

PART III: LEGAL ADVOCACY

(Following is a section of our report focusing on legal advocacy to protect nursing home residents. The full report is available at www.nursinghome411.org.)

There are many reasons why it is rare for a nursing home case of neglect or abuse to wind up in court. The frailty of nursing home residents, who are, of course, the direct consumers of nursing home care, is a major impediment; unlike other consumer-provider relationships, most residents cannot walk out of a facility and hire an attorney from the safety of their home or another locale. Their lives, literally, depend on the people they would be accusing of wrongdoing. Indeed, the fear of retaliation is a major impediment to residents filing complaints within the system – to state overseers or ombudsmen – no matter to taking the more serious step of seeking help from an attorney and filing a lawsuit. Pragmatically, even if a resident or family were willing to sue, the odds of a substantive win have been remote. Under traditional legal conceptions of damages, monetary rewards for nursing home abuse and neglect are hard to prove.

Though, as a recent study found, “the legal system’s traditional response to concerns about the quality of long term care has been regulation,” our investigation turned up a number of examples of innovation in the use of the legal system to tackle nursing home problems.

Following is an overview of causes of action - bases for suing – which have been used successfully in legal advocacy, a review of some state level innovations (both laws and court cases), and a list references for further information and exploration.

Causes of Action

- **Negligence:** A claim of negligence is a logical cause of action in nursing home cases since it requires a duty; violation of that duty; proximate cause; and damages. In addition, “negligence *per se* is a very important cause of action in nursing home cases. The theory of negligence *per se* is based on the reasoning that the statute or regulation sets the standard of care. The unexcused violation of a legislative enactment or administrative regulation is therefore negligence in itself.”¹
- **Wrongful death** (self-explanatory).

¹ *Nursing Home Litigation* (available at http://www.nursing-home-abuse-resource.com/care_center/nursinghome-litigation.pdf).

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- **Intentional tort:** A deliberate act that causes harm to, for which the victim may sue the wrongdoer. Examples in a nursing home include sexual assault, assault and battery. In this situation, the nursing home would likely be responsible for the actions of an employee.
- **Negligent hiring and supervision:** “An ongoing problem in nursing home cases is that, despite specified regulations to the contrary, nursing homes remain understaffed as to all employees and particularly understaffed in the more expensive positions, such as Registered Nurses and LVN=s. Nurse aides with poor salaries, too little training and little experience provide almost all of the care. Therefore, negligent hiring and supervision of personnel is an ongoing problem. An example of this type of claim in a hospital is found in *St. Paul Medical Center v. Cucil*, 842, S.W.2d 808 (Tex.App.-Dallas 1992, no writ).”²
- **Loss of consortium:** Loss of consortium involves a claim by a loved one of the resident – typically a spouse or child – for their suffering as a result of the resident’s abuse, unnecessarily deteriorated condition, etc...
- **Third party responsibility claim:**
 - A nursing home can be found liable because of acts of a third party when the nursing home fails to protect residents from other residents or others in the home. A resident may be injured, assaulted or sexually assaulted by another resident.
 - In addition to suing the nursing home, other relevant parties can be sued, including the administrator, director of nursing, any direct care worker that could be responsible (for example, if there is a claim of failure to give medication, one might sue the medication aide).
- **Breach of statutory or regulatory rights, duties or responsibilities:** Suitable for injuries such as violations of residents’ right to autonomy, dignity, or privacy.

² *Ibid.*

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State Innovations

The following is a subjective review of noteworthy activities on the state level, a product of inquiries made to approximately 35 state attorneys general, discussions with advocates and state officials and research of case law, law journals and other relevant publications.

Alabama

State court allowed class action complaint to be brought against nursing home chain that requires residents to sign admissions agreements with arbitration clause.³

California

1. The California Supreme Court's decision in *Covenant Care, Inc. v. Superior Court* (86 P.3d 290) held that procedural requirements for alleging punitive damages in malpractice actions did not apply in claims asserted under the Elder Abuse and Dependent Adult Civil Protection Act. The Act provides prevailing plaintiffs with the possibility of noneconomic damages, punitive damages, and attorneys' fees where there is proof of physical abuse, neglect, or fiduciary abuse of elderly or dependent adults.⁴

2. Chapter 980, a state law passed in 1998, enhances protections for elders and dependent adults by expanding the categories of reportable types of elder abuse to include abandonment, isolation, neglect, and financial abuse. Prior to Chapter 980, existing law required mandated reporters to report only actual or apparent physical abuse, not isolation, financial abuse, or neglect. The definition of "mandated reporter" is also expanded by Chapter 980 to include any person who has assumed full or intermittent care for an elder or dependent adult. To streamline the process of reporting, investigating, and prosecuting elder abuse that occurs in long term care facilities, Chapter 980 requires that reports of abuse or neglect in long term care facilities be forwarded immediately to

³ *Cockrell v. HIS* (available at http://www.nslc.org/news/03/06/Cockrell_IHS_arbagree.pdf).

⁴ See *Expeditious Efforts for the Elderly: Covenant Care, Inc. v. Superior Court*, Bernadette Stafford, 39 U.C. Davis L. Rev. 699 and *Heart of Stone: What Is Revealed About the Attitude of Compassionate Conservatives Toward Nursing Home Practices, Tort Reform, and Noneconomic Damages*, Michael L. Rustad, 35 NMLR 337.

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the State Department of Health Services, and that reports of criminal abuse or neglect in long term care facilities be forwarded as well to the Bureau of Medi-Cal Fraud. Where the alleged abuse has occurred in a state mental hospital or developmental center, the incident must be reported to investigators of the State Department of Mental Health, the State Department of Developmental Services, or a local law enforcement agency, and reports of known or suspected criminal activity must be forwarded as soon as practicable to the Bureau of Medi-Cal Fraud. In addition, Chapter 980 declares that training regarding how and when to report suspected incidents of criminal elder abuse in a facility setting will be provided by the Bureau of Medi-Cal Fraud. Mandated reporters who violate Chapter 980 by willfully failing to report "physical abuse, abandonment, isolation, financial abuse or neglect of an elder or dependent adult" can be sentenced to up to one year in county jail, fined up to \$ 5,000, or both. Furthermore, Chapter 980 emphasizes the confidential nature of abuse reports, and clarifies how and to whom reports of elder abuse may be disclosed.

To address this and other weaknesses in traditional civil actions against elder-abusers, the California Legislature enacted the Elder Abuse and Dependent Adult Civil Protection Act (EADACPA). This Act provides for the reporting of actual or suspected abuse of an elder, delineates special requirements for mandated reporters, and authorizes APS to conduct investigations and provide other services in response to elder abuse reports. As discussed in Part IV.D, *supra*, implementation of Chapter 980 into the EADACPA should dramatically impact the reporting aspect of elder abuse law, both in the civil and criminal arenas.

EADACPA applies generally to cases involving elderly victims of abuse, regardless of whether the victim is living at home in the community or in a long term care setting. However, California's elderly victims have faced judicial obstacles blocking achievement of full recovery under the EADACPA where the abusive act arose in the context of provision of medical services in long term care facilities. Achieving full EADACPA recovery for victims abused in long-term care settings is particularly important, in light of well-documented reports of extensive abuse and neglect of elderly persons residing in skilled nursing facilities.

Louisiana

Louisiana has a Nursing Home Patient's Bill of Rights which allowed for damages and attorney fees against homes who violated the rights of residents who required extra protection because of their infirmity and isolation from the community. **Unfortunately** in 2003 the state legislature

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did away with the right to seek damages or attorney fees for these violations. ⁵ The example in Louisiana serves as a reminder to consumer advocates and pro-senior policy makers that vigilance is required even after a fight appears to have been won.

Massachusetts

In September 2003, Attorney General Reilly's office sent a letter to the administrators of all nursing home facilities located in Massachusetts reminding them of the requirements they must meet before moving a resident to a different room within the same nursing home facility against the resident's wishes.

The Attorney General's Elder Abuse Project is a training grant to help professionals across the state to address the growing issue of elder abuse. The project is funded by the Office on Violence Against Women at the United States Department of Justice. This project seeks to improve the capacity of law enforcement, including police, prosecutors, victim-witness advocates, probation officers, and elder services professionals to more effectively recognize, investigate and prosecute a wide range of abuse perpetrated against older individuals.

A multidisciplinary steering committee meets at six to eight week intervals to plan and develop training conferences, materials and resources to address the needs of vulnerable elders in our state. Committee representatives include the Massachusetts District Attorneys Association,

⁵ The following came from one Louisiana attorneys we spoke to:

The nursing home lobby in Louisiana successfully stripped away these citizens rights and now only injunctive relief is available. In addition, the nursing homes now fall under the protection of Louisiana's "medical malpractice act" by joining as a "qualified health care provider" to be a member of the Louisiana Patient's Compensation Fund which allows protection and a cap on damages of \$100,000 by the provider and \$ 400,000 from the PCF.

The nursing home lobby ALSO included their management companies, their owners, corporations now as "qualified health care providers" to receive protections under the cap of only \$100,000. We need HELP in Louisiana. The nursing home lobby has over 90% of our Medicaid funds, controls our legislature and continues to strip away any rights they may have. The event of Katrina victims dieing in nursing homes in Louisiana captured a brief moment of attention from some in our nation. However, the happenings of what occurs daily throughout our state in long term care facilities is more appalling. Any exposure, assistance that can be given is so desperately needed. We don't have multimillion dollar verdicts because we have no punitives, we have caps, and no penalties left. However, we have a state full of victims who need help from capable attorneys who are willing to do so.

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Massachusetts Chiefs of Police Association, Executive Office of Health and Human Services, Executive Office of Elder Affairs, Massachusetts Department of Public Health, Jane Doe Inc., UMASS-Boston: Gerontology Institute, Municipal Police Training Committee, Massachusetts Senior Centers & Councils on Aging, and the Office of the Attorney General.

Five statewide training conferences were held between March 2004 and September 2005 covering an overview of elder abuse including forensic markers, financial exploitation, elder domestic violence and sexual assault and abuse in institutional settings. In addition, a police roll call video was produced to aid in the education of police on the issue of elder domestic violence and sexual assault. Model Elder Abuse Roundtable sessions have been held since early Spring 2005. These meetings continue to allow primary community stakeholders to explore new approaches, share information, and advance dialogue concerning elder abuse issues.

Minnesota

Gov. Tim Pawlenty has announced a new tool developed by the Minnesota departments of Human Services and Health to help consumers compare the quality of care in Minnesota nursing homes. The Minnesota Nursing Home Report Card⁶ is the first of its kind in the nation (generated by a state rather than a private group) to provide consumers with information on quality of life and resident satisfaction with respect to individual nursing homes, in addition to such objective data as hours of direct care, staff turnover, proportion of single rooms and state inspection results.

South Carolina

South Carolina has enacted the "Bill of Rights for Residents of Long term Care Facilities." [S.C. Code Ann. § 44-81-10](#), *et seq.* (2001). Essentially, this statute provides that "each resident must be treated with respect and dignity..." and specifically protects, among other things, a resident's right to choose a personal physician, to be free from physical and chemical restraints and privacy. [S.C. Code Ann. § 44-81-40](#) (2001).

Nonetheless, this statute does not provide for any private right of action. Accordingly, almost all of the litigation regarding nursing home abuse and neglect in South Carolina involves traditional common law remedies for negligence, gross negligence and breach of contract.⁷

⁶ <http://www.health.state.mn.us/nhreportcard/>.

⁷ See article by W. Andrew Arnold and Brian E. Arnold in *South Carolina Lawyer* magazine (14 S. Carolina Lawyer 28).

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Texas

1. "Granny Cams"

In 2001, Texas was the first state to enact a law dealing with granny cams. Under the statute, a nursing home or related institution "shall permit a resident or the resident's guardian...to monitor the room of the resident through the use of electronic monitoring devices." Residents are allowed to choose where in the room the cameras can be put. The statute requires express written consent of the resident or her guardian as well as the consent of any roommates.⁸

2. State law addressing abuse of the elderly

"A nursing home assumes the care, custody and control of the resident who is an elderly person. The nursing home assumes responsibility for protection, food, shelter and medical care of the resident. The nursing home violates Texas Penal Code Section 22.04 if, by omission, the nursing home intentionally, recklessly, or negligently causes bodily injury to the resident. Section 22.04 bases liability, among other things, on the fact that the nursing home assumed the care of the resident. It provides:

(a) A person commits an offense if he intentionally, knowingly, recklessly, or with criminal negligence, by act or intentionally, knowingly, or recklessly by omission, causes to a child, elderly individual, or disabled individual:

(1) serious bodily injury;

(2) serious mental deficiency, impairment, or injury; or

(3) bodily injury.

(b) An omission that causes a condition described by Subsections (a)(1) through (a)(3) is conduct constituting an offense under this section... (under certain circumstances)."⁹

Utah

The Utah Multidisciplinary Task Force (UMTF) is an effort to bring together private and public agencies that investigate, prosecute, or enforce sanctions against the abuse/neglect of people with disabilities. According to an advocate we spoke to in Utah, "Our goal is to identify systemic problems that hinder our abilities to effectively reduce abuse/neglect of people with disabilities and find ways to resolve those problems. Our current roster of members include the following agencies: Attorney General's Office- Medicaid Fraud Control Unit APS DCFS Dept. of Health- License, Certification, and Resident Assessment Dept. of Human Services- License and Certification Salt Lake County District Attorney's

⁸ See article by Tracey Kohl in *Fordham Urban Law Journal* (30 Fordham Urb. L.J. 2083).

⁹ <http://www.capitol.state.tx.us/statutes/docs/PE/content/htm/pe.005.00.000022.00.htm>.

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Office, Special Victims Unit Salt Lake City Police Salt Lake County Police Long Term Care Ombudsman Office of Public Guardian.”

The advocate reported that two major projects have come out of UMTF collaboration:

1) A training curriculum developed to train family members who are looking for long term care options or who currently have a loved one residing in a long term care facility. Topics are geared toward increasing family involvement and presence at the facility and include identifying/reporting abuse/neglect and advocating for resident needs in care plan meetings. The trainings are conducted by APS, the Ombudsman, and the Disability Law Center.

2) An identification of the problem that when long term care facility residents pass away at a hospital, the death is reported to the health department with no information that ties the individual's care to the facility from which they were transferred. Therefore, the problem for investigative agencies is the potential that negligent or abusive care is not accounted for in the reporting of the death. We were unable to get legislation to resolve this issue but have embarked on a pilot project with a local hospital, the Utah Hospital association, and our Vital Statistics department to have this information reported on a monthly basis and analyze the collected data for trends/need to establish this reporting in statute.

Legal References

Organizations/Websites Of Interest:

1. National Senior Citizens Law Center (www.nsclc.org).
2. Legal Services Corporation (www.lsc.gov).
3. American Bar Association Commission on Law and Aging (www.abanet.org/aging).
4. National Academy of Elder Law Attorneys (www.naela.com).
5. AARP (www.aarp.org/research/longtermcare/nursinghomes/).
6. Nursing Home Law Outline (www.mcguffey.net/NHlawoutline.html#top), one of many online resources provided by attorneys and law firms, this site provides a well-rounded and easy-to-use listing of articles, news stories, statutes, etc....

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Selected Resources On Elder Abuse

1. Safeguarding Our Seniors: Protecting the Elderly from Physical and Sexual Abuse in Nursing Homes: Hearing Before the Senate Spec. Comm. on Aging, 107th Cong. (2002).
2. *Protecting the Rights of Nursing Home Residents Through Litigation*, Steven M. Levin, III. *State Bar Journal* (January 1996).
3. See generally Nat'l Ctr. on Elder Abuse, *An Analysis of State Laws Addressing Elder Abuse, Neglect, and Exploitation* (1995) (listing prohibited behavior as defined by state laws covering elder abuse).
4. *The Nursing Home Reform Law: Issues for Litigation*, Toby S. Edelman, 24 *Clearinghouse Rev.* 545, 545-49 (1990).
5. *The Right to a Remedy: When Should an Abused Nursing Home Resident Sue?*, Susan J. Hemp, 2 *Elder L.J.* 195 (1994).
6. La. Rev. Stat. Ann. 14:93.3(A) (criminalizing mistreatment of elderly in nursing homes); Mass. Ann. Laws ch. 265, 38 (prohibiting by criminal penalty knowing and willful abuse, mistreatment, or neglect of a patient or resident of a nursing home); Tenn. Code Ann. 71-6-117 (1995) (stating, "It is unlawful for any person to willfully abuse, neglect or exploit any adult within the meaning of the provisions of this part. Any person who willfully abuses, neglects or exploits a person in violation of the provisions of this part commits a Class A misdemeanor."); Wyo. Stat. Ann. 35-20-109 (Michie 2001) (stating, "A person who abuses, neglects, exploits or abandons a disabled adult is guilty of a misdemeanor and upon conviction shall be fined not more than one thousand dollars.").
7. Definitions of abuse See Wash. Rev. Code Ann. 74.34.020(2) (West 2001) (The definition of abuse in Washington State is "the willful action or inaction that inflicts injury, unreasonable confinement, intimidation or punishment on a vulnerable adult."); see also Ariz. Rev. Stat. Ann. 46-451(A)(1) (West 1997) (Arizona defines abuse as the: "(a) Intentional infliction of physical harm; (b) Injury caused by negligent acts or omissions; (c) Unreasonable confinement; or (d) Sexual abuse or sexual assault"); Cal. Welf. & Inst. Code 15610.07 (West 1998) (California law defines elder abuse as "physical abuse, neglect, fiduciary abuse, abandonment, isolation or other treatment with resulting physical harm or pain or mental suffering. The deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering.").
8. *Legal Counsel for the Elderly, A Practical Guide to Nursing Home Advocacy* 88 (1990)

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Resources On The Issue Of Pain Mismanagement As A Form Of Abuse

1. *Mack v. Soung*, 95 Cal. Rptr. 2d 830, 834 (Cal. Ct. App. 2000). The court in Mack defined recklessness as "more than inadvertence, incompetence, unskillfulness, or failure to take precautions, but rather rises to the level of a conscious choice of a course of action with knowledge of the serious danger to others involved in it."
2. In 1990, the estate of Henry James sued the Guardian Care nursing home in North Carolina for the inadequate pain control of the decedent Henry James, a terminally ill cancer patient. Tinker Ready, *Nursing Home Is Fined*, News & Observer (Raleigh, N.C.), Nov. 27, 1990, at 1B. In this case, although the physicians had ordered adequate doses of morphine to be given every three hours for Mr. James' pain control, the nursing home's staff regularly substituted less powerful narcotics. Unfortunately, Mr. James was in pain caused by his cancer for seven months before he died. Quietly and ahead of its time, a North Carolina jury found the Guardian Care nursing home liable for violations of state Division of Facility Services regulations concerning the inadequate pain control of a terminally ill cancer patient. The jury awarded \$ 7.5 million in compensatory damages and \$ 7.5 million in punitive damages to the estate of Henry James. While suits against nursing homes for poor care are not unique, this case may be the first of its kind where a nursing home was held liable for inadequate pain control.
In *Bergman v. Chin*, No. H205732-1 (Cal. Super. Ct. June 13, 2001) the family of an eighty-five-year-old man sued the physician who failed to treat him adequately for the pain his cancer caused prior to his death, using elder abuse statutes and not the more conventional medical malpractice statutes. Natalie White, *Failure to Treat Pain, Novel Verdict Could Signal a New Brand of Med-Mal Suit*, Lawyer's Wkly. USA, Aug. 6, 2001 (<http://www.lawyersweeklyusa.com/subscriber/archives.cfm?page=/archives/usa/01/806011.htm>). Despite the fact that this case involved elder abuse laws, and not medical malpractice statutes, the trial judge reduced this \$ 1.5 million award to \$ 250,000 applying California's \$ 250,000 medical malpractice damage "cap." Marino, supra note 29, at 341-42 (citing Cal. Civ. Code 3333 (West 1995)). This author suggests that the verdict and the precedent it establishes may be a "self-inflicted wound" by organized medicine. The Bergman case began as a complaint to the California Medical Board, "which agreed the patient should have had better palliative care but took no action against the doctor." If the California Medical Board had even sent Dr. Chin a letter of reprimand, this suit may not have been filed. The Bergman estate claimed that Dr. Chin

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was reckless in not prescribing enough medication to relieve the pain from Mr. Bergman's lung cancer complications. In May 2001, a California jury awarded \$ 1.5 million to the Bergman estate.