

## **Nursing Home Litigation:** **The Rights of Seniors Slipping Away in their Golden Years**

The United States Senate is considering a cap on noneconomic damages for victims of nursing home negligence, abuse, and mistreatment. Corporate nursing homes in for-profit hospitals were the 19<sup>th</sup> largest donor in President Bush's 2004 campaign. Texas enacted such a cap, and other states have done the same.

Nursing home and corporate long term facilities are aggressively lobbying for tort reforms that limit the ability of families and residents to collect claims on legitimate damages.

According to Professor Robert Crawford from the School of Public Health University of North Carolina, Chapel Hill, the number of preventable medical errors in this country are equivalent to Asian tsunamis per year. Professor Crawford notes that the catastrophe of preventable medical errors in this country falls most heavily upon senior citizens.

A very thorough recent study by Michael L. Rustad, Thomas F. Lambert, Jr., Professor of Law and Co-Director of the Intellectual Property Law Concentration, Suffolk University Law School, Boston, Massachusetts, recently published an in-depth study on the subject of nursing home litigation.

A large number of studies confirm that there is an epidemic of pain and suffering in nursing homes. A general accounting office report found that one in three nursing homes or 5,283 of approximately 17,000 facilities were "cited for abuse violations between 1999 and 2001. In more than 1600 of those nursing homes, the abuses were serious enough to place the residents in immediate jeopardy of death or serious injury." In spite of the rhetoric over the increasing number of verdicts against nursing home operators beginning in the early 1990's, there is little empirical data on the nature of these cases.

A study by the Harvard Public Health School researchers Stevenson and Studdert of 278 nursing home attorneys (representing plaintiffs as well as defense) found that most nursing home litigation was based upon serious allegations of abuse, mistreatment, and reckless indifference to the needs of patients. These researchers found that "More than half of nursing home cases involve deaths compared to one in five medical malpractice claims."

Few cases are taken for nursing home residents in most states because the law, generally speaking, does not provide a cause of action for loss of life's pleasures in a death case. Therefore, it pays the negligent defendant to kill the

person rather than have them linger on and suffer. Most senior citizens do not have large economic damages, should they die from negligence, since they are not working and are not supporting minors or a spouse. These people are the uncompensated and unreimbursed victims of nursing home abuse.

The cap on noneconomic damages strikes hard in elderly women, "Since they have a significantly greater proportion of their damages awarded as noneconomic loss damages."

A March 2002 study by the Department of Health and Human Services concluded that 9 in 10 nursing homes nation-wide failed to meet minimum staffing standards. Professor Rustad makes the argument that more nursing home litigation may be necessary to supplement ineffective enforcement by state inspectors that do not bring facilities up to minimum quality standards.

States such as Texas, with a "hard" cap seem to be worse in terms of nursing home problems.

Nursing home claimants have few desirable litigant characteristics because of their pre-existing illnesses and non-existing imputed earnings. As mentioned previously, many nursing home victims have little in the way of earnings or money that they contribute to others. Many of the nursing home victims have chronic physical or mental illnesses that render them incapable of seeking out legal representation. The median age for a nursing home claimant is 76 years of age, and the mean was 78. Nearly 1 in 5 prevailing plaintiffs was 86 or older. Elderly nursing home residents do not have years to devote to litigation, and many times the nursing home defendants drag these cases out.

Professor Rustad noted a widespread misconception that the elderly do not feel as much pain as younger individuals. Eighty percent (80%) of nursing home patients suffer from chronic pain, as compared to 25 to 50 percent of elders living in the community who complain about persistent pain. Inadequate pain treatment is one of the problems faced by seniors.

The study by Professor Rustad looks in particular at California, Florida and Texas, among other states. The Professor noted that creating a \$250,000 cap on noneconomic damages is designed essentially to eliminate compensation to nursing home victims, since noneconomic damages is the only way realistically to make whole a nursing home victim from the abusive conditions encountered in America's nursing homes.

Eighty-nine percent (89%) of nursing home plaintiffs, in Professor Rustad's sample surveys, suffered catastrophic injuries or death from nursing home neglect. Fifty-eight percent (58%) of the nursing home lawsuits were tried as wrongful death and survival actions. The primary injuries included amputation of legs or feet, decubitus ulcers, hip fractures, paralysis, and severe emotional injuries in the wake of sexual assaults, physical beatings, or

patterns of abuse. “The injuries suffered by these nursing home claimants erased their quality of life and often snuffed out their lives in horrifying conditions. In a third of the nursing home cases, there was a claim of elder abuse. Nearly a third of the residents suffered from decubitus ulcers or pressure sores caused by substandard care. Thirty-one percent of the nursing home claimants suffered falls from lack of supervision or for medication errors. More than 1 in 5 of the residents suffered from dehydration or malnutrition. Seventy-nine percent of the residents suffered from multiple injuries, including burns, falls, starvation, sexual abuse, and the failure of pain management.”

Professor Rustad points out that these cases are non-frivolous.

A comprehensive study concludes that Congress should consider the empirical reality that there are too few nursing home lawsuits performed posing arbitrary caps on noneconomic damages. “Capping noneconomic damages is the functional equivalent of a death penalty for the cause of action for many victims of nursing home abuse” who will not be able to do anything to help themselves when they suffer unconscionably in a nursing home.

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