

## Choking Death: Court Finds Evidence For The Family's Negligence Lawsuit To Go Forward.

The sixty-eight year-old nursing home resident had alcohol-related dementia and complications from a stroke. He could not speak and had difficulty swallowing.

He choked on his dinner in the dining room. Before he died several nursing home employees tried the Heimlich maneuver and paramedics removed pieces of food from his trachea.

The family's lawsuit alleged the nursing home failed to set up a suitable care plan, failed to change or adjust the care plan as needed and failed to provide adequate staffing.

The resident's family's expert witness was a registered nurse on the malpractice side of the case, the care planning and staffing issues. The facility's expert witness was a physician. The New York Supreme Court, Appellate

***The incident report revealed that the CNA assigned to supervise the resident in the dining room was passing trays to other residents when the resident choked on his food.***

***The resident may have had a heart attack or a stroke right before he died, as the facility claimed, but that is not necessarily inconsistent with choking as the cause of death.***

NEW YORK SUPREME COURT  
APPELLATE DIVISION  
April 1, 2011

Division, accepted the physician's opinion that the facility's care planning for the resident and the staffing levels fully met the standard of care.

However, family's lawsuit still had legs to stand on. The charge nurse's incident report revealed that the CNA who was supposed to be closely supervising this resident while he ate was passing trays to other residents.

A non-licensed staff member's failure to follow simple explicit directions from the physician to supervise a resident closely who is eating does not involve an error or omission in the exercise of professional judgment.

The law's name for that is ordinary negligence which, unlike professional negligence, does not require expert testimony to prove to a jury. ***Carthon v. Buffalo Gen. Hosp.***, \_\_ N.Y.S.2d \_\_, 2011 WL 1219255 (N.Y. App., April 1, 2011).