/publications/SFY%202020_Report_FINAL.pdf)

Despite compelling evidence of neglect, the local police did not undertake a proper investigation. While the facility was investigated and cited by their licensing authority for related deficiencies, no criminal charges were ever pursued. The local police did not have the resources in terms of medical experts or trained investigators to understand the medical and nursing issues. They recommended my client pursue a civil case, which lead to my involvement and a confidential settlement after two years of litigation.

4. Complicated medical issues create difficult medical proof issues

The prosecution of healthcare neglect requires trained healthcare professionals who can distinguish between adverse outcomes that are due to neglect versus the patient's underlying medical condition. The U.S. Justice department makes use of such investigators and experts, but most local police and prosecutors do not have such resources. Retained medical experts can be very expensive. However, as in the *Correll* case, investigators need to interview treating doctors to develop testimony that the patient's conditions (pressure wounds, malnutrition, severe dehydration) were avoidable with proper care.

I. Dealing with a victim's death & consideration of independent autopsies

A. Investigative Considerations

Where a victim dies under suspicious circumstances in a long-term care facility, an outside autopsy should be completed. Death certificates are frequently inaccurate, representing the provider's best guess of what caused the death. And where such death certificates are completed by doctors affiliated with the nursing facility, they frequently fail to include causes of death that may implicate neglect or malpractice. Due to the inaccuracy of many death certificates, it is important to make timely referrals to the medical examiners office or encourage the family to seek an independent autopsy.

1. Where is the patient going to expire?

Often the location where the patient expires will impact upon the cause of death determination. Whenever possible, the patient is better served by being hospitalized after a life-threatening injury or illness. A full medical work up may save the patient's life, but if he does expire in the hospital, there is a better chance that the cause of death will be accurately reported and that the underlying criminal neglect will be reported to the appropriate authority. Hospital physicians tend to be more objective, and they will also have the benefit of recent medical information, labs and other diagnostics that provide a more accurate picture of the conditions that led to death.

2. Should an independent autopsy be performed?

While independent autopsies can be expensive, between \$5,000 and \$10,000 dollars, they are an option where the Virginia Medical Examiner's office declines to get involved.

Death certificates are often generated quickly, typically on the day the patient passes away. If the certificate reflects a cause of death that is likely inaccurate, the family will have a brief opportunity to conduct an autopsy before the burial. However, you must reach out to the funeral director immediately, explain the decision and make immediate arrangements for the physical autopsy, which can take place at the funeral home. Funeral directors can be a great source of information and they are usually motivated to help the family that is paying significant sums for the funeral services. They may have knowledge of other people who died at the local facility under circumstances suggesting neglect. Funeral home directors can also request an examination by the medical examiner if they believe it is warranted.

3. Virginia law – when to seek an independent autopsy

As the below statute makes clear, any time the resident dies from apparent trauma, accident or injury, a medical examiner should be notified. However, they have the authority, as they often do, to refuse to undertake an examination. In addition, if the healthcare provider does not believe the death was caused by trauma or injury, he or she may not make the referral.

It would be wise to pursue a medical examiner review any time the cause of death is unexpected or related to some trauma or fracture injury. In the first 6 months, hip fractures carry high rates of mortality from the fracture and related complications. A medical examiner will be more likely to consider all potential causes, as opposed to the immediate cause of death. In my experience, a medical examiner is more likely to reflect a hip fracture or pressure wound as a contributing cause of death than a treating healthcare provider, especially if that provider is affiliated with the facility that caused the injury.

4. Va. Code 32.1-263 (effective Jan 1, 2020)

263(C) The medical certification shall be completed and filed electronically with the State Registrar of Vital Records using the Electronic Death Registration System **within 24 hours** after death **by the physician in charge of the patient's care for the illness or condition which resulted in death** except when inquiry or investigation by the Office of the Chief Medical Examiner is required by § 32.1-283 or 32.1-285.1, or by the physician that pronounces death pursuant to § 54.1-2972. If the death occurred while under the care of a hospice provider, the medical certification shall be completed by the decedent's health care provider and filed electronically with the State Registrar of Vital Records using the Electronic Death Registration System for completion of the death certificate.

263 (D) When inquiry or investigation by the Office of the Chief Medical Examiner is required by § 32.1-283 or 32.1-285.1, the Chief Medical Examiner shall cause an investigation of the cause of death to be made and the medical certification portion of the death certificate to be completed and signed within 24 hours after being notified of the death. If the Office of the Chief Medical Examiner refuses jurisdiction, the physician last furnishing medical care to the deceased shall prepare and sign the medical certification portion of the death certificate.

5. Va. Code § 32.1-283 – Investigation required where death occurs from trauma, injury accident, or suddenly when in apparent good health...

A. Upon the death of any person from trauma, injury, violence, poisoning, accident, suicide or homicide, or suddenly when in apparent good health, or when unattended by a physician, or in jail, prison, other correctional institution or in police custody, or who is an individual receiving services in a state hospital or training center operated by the Department of Behavioral Health and Developmental Services, or suddenly as an apparent result of fire, or in any suspicious, unusual or unnatural manner, or the sudden death of any infant the **Office of the Chief Medical Examiner shall be notified by the physician in attendance, hospital, law-enforcement officer, funeral director, or any other person having knowledge of such death . .** (emphasis added)

B. Upon being notified of a death as provided in subsection A, the Office of the Chief Medical Examiner shall take charge of the dead body and the Chief Medical Examiner shall cause an investigation into the cause and manner of death to be made and a full report, which shall include written findings, to be prepared. In order to facilitate the investigation, the Office of the Chief Medical Examiner is authorized to inspect and copy the pertinent medical records of the decedent whose death is the subject of the investigation. Full directions as to the nature, character, and extent of the investigation to be made in such cases shall be furnished each medical examiner appointed pursuant to § 32.1-282 by the Office of the Chief Medical Examiner, together with appropriate forms for the required reports and instructions for their use

6. Practical Considerations

The Virginia Medical Examiner's Office has limited resources and typically focuses on criminal cases. However, where there are clear signs of severe neglect or physical abuse leading to the death of an elder, they may get involved in the case. It is therefore important to build a record of failures in care that support the neglect of the patient.

A proper investigation should include not only a review the records, but interviews with the primary caretakers, a review the patient's labs and discussions with the family members who are often ignored in Department of Health investigation, unless they reported the case.

7. Death Certificates Findings Inadmissible Absent Doctor's Foundation Testimony

- *Edwards v. Jackson*, 210 Va. 450, 171 S.E. 2d 854 (1970)
Error to admit death certificate findings without the foundation testimony of the doctor.
- *Bailey v. Adm 'x v. C.V. Hunter Inc*, 207 Va 123, 148 S.E.2d 826 (1966)
While death certificate is *prima facie* evidence of the facts contained therein, it is inadmissible to prove cause of death.

If you have additional questions or need additional reference material, do not hesitate to contact my office directly.

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