

Legal Issues



By Janet K. Feldkamp, JD, RN, LNHA

Choking Carries Significant Risk for Residents and Facilities

Many residents in long-term care facilities have multiple impairments that often include difficulty chewing and swallowing. Several recent lawsuits alleging negligence against nursing facilities should remind providers that impaired swallowing and potential choking are serious daily risks, at multiple levels, in the care of residents.

In January of this year, a Wisconsin jury awarded \$1.5 million to the mother of a developmentally disabled woman who choked to death in a nursing facility. The allegations included failure to provide the pureed food that a dietician had ordered and to adequately supervise her eating. The resident was in her early fifties and blind, with various developmental disabilities and swallowing deficits. The court record suggests that reduced staffing may have played a part in the incident, as it occurred during inclement weather in early 2009.

Similarly last November, a jury awarded a Michigan family \$2.5 million in compensation from a nursing home after a 56-year-old resident allegedly choked on a large meatball. The family charged that the facility failed to provide a diet of the appropriate texture and lacked staff trained to safely and quickly perform the Heimlich maneuver. The suit also alleged that

the resident was wheeled from the dining room before receiving treatment to unblock his airway and that a staff member wrongfully used a hand-held respiratory resuscitation bag, which potentially forced the food lodged in the resident's airway farther down into the respiratory tract.

Also, a pending suit filed in 2011 in Kentucky alleges that a delay in treatment of a choking resident resulted in her death. The woman's family charges that the facility knew that the resident had swallowing difficulties and required a diet of pureed consistency. While the resident was being fed, she started "gurgling," according to the complaint. When a nurse was summoned, precious time was spent cleaning a dirty suction machine before it could be used in emergency first aid to unblock the airway. The suit also alleges falsification by the facility of documentation related to the choking.

In addition to such negligence suits, facilities are at risk of significant survey citations for inappropriate assessment of residents with swallowing deficits, inadequate care planning, and failure to implement needed interventions for them. A number of Centers for Medicare & Medicaid Services Departmental Appeals Board

cases have cited nursing homes for putting residents in immediate jeopardy of choking.

Although the standards that apply to citations differ from those that negligence lawsuits typically claim, the practical application of good preventive care for the residents applies. Citations of immediate jeopardy can result in federal fines of \$3,050–\$10,000 per day and, often, additional state fines and sanctions. Cases in which citations have been imposed may also result in civil lawsuits.

A balance must be struck between a resident's right to choose and the health care provider's obligation to reduce the risk of choking.

As with most situations in long-term care, the elements of risk to a resident are complex and varied. Each of the lawsuits described above included a number of elements that the facility should have considered in assessing and providing care for its residents. Possible ways to reduce the risk of choking include:

- ▶ **Assessment.** Each resident should be properly and periodically assessed for swallowing deficits and, when appropriate, therapies and modified diets ordered.
- ▶ **Therapy Follow-Through.** Modified diets, including thickened liquids as indicated by assessment, should be ordered and consistently delivered to match the needs of the resident.
- ▶ **Supervision.** Adequate staff, both in number and clinical expertise, should supervise residents while they eat in either the dining hall or a resident's room. This level of care may require extra staffing, but is necessary if an assessment has identified a swallowing deficit needing supervision.
- ▶ **Appropriate Equipment.** Emergency airway clearance equipment should be immediately available and in working order.
- ▶ **Adequately Trained Staff.** All staff should have documentation of current training on basic life support and rescue skills, including the Heimlich maneuver.
- ▶ **Identification of Code Status.** Staff must be aware of each resident's code or resuscitation status in case of an

emergency situation such as a heart attack or choking incident. However, generally accepted rescue protocols demand that anyone who is choking must have attempts made to clear the airway, including the Heimlich maneuver, even if he or she has "No Code" status.

Resident choice is an important consideration when addressing areas as personal as eating and food choices. A balance must be struck between a resident's right to choose and the health care provider's obligation to reduce the risk of choking. A provider must understand whether the resident is legally the decision maker for his or her care or if a guardian or other surrogate has that authority.

Facility staff should convey verbally and in writing the risks and benefits of following or not following professional dietary recommendations. Only this can provide enough information for an informed decision by the resident or other decision maker.

Adequate supervision of all residents during meals is an important safety issue, particularly for residents with chewing and swallowing deficits. Even supervision during activities involving snacks should be routinely reviewed to assure that it is adequate to meet the changing needs of the resident population. Without ongoing review of the residents' needs, the provider is not fulfilling the supervision requirements of state surveys or practice that can avoid malpractice charges.

Proactive medical directors, administrators, directors of nursing, and directors of staff development can provide direction to the management team through the quality assurance process. The medical director especially should occasionally visit residents during meals to see whether reasonable safety measures are in place. Each meal of the day presents a different challenge for caregivers. With good oversight and guidance, residents' risk of choking can be reduced and their dining experience enhanced. Don't be caught unaware of the many risks to providers, as well, when a resident is receiving a modified diet because of known swallowing and chewing deficits.

This column is not to be substituted for legal advice. The writer, JANET K. FELDKAMP, practices in various aspects of health care, including long-term care survey and certification, certificate of need, health care acquisitions, physician and nurse practice, managed care and nursing related issues, and fraud and abuse. She is affiliated with Benesch Friedlander Coplan & Aronoff LLP of Columbus, Ohio.

Medical Expert Perspective

Negative patient outcomes related to aspiration and choking are fairly commonplace in the long-term care setting. As dementia progresses, increasing problems with dysphagia are expected. Not all aspiration events can be prevented in these patients, who can even aspirate on their own saliva.

But clearly, we need to do what we can, using the tools outlined above, to prevent bad outcomes. Documentation of informed consent is always a good idea, as is education of the patient and family about risks, burdens, and benefits and alternatives to interventions such as modified diets, thickened liquids, and feeding tubes.

Sometimes patients and families elect to go against medical recommendations, and they should be allowed to do that. I have seen patients who show silent aspiration in a swallow study do just fine on thin liquids, if they (or a surrogate decision maker) signs a consent or an "against medical advice" form. On the other hand, I have also seen patients promptly aspirate and succumb to aspiration pneumonia in these situations.

Remember to make your processes person centered. Also be mindful of the difficulties that families have when talking about deteriorating nutritional status in patients with worsening dysphagia, including dementia, Parkinson's disease, amyotrophic lateral sclerosis, and other neurodegenerative conditions.

Consideration of tube feeding should be discussed and documented for dysphagia patients, but the literature suggests that we should discourage enteral feeding in dementia, because it provides no survival benefit, increases risks, and does not improve quality of life. When a patient or family chooses not to initiate tube feeding, that decision should also be documented.

Finally, it is wise to let patients and families know what kinds of complications can be expected as oral intake decreases, including unavoidable, end-of-life skin breakdown, dehydration, and weight loss. When people are prepared for these outcomes, they are more likely to accept the natural process and less likely to initiate emotion-based lawsuits when "bad things" do happen.

—Karl Steinberg, MD, CMD, Editor in Chief