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HONOR THY MOTHER AND FATHER: PREVENTING ELDER ABUSE THROUGH EDUCATION AND LITIGATION

Sande L. Buhai and James W. Gilliam, Jr.***

The elderly comprise one of the fastest growing groups in the United States.¹ Yet, problems involving abuse of the elderly have long been ignored.² Even when addressed, dealing with elder abuse brings its own unique set of problems.³ Most importantly, the law has the delicate task of balancing the protection of elderly persons while still respecting their personal autonomy.⁴ That is, although we desire to prevent elder abuse, we must be careful not to assume that

* Clinical Professor of Law, Loyola Law School. I would like to thank the firm of Wilkes & McHugh and especially Stephen Garcia for their support of the Elder Abuse Symposium. I would also like to thank the staff and editors of the *Loyola of Los Angeles Law Review* for their hard work on this Symposium. Finally, I would like to honor my parents, Marvin and Lorraine Buhai, for their lifelong support.

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1. See Seymour Moskowitz, *Golden Age in the Golden State: Contemporary Legal Developments in Elder Abuse and Neglect*, 36 LOY. L.A. L. REV. 589 (2003).

2. See Martin Ramey, Comment, *Putting the Cart Before the Horse: The Need to Re-examine Damage Caps in California's Elder Abuse Act*, 39 SAN DIEGO L. REV. 599, 602 (2002) (“[S]even out of every eight instances of [elder] abuse are never reported.”).

3. See Moskowitz, *supra* note 1, at 590–96.

4. See Kurt Eggert, *Lashed to the Mast and Crying for HELP: How Self-Limitation of Autonomy Can Protect Elders from Predatory Lending*, 36 LOY. L.A. L. REV. 693 (2003).

the elderly are incompetent. Other problems involve dealing with the severe impact of financial abuse⁵ and physical abuse.⁶ A senior's age, health, and limited finances make it difficult for him or her to fully recover from these types of abuse.⁷ Finally, the most recent General Accounting Office report shows significant problems in almost one-third of all California nursing homes.⁸

To address these difficult issues and to examine how the legal system can help resolve these problems, Loyola Law School held a Symposium on April 26, 2002, entitled *Honor Thy Mother and Father: Symposium on the Legal Aspects of Elder Abuse*.⁹ The Symposium focused on two approaches—academic and litigation—to solving the serious problem of elder abuse in our society. The first half of the Symposium consisted of three academic presentations discussing various aspects of elder abuse. In Part I of this Article, we provide a basic roadmap of these articles by Professor Seymour Moskowitz, Jeanne Finberg, and Professor Kurt Eggert.

The second half of the Symposium consisted of a panel discussion highlighting the cutting-edge issues in the litigation of elder abuse cases against skilled nursing facilities (i.e., nursing homes). Part II of this Article will attempt to summarize and explain some of those issues.

I. ROADMAP

In the comprehensive lead article, *Golden Age in the Golden State: Contemporary Legal Developments in Elder Abuse and Neglect*, Professor Seymour Moskowitz begins his discussion by

5. See Jeanne Finberg, *Financial Abuse of the Elderly in California*, 36 LOY. L.A. L. REV. 667 (2003).

6. See Moskowitz, *supra* note 1, at 603-04.

7. See *id.*

8. See *id.* at 594.

9. Indeed, the federal government's recent creation of "Nursing Home Compare" in November, 2002—a Web site designed to provide individuals with "detailed information about the past performance" of all Medicare and Medicaid certified nursing homes in the United States—illustrates further the timeliness and importance of our Symposium. Nursing Home Compare, at <http://www.medicare.gov/NHCompare/home.asp> (last visited Dec. 29, 2002) (providing information on such topics as the percentage of residents with physical restraints, the percentage of residents with bed sores, deficiencies found during annual inspections and complaint investigations, and staffing levels).

defining the main types of elder abuse and by illustrating its prevalence throughout the nation and in California.¹⁰ In defining the various types of elder abuse, Professor Moskowitz explains that conduct is labeled as abusive depending on its duration, intensity, and severity.¹¹

He continues by considering the legal remedies available to the elderly in tort law.¹² Tort law provides relief for elder abuse through some traditional means, including civil battery, negligence, conversion, or fraud suits.¹³

Professor Moskowitz also discusses the civil litigation remedies for nursing care abuse.¹⁴ In California, the Elder Abuse and Dependent Adult Civil Protection Act (the EADACPA or "Elder Abuse Act") supplements tort remedies.¹⁵

Finally, Professor Moskowitz discusses the most promising current legal developments and issues in elder abuse.¹⁶ Developing responses to elder abuse in nursing homes include criminal background checks of nursing home staff, video cameras in nursing homes to deter mistreatment, and minimum staffing ratios for nursing homes.¹⁷ In conclusion, Professor Moskowitz doubts the ability of the law, in and of itself, to enact major social change in the area of elder abuse, but he is optimistic that the combination of elder abuse law, public awareness, additional research, and other regulations could substantially reduce the incidence of elder abuse.¹⁸

In *Financial Abuse of the Elderly in California*, Jeanne Finberg focuses particularly on the financial abuse of the elderly, as opposed to physical abuse.¹⁹ In doing so, she surveys some of the most common types of financial abuse. Ms. Finberg suggests that the best ways to prevent the financial abuse of the elderly are to educate the

10. See Moskowitz, *supra* note 1, at 596–603.

11. See *id.* at 597.

12. See *id.* at 604–31.

13. See *id.*

14. See *id.*

15. See CAL. WELF. & INST. CODE §§ 15600–15675 (West 2001).

16. See Moskowitz, *supra* note 1, at 637–64.

17. See *id.*

18. See *id.* at 665.

19. See Finberg, *supra* note 5.

public and elders about long-term care and estate planning, and to ensure that consumer laws are available for private enforcement.²⁰

Finally, Professor Kurt Eggert contributed an article entitled, *Lashed to the Mast and Crying for HELP: How Self-Limitation of Autonomy Can Protect Elders from Predatory Lending*.²¹ Professor Eggert's article focuses on protecting elders from financial abuse, while at the same time not sacrificing their autonomy by overprotecting them. Professor Eggert focuses on predatory lending in the context of the broader issue, balancing the autonomy of persons who are elderly with protecting their rights and interests. Professor Eggert argues that the autonomy of an elderly homeowner is not determined solely by the freedom to enter into any loan he or she may desire.²² In fact, avoiding the loss and humiliation associated with predatory lending may actually increase autonomy.²³ In a novel approach, Professor Eggert analogizes his predatory lending solution to similar steps taken in the area of gambling.²⁴

As these articles illustrate, elder abuse in our society is a serious and growing problem—be it physical or financial. These three articles address the problem in different ways: from a broad perspective of the entire issue of elder abuse to a narrow focus on a particular problem with a new and intriguing solution.

II. ELDER ABUSE LITIGATION

The following discussion illustrates some of the basic concerns²⁵ that are pertinent to each particular side—be it the plaintiff or the defense—in an elder abuse lawsuit, particularly in California. Understanding how these types of lawsuits typically progress is important, because as Professor Moskowitz points out, there are many Americans who live in nursing homes.²⁶ The following discussion also highlights those areas of the law that are often in question in elder abuse lawsuits, as discussed by the afternoon

20. See *id.* at 690–91.

21. See Eggert, *supra* note 4.

22. See *id.*

23. See *id.*

24. See *id.*

25. This Article only addresses select issues arising in elder abuse litigation. There are certainly other issues, some raised by the panel, that are not covered by this Article.

26. See Moskowitz, *supra* note 1, at 593–94.

panelists,²⁷ thereby providing the reader with an overview of some of the most important issues to consider when preparing for an elder abuse lawsuit. Finally, in considering bringing an elder abuse lawsuit, it is interesting to note that the vast majority of verdicts in elder abuse lawsuits are in favor of the defense.²⁸

A. Background

California's Elder Abuse Act²⁹ was passed to protect the particularly "vulnerable" elderly and those members of society who rely on others for their daily care.³⁰ The statute defines elder abuse,³¹ establishes a procedure for reporting such abuse,³² requires fingerprinting of caregivers,³³ and finally, provides for additional remedies when elder abuse is proved by clear and convincing evidence.³⁴

The legislative intent included in the Act contains some of the clearest language ever written by the California legislature,³⁵

27. The panelists for the afternoon session consisted of the Honorable Judge Carl West of the Los Angeles Superior Court, Mr. Stephen Garcia of the firm of Wilkes & McHugh, and Mr. Rick Canvel of the firm of LaFollette, Johnson, De Haas, Fesler & Ames.

28. See Moskowitz, *supra* note 1, at 630–31. However, those verdicts that are in favor of plaintiffs are more likely to be publicized because of their high dollar amounts, thereby skewing the public perception about the typical result of an elder abuse lawsuit. See, e.g., *Estate of Woman Who Died of Untreated Peritonitis Wins \$5.2M Verdict*, NURSING HOME LITIG. REP. 3:15, May 4, 2001, at 4 (discussing the \$5.2 million verdict awarded "to the children of a woman who died after being released from a nursing home where she developed an abdominal infection that went untreated"); *Extendicare Settles Florida Elder Abuse Case*, NURSING HOME LITIG. REP. 3:9, Feb. 9, 2001, at 11 (reporting Extendicare's ceasing of all nursing home operations in Florida after settling a case that had resulted in a \$20 million verdict); *Trial Judge Affirms \$78 Million Verdict in Elder Abuse Case*, NURSING HOME LITIG. REP. 3:23, Aug. 24, 2001, at 3 (stating that an Arkansas judge "declined to overturn or reduce a \$78.43 million jury verdict awarded in a case against the nursing home . . .").

29. CAL. WELF. & INST. CODE §§ 15600–15675 (West 2001).

30. See *id.* § 15600(d).

31. See *id.* § 15610.07.

32. See *id.* §§ 15630–15634.

33. See *id.* § 15660(1).

34. See *id.* § 15657.

35. See *id.* § 15600(a) ("[E]lders and dependent adults may be subjected to abuse, neglect, or abandonment and . . . this state has a responsibility to protect these persons.").

explicitly recognizing its duty to protect elderly persons and dependent adults.³⁶ Further, the Act was designed to motivate lawyers to take these types of cases.³⁷ Previously, the unavailability of non-economic damages such as pain and suffering once a patient died³⁸ made attorneys apprehensive about taking these cases, fearful that the patient would die during the course of the litigation.³⁹ The Elder Abuse Act modifies this typical arrangement, thereby allowing a decedent's family to pursue pain and suffering damages up to \$250,000.⁴⁰

Indeed, if it were not for the generous provisions of the Elder Abuse Act, such as the availability of attorney's fees⁴¹ and punitive damages⁴² for successful suits, it would be considerably more difficult to get many viable elder abuse cases litigated.⁴³

To get the enhanced remedy of punitive damages under the Act, the plaintiff must prove by clear and convincing evidence that the defendant either fraudulently, maliciously, or oppressively

36. *See id.*

37. *See id.* § 15600(h) (“[F]ew civil cases are brought in connection with this abuse due to . . . lack of incentives to prosecute these suits.”); *see also id.* § 15600(j) (“It is the further intent of the Legislature in adding [the attorney’s fees provision] to enable interested persons to engage attorneys to take up the cause of abused elderly persons and dependent adults.”).

38. *See* CAL. CIV. PROC. CODE § 377.34 (West 1982); *see also* County of Los Angeles v. Superior Court, 21 Cal. 4th 292, 295, 981 P.2d 68, 69–70, 87 Cal. Rptr. 2d 441, 443 (1999) (“When, as here, a plaintiff dies while a personal injury action is pending . . . ‘the damages recoverable are limited to the loss or damage that the decedent sustained or incurred before death, . . . and do not include damages for pain, suffering, or disfigurement.’”).

39. This is particularly a problem because most of these cases are taken on a contingency fee basis where the lawyers must pay litigation costs in advance and cannot recover any fees if the patient dies.

40. *See* CAL. WELF. & INST. CODE § 15657(b) (West 2001). *But see* Ramey, *supra* note 2, at 605 (critiquing the low amount of damages allowed and arguing that reform of the Elder Abuse Act is “long overdue”).

41. *See* CAL. WELF. & INST. CODE § 15657(a) (“The court shall award to the plaintiff reasonable attorney’s fees and costs.”).

42. *Compare id.* § 15657 (allowing the imposition of punitive damages upon meeting the required standard of proof), *with* CAL. CIV. PROC. CODE § 425.13 (West Supp. 2002) (precluding the imposition of punitive damages for claims based on professional negligence).

43. Indeed, the California legislature recognized this when enacting the statute, stating that “few civil cases are brought in connection with this abuse due to problems of proof, court delays, and the lack of incentives to prosecute these suits.” CAL. WELF. & INST. CODE § 15600(h) (West 2001).

disregarded the patient's care.⁴⁴ This is also the standard typically required under the California Civil Code for the imposition of punitive damages.⁴⁵ Therefore, because the standard is the same, satisfying the punitive damages provision under the Act is not usually an issue in elder abuse lawsuits.⁴⁶

Plaintiff's counsel specializing in elder abuse lawsuits focus on proving the guilt of the corporate entity running the skilled nursing facilities.⁴⁷ It is important to stress the case as elder abuse, which is defined as "a pattern of conscious disregard of a known peril" by the corporation—the "ongoing criminal enterprise"—that owns the skilled nursing facility.⁴⁸ The plaintiff frames the issue as a determination of whether the harmful course of conduct at issue occurred because earlier violations and incidents, often caused by chronic understaffing, were not rectified by the corporation.⁴⁹

On the other hand, defense counsel approaches elder abuse litigation from a different, narrower perspective. The defense frames the issue as whether an injury occurred to this particular plaintiff on a specific day, and whether it was caused by something that the facility did on that day.⁵⁰

Many of the most important underlying issues involved in elder abuse lawsuits remain unresolved. Because there are no clear

44. See *id.* § 15657; *Delaney v. Baker*, 20 Cal. 4th 23, 31, 971 P.2d 986, 990, 82 Cal. Rptr. 2d 610, 614 (1999).

45. See CAL. CIV. CODE § 3294 (West 1997).

46. Compare CAL. WELF. & INST. CODE § 15657 (allowing the imposition of punitive damages upon proving abuse by clear and convincing evidence) with CAL. CIV. CODE § 3294 (allowing punitive damages for clear and convincing evidence of oppression, fraud, or malice).

47. Indeed, "[i]t is the plaintiff's attorney's responsibility to identify injuries and incidents that are the result of chronic institutional neglect." Susan N. Childers, *Plaintiff's Perspective: Pre-Suit Considerations in Nursing Home Litigation*, ARK. LAW., Summer 2001, at 13.

48. Stephen Garcia, Presentation at Honor Thy Mother and Father: A Symposium on the Legal Aspects of Elder Abuse at Loyola Law School (Apr. 29, 2002) (transcript on file with *Loyola of Los Angeles Law Review*); see also Moskowitz, *supra* note 1, at 626 ("In 1999–2000, fifty-five percent of the nursing facilities in the United States were owned or operated by national chains" and "[s]ixty-seven percent of all facilities were for-profit . . .").

49. See Garcia, *supra* note 48.

50. See Rick Canvel, Presentation at Honor Thy Mother and Father: A Symposium on the Legal Aspects of Elder Abuse at Loyola Law School (Apr. 29, 2002) (transcript on file with *Loyola of Los Angeles Law Review*).

answers to these questions, this Article does not attempt to predict how the courts will rule on such issues in future lawsuits. Rather, it is the authors' hope that attorneys on both sides of future elder abuse lawsuits will use this Article to better prepare themselves by having advance knowledge about some of the issues that are likely to arise throughout the course of the lawsuit.⁵¹

B. Issues Arising in the Pleading of Elder Abuse Cases

This Section will discuss three issues that arise in the pleading of elder abuse cases. The first is whether elder abuse is a separate cause of action or merely an enhanced remedy for negligence. The second question is whether elder abuse is simply a claim for professional negligence. The third question focuses on the issue of chronic understaffing, discussing whether it is grounds for an action under elder abuse or professional negligence. Finally, this Section concludes with a discussion of the importance of these issues.

1. Statute of limitations: is elder abuse a separate cause of action or simply an enhanced remedy?

If elder abuse is considered a separate cause of action, the statute of limitations for the claim stretches from one year to three years.⁵² The argument supporting elder abuse as a separate cause of action relies on *Delaney v. Baker*,⁵³ a recent California Supreme Court case. In *Delaney*, the surviving daughter of an eighty-eight-year-old woman who died after being placed in the facility for a broken ankle sued the nursing home.⁵⁴ The woman had been "left lying in her

51. In fact, an attorney who practices in the area of elder abuse has suggested that it will take the "members of the private bar" to make a difference in the "epidemic of elder abuse in the State of California." Kevin P. Kane, *Selecting a Nursing Home: Elder Abuse Detection and Prevention*, ORANGE COUNTY LAW., Aug. 2002, at 15, 23.

52. See CAL. CIV. PROC. CODE § 340(3) (West 1982) (stating that the statute of limitations for wrongful death is one year); *id.* § 338 (stating that the statute of limitations for statutorily created causes of action is three years).

53. 20 Cal. 4th 23, 32, 971 P.2d 986, 991, 82 Cal. Rptr. 2d 610, 615 (1999) (accepting amici curiae's position that "causes of actions within the scope of section 15657 [Elder Abuse Act] are not 'cause[s] of action . . . based on . . . professional negligence' within the meaning of section 15657.2 [professional negligence].") (alterations in original).

54. See *id.* at 27, 971 P.2d at 988, 82 Cal. Rptr. 2d at 612.

own urine and feces for extended periods of time.”⁵⁵ The court explicitly recognized that “rapid turnover of nursing staff, staffing shortages, and the inadequate training of employees” resulted in the neglect.⁵⁶ The court held that this conduct gave rise to a claim for elder abuse, aside from any claim for professional negligence.⁵⁷

On the other hand, if claims for elder abuse are basic negligence claims, the statute of limitations remains the usual one-year limit for torts.⁵⁸ In *Community Care and Rehabilitation Center v. Superior Court*,⁵⁹ the California Court of Appeal, post-*Delaney*, seems to have held that the remedies available under the Elder Abuse Act are “an additional remedy not available in *other* tort actions,”⁶⁰ rather than a separate cause of action. In *Community Care*, a surviving spouse brought suit against a nursing home after his wife died in the facility as a result of a hip replacement surgery.⁶¹ The court held that the spouse could possibly recover punitive damages against the nursing home under the Elder Abuse Act, “even in the context of professional medical malfeasance,” but it did not use language that indicated whether pursuing an elder abuse claim would be a separate cause of action.⁶²

Neither the *Delaney* nor the *Community Care* decisions directly address the issue of the applicable statute of limitations for elder abuse claims. Therefore, this issue remains unresolved.⁶³ If, as the authors contend, elder abuse and professional negligence are two separate causes of action, then each would have its own respective statute of limitations.

55. *Id.*

56. *Id.*

57. *See id.* at 32–33, 971 P.2d at 991–92, 82 Cal. Rptr. at 615–16.

58. *See* CAL. CIV. PROC. CODE § 340(3) (West 1982 & Supp. 2002); Canvel, *supra* note 50.

59. 79 Cal. App. 4th 787, 94 Cal. Rptr. 2d 343 (Cal. Ct. App. 2000).

60. *Id.* at 792, 94 Cal. Rptr. 2d at 346 (emphasis added) (suggesting that elder abuse is a tort rather than a statutorily-created cause of action).

61. *See id.*

62. *Id.* at 797, 94 Cal. Rptr. 2d at 350.

63. However, refer to the discussion below concerning whether a claim for elder abuse is the same as a claim for professional negligence.

2. Pleading elder abuse or professional negligence: standard of care and burden of proof

The second issue—whether to pursue a lawsuit as a professional negligence case⁶⁴ or an elder abuse case—can be difficult because “some health care institutions, such as nursing homes, perform custodial functions *and* provide professional medical care.”⁶⁵ Indeed, this decision can have a dramatic impact on the course of the litigation.

Perhaps the most important difference that arises when the case is pled as a professional negligence case rather than elder abuse is the standard of care that must be shown to constitute negligence. In a professional negligence case, the standard of care required of the defendant is to exercise “the knowledge, skill and care ordinarily possessed and employed by members of the profession in good standing.”⁶⁶ Further, this standard can only be established by expert testimony.⁶⁷ In an elder abuse case, the plaintiff must show “reckless, oppressive, fraudulent, or malicious conduct”⁶⁸ in the provision or lack of provision of services, regardless of how others in the community operate. The applicable standard of care is that of a reasonable person in similar circumstances.⁶⁹

64. See CAL. CIV. CODE § 3333.2 (West 1997). Section 3333.2 defines professional negligence as:

[A] negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital.

Id.

65. *Delaney*, 20 Cal. 4th at 34, 971 P.2d at 993, 82 Cal. Rptr. 2d at 617 (emphasis added).

66. *Id.* at 31, 971 P.2d at 991, 82 Cal. Rptr. 2d at 615 (quoting *Flowers v. Torrance Mem'l Hosp. Med. Ctr.*, 8 Cal. 4th 992, 997–98, 884 P.2d 142, 145–46, 35 Cal. Rptr. 2d 685, 688–89 (1994)).

67. See *Howard v. Owens Corning*, 72 Cal. App. 4th 621, 632, 85 Cal. Rptr. 2d 386, 394 (Cal. Ct. App. 1999) (stating that the standard of care in professional negligence cases must be established by expert testimony).

68. *Delaney*, 20 Cal. 4th at 32, 971 P.2d at 991, 82 Cal. Rptr. 2d at 615.

69. See *id.* at 32 n.5, 971 P.2d at 991 n.5, 82 Cal. Rptr. 2d at 615 n.5.

Reckless means that a person is aware of and consciously disregards a substantial and unjustifiable risk that his or her act will cause injury. The risk shall be of such nature and degree that disregard thereof

Additionally, the burden of proof is higher under the Elder Abuse Act than in a professional negligence case. To recover under the Elder Abuse Act, the plaintiffs must prove their case with "clear and convincing evidence."⁷⁰ Because the professional negligence statute does not specify a particular burden of proof, it is the more lenient standard of "preponderance of the evidence," as is the typical standard in most civil lawsuits.⁷¹

Finally, if elder abuse is pled as a form of professional negligence, the case may be subjected to the limitations provided by the Medical Injury Compensation Reform Act (MICRA) statutes.⁷² MICRA was passed in response to the rapidly rising costs of medical malpractice insurance in the 1970s out of a concern for some hospitals' and doctors' chances for continued viability.⁷³ Taken together, these statutes operate to protect medical care providers by limiting the scope and length of viability for an injured resident's claim.

The defense in *Delaney* argued that any act taken under the scope of licensure is professional negligence. The defense stressed that the acts or omissions that lead to claims of elder abuse fall within the scope of the defendants' licensure because they occurred

constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

Id. (quoting from the definition of "reckless" as defined for the jury in the case).

70. CAL. WELF. & INST. CODE § 15657 (West 2001).

71. See *Stoner v. Williams*, 46 Cal. App. 4th 986, 1001, 54 Cal. Rptr. 2d 243, 251 (Cal. Ct. App. 1996) ("In civil cases, liability generally must be proved by a preponderance of the evidence.").

72. MICRA "refers to several statutes that restrict or place conditions upon causes of action and remedies directed at 'health care providers' for 'professional negligence.'" *Delaney*, 20 Cal. 4th at 28–29 n.2, 971 P.2d at 989 n.2, 82 Cal. Rptr. 2d at 613 n.2 (quoting CAL. CIV. PROC. CODE § 364). The statutes include CAL. CIV. PROC. CODE § 364 (West 1982) (requiring a ninety-day notice prior to bringing a lawsuit); CAL. CIV. PROC. CODE § 667.7 (West 1987) (permitting periodic payment of any judgment against the provider); CAL. CIV. PROC. CODE § 1295 (West 1982) (requiring a certain type of notice for providers' mandatory arbitration provisions); CAL. BUS. & PROF. CODE § 6146 (West 1990) (providing caps on attorney contingency fees); CAL. CIV. CODE § 3333.1 (West 1997) (making admissible evidence of workers' compensation or disability payments); and *id.* § 3333.2(b) (providing a \$250,000 cap on noneconomic damages).

73. See *Delaney*, 20 Cal. 4th at 33–34, 971 P.2d at 992, 82 Cal. Rptr. 2d at 616.

in the skilled nursing facility.⁷⁴ However, the *Delaney* court recognized that adopting such an interpretation of the elder abuse statute would create an “anomaly”⁷⁵ in that custodians who are not also health care providers would be subjected to the heightened remedies of the Elder Abuse Act, while those who are licensed as health care workers would only be subjected to claims based on professional negligence.⁷⁶

Additionally, *Delaney* clearly articulates that there is a distinction between custodial care and professional medical care. Thus, under *Delaney*, it appears that health care workers who neglect residents to the level that satisfies the Elder Abuse Act can be sued outside the purview of MICRA.⁷⁷ The court appears to distinguish professional negligence on behalf of health care providers, which should be evaluated and litigated under the professional negligence statutes, from those violations that occur within the custodial context, which should be evaluated under the enhanced Elder Abuse Act provisions.⁷⁸ It also explicitly recognized that “the legislative history suggests that nursing homes and other health care providers were among the primary targets of the Elder Abuse Act.”⁷⁹

Thus, each pleading decision brings its own advantages and disadvantages. A cause of action under the Elder Abuse Act allows for additional damages and attorneys’ fees, yet requires the plaintiff to meet a higher standard of care and a higher burden of proof. Conversely, a cause of action for professional negligence has a lower standard of care and a lower burden of proof, but provides for fewer remedies. To best protect the interests of the elderly injured person, as the court in *Delaney* recognized, there may be times when the same act can give rise to a claim for both causes of action.⁸⁰ The example the court in *Delaney* used involved a patient who suffered

74. See *id.* at 35, 971 P.2d at 993, 82 Cal. Rptr. 2d at 617.

75. See *id.*

76. See *id.* at 36–37, 971 P.2d at 994–95, 82 Cal. Rptr. 2d at 618–19.

77. See *id.* at 34, 971 P.2d at 993, 82 Cal. Rptr. 2d at 617.

78. See *id.* at 35, 971 P.2d at 993, 82 Cal. Rptr. 2d at 617 (“[I]f the neglect is ‘reckless[,]’ or done with ‘oppression, fraud or malice,’ then the action falls within the scope of section 15657 [the Elder Abuse Act] and as such cannot be considered simply ‘based on . . . professional negligence’ within the meaning of section 15657.2 [the professional negligence statute].”).

79. *Id.* at 41, 971 P.2d at 997, 82 Cal. Rptr. 2d at 621.

80. See *id.* at 34–35, 971 P.2d at 993, 82 Cal. Rptr. 2d at 617.

from malnutrition. The court stated that failing to provide “a plan of furnishing sufficient nutrition to someone too infirm to attend to that need herself” could be considered professional negligence and could also constitute neglect, thereby possibly satisfying the standard for elder abuse.⁸¹

3. Does chronic understaffing constitute elder abuse or professional negligence?

Many incidents of elder abuse are often the result of understaffing at skilled nursing facilities.⁸² Therefore, determining how the courts will treat chronic staffing problems is one of the most important questions in this area of the law.

On the one hand, recurring staffing problems appear to constitute elder abuse, not professional negligence.⁸³ Understaffing often leads to a failure to provide adequate care and to abuse, and it is the corporate entity, whose corporate scheme is based on maximizing profit, that causes the injury, not the low-paid workers on the floor.⁸⁴ Alternatively, defense counsel might prefer that staffing problems be seen as professional negligence because there are procedural advantages.⁸⁵ However, the California Supreme Court stated in *Delaney* that insufficient staff is not professional negligence.⁸⁶

81. See *id.* at 34, 971 P.2d at 993, 82 Cal. Rptr. 2d at 617.

82. See Kane, *supra* note 51, at 17 (stating that elder abuse occurs in nursing homes because they are “under-regulated and under-staffed, often sacrificing care in order to maximize profit.”); Ramey, *supra* note 2, at 623 (“One of the most frequently given excuses for deficiencies and abuse is the lack of adequate staffing.”); Robert Pear, *U.S. Recommending Strict New Rules at Nursing Homes*, N.Y. TIMES, July 23, 2000, at 1 (“Nursing homes with a low ratio of employees to patients are ‘significantly more likely to have quality-of-care problems’ . . .”).

83. See Garcia, *supra* note 48, at 14.

84. See Childers, *supra* note 47, at 13–14 (“[I]t is the corporate decision makers who set the budget and force nursing homes to operate with inadequate staff and supplies.”).

85. As discussed above, per MICRA, the damages in a professional negligence case are limited to \$250,000. See CAL. CIV. CODE § 3333.2(b) (West 1997). Further, collateral sources can be used. See *id.* § 3333.1.

86. See *Delaney*, 20 Cal. 4th at 41–42, 971 P.2d at 998, 82 Cal. Rptr. 2d at 622.

C. *Issues of Proof in Elder Abuse Litigation*

This Section will briefly discuss three particular issues that often arise in elder abuse litigation:⁸⁷ the clear and convincing standard of proof, corporate ratification and liability, and the use of regulations to set forth the standard of care.

1. Clear and convincing evidence standard

Satisfying the “clear and convincing” burden is extraordinarily difficult.⁸⁸ Indeed, it often comes down to what the judge decides when considering the evidentiary motions. For example, if plaintiffs are allowed to bring in former employees to talk about the egregious conduct at the facility and the facility’s knowledge and disregard of the problems, as well as to bring in corporate executives to show they did not care about the problems at the facility, they are more likely to prevail.

Defense counsel could attempt to counter the proof offered by plaintiffs to prove “clear and convincing” evidence of neglect on behalf of the facility by focusing on the local facility level, showing the real people who work at these facilities, as well as the conditions in which they work.⁸⁹ Ultimately, the defense tries to show the facility as caring on as pragmatic a level as possible.⁹⁰

2. Corporate ratification

Plaintiffs must prove corporate ratification of the reckless disregard for the patient’s care to bring suit against the corporation for punitive damages.⁹¹ Plaintiffs do this by proving that the corporation has a continuing history of complaints and injuries

87. This Article does not attempt an exhaustive discussion of these issues. Instead, our purpose is simply to highlight these significant topics.

88. Garcia, *supra* note 48, at 14; *see also* Ramey, *supra* note 2, at 605 (arguing that the Elder Abuse Act should be re-examined because the “burden of proof is raised so high as not to deter wrongful conduct but rather to complicate the bringing of meritorious elder abuse actions.”).

89. *See* Canvel, *supra* note 50, at 15.

90. *See id.*

91. Because plaintiffs argue that it is the corporation that is liable for the death and injuries of the residents of its facilities, not the individual employees, the acts of the corporation must be done with “reckless, oppressive, fraudulent, or malicious conduct.” *Delaney*, 20 Cal. 4th at 31, 971 P.2d at 991, 82 Cal. Rptr. 2d at 615.

against it, often as the result of understaffing.⁹² Corporations may be viewed as reckless when their nursing homes admit more residents than they are equipped to accommodate. This is especially true when they make these admission decisions knowing their budgets do not allow them to staff at appropriate levels; yet, they recklessly disregard these facts and continue to accept new patients as long as there is an empty bed in the facility.⁹³ Therefore, the conduct the plaintiff wants the jury to focus on is the acts of the corporation.⁹⁴ Thus, it is crucial for the plaintiffs to be able to introduce as much evidence as possible about what the corporation knew about the facility and its ability to care for its residents, especially any evidence that proves the corporation knew of chronic staffing problems.⁹⁵ The plaintiffs frame the issue as determining whether the harmful course of conduct occurred because of all the earlier violations and incidents, often caused by chronic understaffing, that were not rectified by the corporation.⁹⁶

Many elder abuse lawsuits are not about the people working on the floors; rather, they are about corporations that purposely take the highest number of the sickest patients and then staff their facilities with the lowest number of employees possible.⁹⁷

92. See *supra* note 82.

93. See Garcia, *supra* note 48.

94. See Childers, *supra* note 47, at 13 (“In most cases filed against nursing homes, the defendants are not the actual caregivers hired by the facility, but rather the corporations who have failed to provide necessary and available resources in order to prevent injuries to the residents of the nursing homes they own.”).

95. See *supra* text accompanying note 84.

96. See *supra* note 82. During the Symposium, plaintiffs’ counsel provided a straightforward approach one can use when trying to prove corporate intent, suggesting a few specific questions with which to begin the examination of the witness:

1. “You are a for-profit organization are you not?”
2. “You are publicly traded are you not?”
3. “So, you have a fiduciary responsibility to make as much money as possible for your stakeholders, do you not?”

From there, the questions should continue to focus on the corporation as a profit maker. Garcia, *supra* note 48.

97. See Garcia, *supra* note 48.

3. Use of regulations

An interesting question that arises in elder abuse lawsuits is whether the regulations passed pursuant to the Elder Abuse Act can be used to set forth the standard of care required of the skilled nursing facility.⁹⁸ The California Court of Appeal, in *Estate of*

98. See CAL. CODE REGS. tit. 22, § 72315 (2002). These regulations state that:

- (a) No patient shall be admitted or accepted for care by a skilled nursing facility except on the order of a physician.
- (b) Each patient shall be treated as individual with dignity and respect and shall not be subjected to verbal or physical abuse of any kind.
- (c) Each patient, upon admission, shall be given orientation to the skilled nursing facility and the facility's services and staff.
- (d) Each patient shall be provided care which shows evidence of good personal hygiene, including care of the skin, shampooing and grooming of hair, oral hygiene, shaving or beard trimming, cleaning and cutting of fingernails and toenails. The patient shall be free of offensive odors.
- (e) Each patient shall be encouraged and/or assisted to achieve and maintain the highest level of self-care and independence. Every effort shall be made to keep patients active, and out of bed for reasonable periods of time, except when contraindicated by physician's orders.
- (f) Each patient shall be given care to prevent formation and progression of decubiti, contractures and deformities. Such care shall include:
 - (1) Changing position of bedfast and chairfast patients with preventive skin care in accordance with the needs of the patient.
 - (2) Encouraging, assisting and training in self-care and activities of daily living.
 - (3) Maintaining proper body alignment and joint movement to prevent contractures and deformities.
 - (4) Using pressure-reducing devices where indicated.
 - (5) Providing care to maintain clean, dry skin free from feces and urine.
 - (6) Changing of linens and other items in contact with the patient, as necessary, to maintain a clean, dry skin free from feces and urine.
 - (7) Carrying out of physician's orders for treatment of decubitis ulcers. The facility shall notify the physician, when a decubitis ulcer first occurs, as well as when treatment is not effective, and shall document such notification as required in Section 72311(b).

Gregory v. Beverly Enterprises, Inc.,⁹⁹ stated that regulations cannot be used to create a standard of care,¹⁰⁰ but they can be used in formulating jury instructions to “describe the care required.”¹⁰¹ In

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- (g) Each patient requiring help in eating shall be provided with assistance when served, and shall be provided with training or adaptive equipment in accordance with identified needs, based upon patient assessment, to encourage independence in eating.
 - (h) Each patient shall be provided with good nutrition and with necessary fluids for hydration.
 - (i) Measures shall be implemented to prevent and reduce incontinence for each patient and shall include:
 - (1) Written assessment by a licensed nurse to determine the patient’s ability to participate in a bowel and/or bladder management program. This is to be initiated within two weeks after admission of an incontinent patient.
 - (2) An individualized plan, in addition to the patient care plan, for each patient in a bowel and/or bladder management program.
 - (3) A weekly written evaluation in the progress notes by a licensed nurse of the patient’s performance in the bowel and/or bladder management program.
 - (j) Fluid intake and output shall be recorded for each patient as follows:
 - (1) If ordered by the physician.
 - (2) For each patient with an indwelling catheter:
 - (A) Intake and output records shall be evaluated at least weekly and each evaluation shall be included in the licensed nurses’ progress notes.
 - (B) After 30 days the patient shall be reevaluated by the licensed nurse to determine further need for the recording of intake and output.
 - (k) The weight and length of each patient shall be taken and recorded in the patient’s health record upon admission, and the weight shall be taken and recorded once a month thereafter.
 - (l) Each patient shall be provided visual privacy during treatments and personal care.
 - (m) Patient call signals shall be answered promptly.

99. 80 Cal. App. 4th 514, 95 Cal. Rptr. 2d 336 (Cal. Ct. App. 2000).

100. *See id.* at 522, 95 Cal. Rptr. 2d at 341 (stating that “an administrative agency cannot independently impose a duty of care if that authority has not been delegated to the agency by the Legislature.”).

101. *Id.* The court stated:

[T]he question before us is . . . whether the duly authorized regulations can be used to describe the care required under an *existing* statutory right of action for elder abuse. . . . We find no authority to suggest a

fact, according to the court, it seems one can use most any source available in drafting jury instructions.¹⁰²

Counsel for plaintiffs will argue that the violation of a regulation should be evidence of recklessness, or should at least establish notice.¹⁰³ Arguably, the regulations cannot be used to establish a cause of action or to establish a finding of negligence per se.¹⁰⁴

Indeed, even the judge expressed concern about the court's language in *Estate of Gregory*,¹⁰⁵ stating that he could not see the difference between "describing" the standard of care, which is allowed,¹⁰⁶ and "establishing" the standard of care, which is not.¹⁰⁷

In attempting to determine how to use the regulations in elder abuse cases, looking at the original purpose of the regulations may be illustrative. As Judge West questioned, "Is the purpose of the regulations to establish a standard of care or to improve the level of care given?"¹⁰⁸

D. The Use of Experts in Elder Abuse Litigation

California Evidence Code section 801 "codifies the existing [general] rule that expert opinion is limited to those subjects that are beyond the competence of persons of common experience, training,

party may not base instructions on relevant state or federal regulations in the proper case.

Id. at 522–23, 95 Cal. Rptr. 2d at 341–42 (emphasis added).

102. *See id.* at 523, 95 Cal. Rptr. 2d at 342 ("Sources of law for jury instructions include statutes, court opinions, treatises, hornbooks, legal encyclopedias, digests, and form books.").

103. *See Garcia, supra* note 48.

104. *See Estate of Gregory*, 80 Cal. App. 4th at 523, 95 Cal. Rptr. 2d at 342 (citing *Housley v. Godinez*, 4 Cal. App. 4th 737, 747, 6 Cal. Rptr. 2d 111, 117 (Cal. Ct. App. 1992) (finding that the regulation requiring drivers to wear a seatbelt could be considered by the jury in determining whether the driver had exercised due care, but not to establish presumptive negligence).

105. *See The Honorable Carl West, Presentation at Honor Thy Mother and Father: A Symposium on the Legal Aspects of Elder Abuse at Loyola Law School* (Apr. 29, 2002) (transcript on file with *Loyola of Los Angeles Law Review*).

106. *See Estate of Gregory*, 80 Cal. App. 4th at 522, 95 Cal. Rptr. 2d at 341–42; *see also supra* text accompanying note 101.

107. *See Estate of Gregory*, 80 Cal. App. 4th at 522, 95 Cal. Rptr. 2d at 341; *see also supra* text accompanying note 100.

108. West, *supra* note 105.

and education.”¹⁰⁹ For example, experts are required in the professional negligence context to prove the standard of care required for the health care provider involved in the lawsuit.¹¹⁰ Therefore, because experts are only used to explain difficult or confusing concepts to the trier of fact, they may not be appropriate in an elder abuse lawsuit. However, as one recent RAND study found, in California Superior Court trials in the late 1980s, experts testified in eighty-six percent of all cases.¹¹¹

One argument for using expert testimony in elder abuse cases is that an expert may be needed to explain the meaning of “recklessness.”¹¹² “‘Recklessness’ refers to a subjective state of culpability greater than simple negligence, which has been described as a ‘deliberate disregard’ of the ‘high degree of probability’ that an injury will occur.”¹¹³ However, Judge West explained that it may not be necessary to use an expert to explain the standard of care in a simple negligence case or in an elder abuse case not involving claims of professional negligence of a health care/medical provider.¹¹⁴ As he expressed, there may be statutes that lay out standards which would be understandable to the lay juror.¹¹⁵

Other possible uses for an expert may include making the connection between the injury and the acts or omissions that allegedly led to the injury,¹¹⁶ which is often a lack of adequate numbers of staff.¹¹⁷ An expert may be needed to testify as to whether the staffing at the facility meets the required level based on the number of residents in the facility.¹¹⁸ An expert witness also may

109. CAL. EVID. CODE § 801 (West 2002) (Law Revision Commission Comment). This discussion about the use of experts could be applicable to other statutes as well. The corresponding Federal Rule of Evidence regarding experts is Rule 701. *See* FED. R. EVID. 701.

110. *See* Howard v. Owens Corning, 72 Cal. App. 4th 621, 632, 85 Cal. Rptr. 2d 386, 394 (stating that the standard of care in professional negligence cases must be established by expert testimony).

111. *See* Samuel R. Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113, 1118–19.

112. CAL. WELF. & INST. CODE § 15657 (West 2001).

113. Delaney v. Baker, 20 Cal. 4th 23, 31, 971 P.2d 986, 991, 82 Cal. Rptr. 2d 610, 615 (1999) (citations omitted).

114. *See* West, *supra* note 105.

115. *See id.*

116. *See* Childers, *supra* note 47.

117. *See supra* note 82.

118. *See* Garcia, *supra* note 48.

be necessary to explain the medical issues, the appropriate standard of care, the effects of the understaffing, and the history of the facility.¹¹⁹

Depending on the actual facts of the case, the use of expert witness testimony can be critical. Thus, the trend of using experts as extensively as possible is likely to continue.

E. Evidentiary Issues & Elder Abuse Litigation

There are several unresolved evidentiary issues that often arise in elder abuse litigation, including whether evidence of chronic understaffing should be admissible, whether California Evidence Code section 1157 applies in elder abuse cases, whether plans of correction are admissible, and whether evidence of prior incidents is admissible.¹²⁰ This Section briefly discusses each of these issues.

1. Should evidence of chronic understaffing be admissible?

Because evidence of understaffing is so damaging, plaintiffs would like all such evidence about the facility's prior problems with staffing to be admitted, as well as information about the corporation's knowledge about its problems with staffing at their other facilities.¹²¹ As Mr. Garcia so succinctly expressed, "If the facilities are not adequately staffed to care for their residents, why do they continue to admit them?"¹²² To prove the corporate ratification required for corporate guilt,¹²³ the plaintiffs must be able to show what the corporation knew and disregarded before the particular incident at the center of the current litigation occurred.¹²⁴

Conversely, defense counsel would prefer that less evidence about understaffing be admitted. To the defense, the most important question in relation to understaffing is "did the understaffing contribute to the neglect or abuse that is alleged in this particular case?"¹²⁵ Further, the defense argues that only the particular

119. See Canel, *supra* note 50.

120. However, this Article does not attempt to exhaustively cover all the evidentiary issues that may arise in an elder abuse lawsuit.

121. See Garcia, *supra* note 48.

122. *Id.*

123. See *supra* Part II.C.2.

124. See Garcia, *supra* note 48.

125. Canel, *supra* note 50.

facility's problems with staffing should be admitted, and that such evidence must be understood in context with the challenges of the economy and the job market.

2. Does California Evidence Code section 1157 apply in elder abuse cases?

California Evidence Code section 1157 establishes an absolute privilege for documentation related to peer review and quality of care discussions for certain types of medical facilities.¹²⁶ Additionally, "no person in attendance at a meeting of any of those committees shall be required to testify as to what transpired at that meeting."¹²⁷ It is mandatory that every skilled nursing facility have a quality assurance committee, which must review the quality of care given at that particular facility.¹²⁸ However, because skilled nursing facilities are not explicitly listed in the statute as being protected by this provision, questions remain as to whether the documents and people in attendance at skilled nursing facility committee meetings will be protected. Indeed, if protected under the statute, these committees can discuss anything they want rather freely with no fear of those discussions being discoverable. Consequently, the courts must decide whether these facilities will be protected under California Evidence Code section 1157.

The interpretation of this provision is so crucial because, otherwise, as so clearly stated by counsel for the plaintiffs, this evidence is the "smoking gun" that can often win the plaintiff's case.¹²⁹ As plaintiff's counsel also stated, these incident review discussions are "where they hide how they kill, abuse, and maim" people.¹³⁰

126. See CAL. EVID. CODE § 1157 (West 2002). This privilege covers committees of "medical, medical-dental, podiatric, registered dietitian, psychological, marriage and family therapist, licensed clinical social worker, or veterinary staffs in hospitals." *Id.* § 1157(a). Note that it does not specifically include skilled nursing facilities.

127. *Id.* § 1157(b).

128. See 42 C.F.R. § 483.75(o) (2001); see also Elizabeth K. Schneider, *Long-Term Care Regulatory Reform: HCFA, the IOM and Opportunity Lost*, 4 QUINNIPIAC HEALTH L.J. 107, 137 (2000) (discussing the requirements for quality assurance committees, as well as some of their procedures).

129. Garcia, *supra* note 48.

130. *Id.*

On the one hand, the statute is extraordinarily particular as to whom it does and does not protect.¹³¹ On the other hand, it includes several categories of services that are typically inherent in the operations of skilled nursing facilities, including dieticians and therapists.¹³² Thus, it is unclear as to whether skilled nursing facilities will be covered by section 1157. Again, each case may come out differently in front of different judges, at least until the California Court of Appeal or the California Supreme Court speaks on the issue.¹³³

As Judge West pointed out, even if the statute does not protect the skilled nursing facilities, thereby opening their peer review and quality assurance committee discussions up to discovery, the information still may not be admissible under California Evidence Code section 1151.¹³⁴

3. Is evidence of prior incidents admissible?

One of the first questions that must be answered in deciding whether to admit evidence of prior incidents is whether California Evidence Code section 403¹³⁵ must be met to get evidence of prior incidents admitted. Under section 403, the judge must determine whether there are sufficient foundational facts to support the admission of evidence regarding the prior incidents before admitting such evidence. The defense may urge the court to limit the amount

131. See CAL. EVID. CODE § 1157(a) (West 2001).

132. See *id.*

133. At the time of publication of this Article, a very broad Lexis search of California case law for the terms "elder abuse" and "evidence w/5 1157" returned zero cases.

134. See West, *supra* note 105. Under California Evidence Code Section 1151, subsequent remedial measures taken after the event at issue occurred that may have kept the event from happening may not be used to prove negligence or culpable conduct with respect to the particular plaintiff involved in the litigation. CAL. EVID. CODE § 1151. The corresponding Federal Rule of Evidence regarding subsequent remedial measures is Rule 407. See FED. R. EVID. 407.

135. See CAL. EVID. CODE § 403. Further, section 402 of the Evidence Code allows a judge to make findings of foundational and preliminary facts out of the presence of the jury. See *id.* § 402. Defense counsel's concern is that the jury will hear testimony regarding prior incidents of injuries that may not have actually occurred.

of such evidence that is admitted to a reasonable number of incidents over a reasonable period of time.¹³⁶

Plaintiffs, on the other hand, must be able to admit such evidence to prove malice,¹³⁷ to prove the corporate ratification required under California Civil Code section 3294,¹³⁸ and to show a conscious disregard for known peril. For plaintiffs, there may be no other way to prove these issues other than by using prior incidents to establish that the corporation knew of the peril and the consequences beforehand.¹³⁹

Judges may be inclined to limit the admission of such evidence to similar incidents.¹⁴⁰ For example, if the litigation involves an individual who has fallen out of a wheelchair, and that person was supposed to be restrained but was not, then only other incidents where other unrestrained individuals had fallen out of a wheelchair should be admitted, not every incident of anyone ever falling out of a wheelchair.¹⁴¹ This would also preclude admission of evidence of other types of accidents that do not involve wheelchairs.

Ultimately, this is one of the most important issues to the case, and the judge must make the final decision, as dictated by California Evidence Code section 402.¹⁴²

III. CONCLUSION

As this Symposium indicates, elder abuse is a problem in drastic need of legal and social redress. The articles summarized in Part I suggest a broader approach to the overall problem of elder abuse, including education, social change, and legislation. Conversely, Part II of this Article specifically discussed litigation as an approach to protecting the elderly in our society, particularly in nursing homes. Taken together, this Symposium attempts to focus our discussions on

136. See Canvel, *supra* note 50.

137. See *Delaney*, 20 Cal. 4th at 35, 971 P.2d at 993, 82 Cal. Rptr. 2d at 617 (stating that showing malicious neglect constitutes an action within the scope of the Elder Abuse Act).

138. See *supra* Part II.C.2 for a complete discussion of corporate ratification.

139. See Garcia, *supra* note 48.

140. See West, *supra* note 105.

141. See *id.*

142. See CAL. EVID. CODE § 402; see also *supra* text accompanying note 135.

the legal aspects of elder abuse and to move our society towards honoring our mothers and fathers.