HEART OF STONE: WHAT IS REVEALED ABOUT THE ATTITUDE OF COMPASSIONATE CONSERVATIVES TOWARD NURSING HOME PRACTICES, TORT REFORM, AND NONECONOMIC DAMAGES

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As asked at a debate in the Republican primary contest in 1999 which philosopher he most identified with, Mr. Bush promptly said, "Christ—because he changed my heart."

The Economist

INTRODUCTION

The 1.6 million elderly, disabled, and vulnerable residents of America's nursing homes, and another one million living in residential care facilities, are in danger of being victimized by abuse or neglect. The Government Accounting Office (GAO) documented that one in three nursing homes, or 5,283 of approximately 17,000 long-term care facilities, had been cited for one or more serious abuse violations in a two-year study of state inspection and complaint investigation records. A total of 1,345 nursing homes were cited for violations of minimum quality standards that actually harmed residents from 1999 to 2001. The state inspection reports and citations reviewed by the GAO describe nightmarish conditions of abuse and neglect. A total of 1,009 nursing homes were cited by state inspectors for failing to protect residents from sexual, physical, or verbal abuse, or corporal punishment. The GAO study uncovered shameful conditions in our nation's nursing homes, and even evidence that elderly residents were molested or raped by nurse's aides.

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2. Elder Justice: Protecting Seniors from Abuse and Neglect: Hearing Before the Comm. on Fin. U.S. Senate, 107th Cong. 8 (2002) (statement of Professor Catherine Hawe that "the 1.6 million nursing home residents...in board-and-care homes are at particular risk for abuse and neglect. Most suffer from several chronic diseases and are dependent for their care on others"), available at http://www.finance.senate.gov/hearings/82405.pdf (last visited June 6, 2005).
4. Id. at 5.
5. See id. at 7.
6. Id. at 5.
7. "The state inspection reports...documented numerous instances where residents of nursing homes were subjected to sexual abuse by nursing home personnel or other residents." Id. at 12.
verbally abused by the staff, and endangered by systemic abuse, mistreatment, and neglect.9

Nursing homes are the “ugly stepsisters” of our healthcare system, a shadowy industry ill equipped to offer high quality care for the older American.10 The worst facilities are short-staffed, non-unionized, and they short-change elderly residential care to fatten corporate profits. These facilities are “total institutions” because they are places of residence where elderly or disabled individuals are cut off from the wider society twenty-four hours a day, seven days a week.11 In the worst of these facilities, the victims of abuse, mistreatment, and neglect do not receive even a minimal standard of care.

Nursing home negligence and abuse lawsuits have increased in recent years to champion the cause of elderly Americans who deserve redress for the consequences of abuse or neglect.12 The elderly claimants in these cases look like your typical nursing home residents, often “elderly Medicaid recipients, often with dementia or Alzheimer’s disease. Claims often involved serious injuries....More than half...involved deaths, while allegations of pressure sores, dehydration/malnutrition, and emotional distress featured prominently.”13 Even though there is widespread neglect and abuse in our nation’s nursing homes, there are relatively few nursing home negligence or abuse verdicts.14

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8. State inspection reports “documented instances where nursing staff told residents ‘If you hadn’t sh*t all over yourself, I wouldn’t have to clean your ass,’ and ‘I...am sorry you were born.’” Staff told residents that “they ate like a pig,” told residents to “shut the f*** up,” and called residents “a blob,” “stupid,” and “bitch.” Id. at 14 (omissions in original) (citations omitted).

9. See id. at 5.


11. The term “total institution” was coined by sociologist Erving Goffman. The nursing home is an institution designed for the custodial care of the incapable, the blind, the aged, and the indigent. See ERVING GOFFMAN, ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES 4-5 (1961).


13. Id. at 2–3.

14. Judging from all available empirical data, nursing home jury awards are rare. The Exchange of the Association of Trial Lawyers of America (ATLA) reported only twenty-eight nursing home cases where there were any noneconomic damages awarded in all jurisdictions for the period 1986-2004. Email from Juliann Tigert, Staff Attorney, ATLA Exchange (Dec. 15, 2004) (reporting nursing home cases for any award in all jurisdictions from 1986 to Dec. 15, 2004) (on file with author). New Mexico, for example, reports only a handful of nursing home verdicts in the past decade. A LexisNexis search of The New Mexico Blue Sheets Verdict Reporter uncovered only six cases for the decade 1994–2004, and most of these cases were settlements rather than verdicts. A Westlaw search of the New Mexico Verdict Reporter uncovered five cases for that same period. The rarity of nursing home cases in New Mexico reflects a nationwide trend of most litigation occurring in a few hotspots. Dr. Stevenson found that most nursing home cases were in either Texas or Florida, but provided no explanation why nursing home litigation occurs in these states. One possible explanation is the passage of legislation that makes it easier to pursue nursing home litigation. Florida was one of the first states to enact a nursing home resident’s rights act. See FLA. STAT. ANN. § 400.011 (West 2002). To enforce rights under the Florida Nursing Home Resident’s Rights Act, the legislature provided each resident with a cause of action for violation of those rights. See FLA. STAT. ANN. § 400.023(1) (West 2002). The purpose of the statute was to encourage nursing home neglect lawsuits by providing for the award of attorney’s fees. Id. The legislature also provided for the award of punitive damages for gross or flagrant conduct or conscious indifference to the rights of the resident. See id. See generally Nursing Home Protections, ST. PETERSBURG TIMES, Nov. 27, 1992 (noting how Florida’s Nursing Home Resident’s Rights Act is a national model
Part I of this Article analyzes a hypothetical as a device to examine the reasons why there are so few nursing home abuse, neglect, or mistreatment cases nationwide, despite the fact that substandard care is routine. Part II explains the functions of uncapped noneconomic damages, including making it possible for law firms to represent the victims of shameful nursing homes, augmenting often ineffective public regulation of facilities with private attorneys general, and revealing shocking conditions otherwise hidden from the public. Given the cost of experts, investment of time, medical complexity, and expense of discovery involved in nursing home liability lawsuits, it is critically important to permit the recovery of uncapped noneconomic damages. Nursing home negligence cases not only compensate the elderly resident or his or her estate, but serve to correct horrible conditions in which there is excessive and preventable suffering.

Part III argues that a tsunami of nursing home abuse, neglect, and mistreatment is imminent in the near future. One factor is the startling demographic wave of Baby Boomers reaching the age of sixty-five. Another factor is the corporatization of nursing homes, which often leads homes to understaff their facilities, thus trading the well-being of patients for profits. A third factor is the abysmal record of the states in enforcing nursing home quality standards.

In light of these factors, we need nursing home lawsuits, more now than ever, to discipline this profit-oriented industry.

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15. A tsunami is a “wave train, or series of waves, generated in a body of water by an impulsive disturbance that vertically displaces the water column.” Gander Academy, *Tsunami*, at http://www.cdli.ca/CITE/oceansunami.htm (last visited June 6, 2005).

16. See infra Part III.

17. See, e.g., *Davis v. Fairburn Healthcare Ctr.*, No. C-97368 (Ga. Super. Ct. Fulton County Oct. 1988) (awarding punitive damages against a corporate nursing home that failed to prevent a male stroke victim from dying due to severe bowel impaction resulting in toxic shock). The plaintiff’s counsel in *Davis v. Fairburn Healthcare Center* observed that it was his experience that “nursing homes operated for profit are far more likely to have problems of the type found in his case.” Questionnaire of Warner R. Wilson, Jr., Plaintiff’s Counsel in *Davis v. Fairburn Healthcare Center* (on file with author). His opinion was that financial pressures result in inadequate staffing in terms of number of personnel, training of personnel, and level of pay. *Id.; see also*, e.g., Tamar Lewin, *Jury Finds Nursing Home Liable for Routine Neglect*, N.Y. TIMES, July 12, 1990 ($125,000 punitive damage award to each claimant for negligent supervision); Florida Jury Verdict Reporter, *Spilman v. Beverly Enters.*-Fla., Inc. (1994) (noting award of $2 million punitive damages for negligent supervision); Verdicts, Settlements & Tactics, *Saunders v. Beverly Enters.* (1992) (reporting action by terminal cancer patient who alleged neglect by Beverly Enterprises nursing home).

18. See infra Part II.
The tort reformers have a very different message. They view nursing home cases as “frivolous lawsuits” filed by greedy claimants and their even greedier lawyers. Tort reformers regale the public with horror stories about nursing homes going bankrupt or having to forgo insurance coverage as a result of frivolous lawsuits. They want to cut off the ability of injured residents to obtain legal representation by reducing the incentives for lawyers to represent elderly victims of neglect. Tort reformers know that it is expensive for the nursing home industry to react to lawsuits by improving conditions; unfortunately, they are more concerned about saving corporate profits than about preventing an epidemic of pain and suffering. Any concept of morality or family values should include robust legal remedies to redress the consequences of disgusting nursing home conditions. Capping noneconomic damages will mean that fewer worthy lawsuits will be filed because the potential payout will not justify the cost and risk of bringing these claims. Thus, it would be callously indifferent public policy to institute noneconomic damages caps, which will, in effect, lock the courtroom door to the victims of nursing home neglect and abuse.

The Granny Smith hypothetical below represents this larger universe of non-frivolous nursing home cases. These are our mothers and grandmothers who are targeted by corporate-friendly tort reformers who want to sacrifice quality, compassionate care for the sake of investors. If this tort reform movement succeeds, more and more elderly Americans will die of neglect and abuse, as their cries will not be heard. Moreover, the Baby Boom generation will be doomed to live the last years of their lives in even more horrendous conditions than did their parents or grandparents. The hypothetical introduces the conundrum of factors that go into representing a plaintiff in a nursing home abuse or neglect case. The costs of pursuing litigation against a corporate nursing home must be balanced with the low economic worth of an elderly plaintiff who has no past, present, or future earnings. Nursing home cases must be decided in a legal environment in which the only meaningful recovery is noneconomic damages, since elderly residents have no significant compensatory damages. Given this environment, it is critically

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19. See infra Part III.
20. In nursing home cases, the claimant has little or no economic damages. See, e.g., Verdict Search Texas Reporter, Barger v. Sensitive Care Briarwood (2002) (discussing award of $1897 in economic damages and $200,000 in noneconomic damages), available at 1997 WL 801947; Florida Jury Verdict Reporter, Bright v. Mariner Health Care, Inc. (2004) (discussing award of $12,251 in economic damages and $43,200 in noneconomic damages). In many nursing home cases, experts are necessary to establish the standard of care or the cause of an injury. In Wiggins v. St. Johns Terrace Homes for example, the elderly plaintiff was burned by hot coffee spilled by the staff. Florida Jury Verdict Reporter, Wiggins v. St. Johns Terrace Homes (1998), available at 1998 WL 555162. In that case, the plaintiff’s attorney hired an engineer and a metallurgist to prove that the nursing home was negligent. Id. In Wanderon v. Unicare Health Facilities, Inc., the plaintiff’s attorney called experts in geriatrics and gerontology to prove that the facility violated a standard of care. Florida Jury Verdict Reporter, Wanderon v. Unicare Health Facilities, Inc. (1992). The capping of noneconomic damages at $250,000 will mean that the potential payout for the attorney will be less than the cost of retaining experts and paying other litigation expenses.
21. For purposes of this article, noneconomic damages are broadly defined to include all “damages which are recoverable in tort actions includ[ing] damages for pain and suffering, mental anguish, disfigurement, loss of enjoyment of life, loss of consortium, and all other nonpecuniary losses or claims.” Haw. REV. STAT. ANN. § 663-8.5 (Michie 2004).
22. See, e.g., VerdictSearch California Reporter, Marsalese v. Park Imperial Convalescent Ctr. (2002) (describing settlement for $45,000 in noneconomic damages to 81-year-old nursing home resident who suffered
important to permit uncapped noneconomic damages so that trial lawyers will take
more cases like the hypothetical case described in the next section.

A Hypothetical Scenario

"I am not Charlotte Simmons," I told our firm’s senior partner, who had evidently
just read about Tom Wolfe’s new novel.23 "I am Charlotte Fitzsimmons." I have
recently graduated from law school and been hired as an associate at a Tumbleweed,
Texas, law firm known for its extensive personal injury practice. My law firm
received a call from the representative of the estate of an elderly nursing home
patient, Granny Smith, who recently died. My firm has been asked to represent the
decedent’s estate. After getting my name straight, the senior partner asks me to
interview Apple Hall, who is Granny Smith’s daughter and the representative of her
estate, and who seeks legal redress to hold the Over the Hill nursing home
accountable for Granny’s death.24

The senior partner also asked me to research and draft a memorandum regarding
the pros and cons of taking this nursing home negligence case. I asked Apple to
bring Granny’s admission contract, which set the terms of her care at the Over the
Hill facility, as well as the coroner’s report. I have also received Apple’s permission
to seek all of Granny’s medical records, as well as nursing home medical care
records.

Granny Smith, eighty-eight, died at the Over the Hill Nursing Home of sepsis,
which is an overwhelming bacterial infection that poisons the blood.25 My
preliminary research reveals that more than half of nursing home litigation involves
death and allegations of pressure sores, malnutrition, and emotional distress.26 I
found an evaluation of Granny’s medical records performed by a doctor who

from bedsores on his genitals and buttocks and bacterial pneumonia as a result of neglect), available at 1997 WL
in noneconomic damages for nursing home resident who died from malnutrition from the effects of nursing home
(2002) (describing award of $3.5 million in noneconomic damages to estate of elderly male who suffered from
decubitus ulcer that spread into his bones), available at 2002 WL 32374392; Verdicts, Settlements, and Tactics,
Dixon v. South Park Rehab. & Nursing Ctr. (2001) (describing settlement for $6,970,000 in noneconomic
damages to nursing home resident who suffered from dehydration, malnutrition, and multiple pressure sores), available at
2000 WL 33231753; North Texas Reports, Fuqua v. Horizon/CMS Healthcare Corp. (2001) (describing award of
$2,710,000 in noneconomic damages and $310,000,000 for abject neglect resulting in death).


24. "The expression 'over the hill' comes from an 1871 ballad that depicts the plight of an old woman cast
out by her children to live in a government-run workhouse." Eric Bates, The Shame of Our Nursing Homes:
Nursing Homes Allegedly Treat Patients Poorly, Millions for Investors, Misery for the Poor, THE NATION, Mar. 29,
May 2, 2005).

25. Sepsis occurs in response to a series of events. Neglectful nursing home care can lead to sepsis,
which is a body’s response to infection. The occurrence of sepsis in this country is extremely
high, with over 750,000 cases of sepsis reported each year. The sepsis in these reported
individuals accounted for 215,000 deaths despite the sepsis treatment available.
The cases of sepsis has [sic] almost doubled over the last ten years, which is easily correlated to
the increase of people that have aged and the extremely high incidence of nursing home abuse.

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specializes in geriatric medicine. The doctor concluded that her death was caused or exacerbated by malnutrition and multiple decubitus ulcers that were so severe they created infection in her bones. Granny suffered from malnutrition so substantially that her weight dropped from one hundred forty to seventy-five pounds in the five weeks before her death.

Granny received pain medication only three times during a five-week period, even though she suffered through painful debridement procedures for her infected pressure sores. I learned about another nursing home neglect case where the decedent “suffered over [thirty] falls, lost [forty-one] pounds, and developed severe contractures of all his extremities.” The elderly victim of neglect developed at least eleven pressure sores, one of which penetrated to the bone of his hip. He suffered numerous infections, was dehydrated, and eventually died from starvation. In that case, the jury awarded $15 million in pain and suffering damages to the decedent’s estate. I interviewed an expert in geriatric medicine who was of the opinion that Granny’s pressure sores were caused by the failure of the nursing home staff to change her position or her bedding.

Apple Hall gave me a copy of Granny’s nursing home admission contract with Over the Hill. The document has a clause in Lilliputian print requiring that all disputes over the standard of care or the rendering of services be submitted to the Medical Arbitrators Group. This organization is a private corporation performing alternative dispute services for the health care industry. I also noticed that, under the contract, the plaintiff must pay his or her share of the arbitration costs. I have found that corporate nursing homes like Over the Hill are routinely including one-sided

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27. The terms decubitus ulcer and pressure sore often are used interchangeably in the medical community. Decubitus, from the Latin decumbere, means “to lie down.” Decubitus ulcer, therefore, does not adequately describe ulceration that occurs in other positions, such as prolonged sitting (eg, the commonly encountered ischial tuberosity ulcer). Because the common denominator of all such ulcerations is pressure, pressure sore is the better term to describe this condition.

Don R. Revis, Jr., Decubitus Ulcers, E-MEDICINE, Mar. 2004, at http://www.emedicine.com/med/topic2709.htm (last visited May 2, 2005). There are four stages of a decubitus ulcer. A Stage I ulcer is evident when the skin has persistent redness in a certain area caused by pressure. Stage II is not clearly defined and an ulcer may progress directly to Stage III. An ulcer is classified as Stage III when it breaks open to expose fat under the skin, and it is in Stage IV if bone or muscle is exposed. See id.

28. Debridement or scraping of the tissue to the bone is recommended when there are “foul odors, wound drainage, eschar, necrotic material, and soilage from urinary or fecal incontinence. This provides information regarding the level of bacterial contamination and the need for debridement or diversionary procedures.” Id.


30. Id.

31. Id.

32. Id.

33. Pressure sores or decubitus ulcers are caused when:

[p]ressure is exerted on the skin, soft tissue, muscle, and bone by the weight of an individual against a surface beneath. These pressures are often in excess of capillary filling pressure, approximately 32 mm Hg. In patients with normal sensitivity, mobility, and mental faculty, pressure sores do not occur. Feedback, both conscious and unconscious, from the areas of compression leads individuals to change body position. These changes shift the pressure prior to any irreversible tissue damage.

Revis, supra note 27.

34. The Medical Arbitrators Group is a hypothetical company specializing in nursing home mediation and arbitration.

arbitration clauses in their admission contracts. The admission contract also reserved the right of Over the Hill to waive arbitration and file suit in Texas federal and state courts, a right not accorded to their residents. Three out of four newly admitted nursing home patients in the nation’s largest nursing home chain, Beverly Enterprises, are bound by arbitration clauses. I wonder if senior citizens who are mentally or physically disabled understand that they are waiving their legal rights as a condition of admission. Over the Hill’s arbitration clause requires Granny to waive her right to file a claim in any court as well as her right to any punitive or noneconomic damages that could result from the arbitration. My research found an Ohio case in which the court struck down an arbitration agreement entered into by a comatose nursing home patient whose spouse signed the agreement. In that case, the spouse of the decedent signed an arbitration agreement at a time when she was distracted by the gravity of her husband’s health condition.

I have concluded that Over the Hill’s arbitration clause may be successfully challenged on grounds of substantive and procedural unconscionability. Granny was asked to sign the arbitration agreement while she was under the effects of a prescription pain reliever, and she could not properly read it because she did not have her reading glasses with her. Even though Over the Hill’s nursing administrator read portions of the agreement to Granny until she said that it sounded all right to her, Granny was only offered arbitration on a “take it or leave it” basis, and a court may be receptive to the argument that she had no meaningful alternative but to sign the arbitration agreement. We can also argue that Over the Hill’s arbitration

36. W. Todd Harvey, Arbitration Agreements in Nursing Home Admission Contracts, 39 TRIAL 72 (2003) (documenting the trend of requiring nursing home residents to sign arbitration agreements as a condition for admission to nursing home facilities).

37. “The arbitration option currently is being accepted by approximately 75 percent of newly admitted patients. In another positive development, tort reform is gaining widespread bipartisan support at national and state levels, and legislative remedies would slow the growth of liability costs throughout the nursing home industry.” Beverly Enterprises, Inc., Beverly Fourth-Quarter Loss Reflects Medicare Funding Reductions, Discontinued Operations (2003), at http://www.beverlycorp.com/BeverlyCorp/News/Beverly+fourth-quarter+loss+reflects+Medicare+Funding+Reductions+discontinued+operations.htm (last visited June 3, 2005).

38. A Florida appellate court upheld an arbitration clause requiring claims by an elderly nursing home patient against a nursing home to be arbitrated. Richmond Healthcare, Inc. v. Digati, 878 So. 2d 388 (Fla. Dist. Ct. App. 2004). The appeals court found nothing in Florida’s Nursing Home Statute limiting arbitration clauses in nursing home admission agreements. Id. at 391. The court reasoned that since there was no statutory limitation on arbitration provisions in nursing home admission contracts, the clause would be enforced. Id.


40. Id. at 24.

41. Procedural unconscionability refers to the individualized circumstances under which the contract is entered into, while substantive unconscionability deals with the unreasonableness and unfairness of the contractual terms themselves. Most courts take a “balancing approach” to the unconscionability question and seem to require a certain quantum of procedural plus a certain quantum of substantive unconscionability. See Romano ex rel. Romano v. Manor Care, Inc., 861 So. 2d 59, 62–64 (Fla. Dist. Ct. App. 2003) (finding both procedural and substantive unconscionability in arbitration clause in nursing home admissions contract given the age of the resident and the circumstances surrounding the signing of the agreement).

42. Cf. Small, 823 N.E.2d at 24 (finding procedural unconscionability when signor was under a great deal of stress and had no lawyer or legal knowledge, and when the agreement was not explained).

43. Cf. id.
agreement does not provide Granny with adequate means to vindicate her rights under the Texas elder abuse statute.\textsuperscript{44}

I have also been asked to make a preliminary assessment of what causes of action Granny’s estate might pursue, assuming that the arbitration clause can be successfully challenged. Further research is necessary to determine Granny Smith’s potential causes of action and damages, and to anticipate defenses that the nursing home will likely raise.

I. WHY THERE ARE TOO FEW NURSING HOME LAWSUITS

In the nursing home industry, as in many other sectors, there are two Americas. The wealthy minority is able to afford resident-friendly facilities with a wide variety of choices. For example, “The Sweet Life at Rosehill”\textsuperscript{45} offers its well-heeled residents “amenities usually reserved for assisted living properties, such as all private suites, gourmet buffet dining, and an ‘interactive village center,’ complete with French Bistro, Salon, Boutique, Art Gallery, and Movie Theater.”\textsuperscript{46} Rosehill touts itself as a concerned village incorporating “a care philosophy that encourages independence, choice, and involvement in activities such as art programs with weekly workshops and both a premier and a children’s art gallery that bring in rotating work, appreciation, and participation awards for all.”\textsuperscript{47} Another facility boasts a Victorian décor that resembles an upscale restaurant, café, convenience store, bank, swimming pool, fitness room, and guest suites for visiting friends and family.\textsuperscript{48}

In contrast, the less affluent are consigned to a dumping ground for the elderly where there is no menu of choices. “[M]ost patients [are] poor and isolated; more than 50 percent had some mental impairment; half had no close relatives; and fewer than 50 percent could walk alone.”\textsuperscript{49} Substandard care in nursing homes is all too common. A March 2002 study by the Department of Health and Human Services found that nine in ten nursing homes nationwide had staffing too low to satisfy minimum standards.\textsuperscript{50} In addition, state inspections uncovered 1,600 nursing homes that had substantial infractions of quality standards that were life-threatening.\textsuperscript{51}
nationwide report by a congressional committee found that nearly one-third of all nursing homes were cited for elder neglect and abuse in the two-year period between January 1999 and January of 2001. In fact, an inspection of one nursing home uncovered these problems: (1) residents with severe pressure sores, (2) residents with skin tears and bone fractures often incurred when a disabled person is handled roughly, (3) diapers changed and left for hours on the floor, (4) bedside commodes left full of eye-stinging urine, (5) residents left in bed until noon or beyond, and (6) maggots in untreated decubitus ulcers or bedsores.

The Institute of Medicine's 1986 report entitled Improving the Quality of Care in Nursing Homes (IOM Report) concluded that problems with nursing homes are widespread: "[T]here is broad consensus that government regulation of nursing homes, as it now functions, is not satisfactory, because it allows too many marginal or substandard nursing homes to continue in operation." The IOM Report concluded that too many government certified nursing homes provided "very inadequate—sometimes shockingly deficient—care." This nationwide study of nursing home care indicated a widespread pattern of "grossly inadequate care and abuse of residents." The IOM Report concluded:

The deficient conditions included neglect and abuse leading to premature death, permanent disability, and unnecessary fear and suffering on the part of residents....Residents are often treated with disrespect; they are frequently denied any choices of food, of roommates, of the time they rise and go to sleep, of their activities, of the clothes they wear, and of when and where they may visit with family and friends....The quality of medical and nursing home care also leaves much to be desired.

The IOM Report was key to congressional action in enacting a major overhaul of the nursing home regulatory system when it passed the Omnibus Budget Reconciliation Act of 1987 (OBRA). OBRA required all nursing homes receiving

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55. Id. (quoting IOM REPORT, supra note 54, at 2).
56. Id. (quoting IOM REPORT, supra note 54, at 3).
57. Id. n.5 (quoting IOM REPORT, supra note 54, at 3).

In 1983, HCFA contracted with the Institute of Medicine to conduct a study on nursing home care in America and how it could be improved. HCFA was concerned that nursing homes were not providing a sufficient level of care and that the enforcement system was too lax. As a result, IOM published its report in 1986, entitled Improving the Quality of Care in Nursing Homes ("IOM Report")....
Medicare and Medicaid to comply with over 100 new quality standards.59 "To monitor compliance with these conditions, nursing homes have to enter into provider agreements that permitted unannounced annual standard surveys...."60 "Using the survey protocol, state surveyors, pursuant to contract with [the Department of Health and Human Services], conduct annual surveys of nursing homes which receive Medicare and Medicaid payments in order to determine whether the home is in substantial compliance with the participation requirements."61 Recent data shows, however, that these regulatory mechanisms are not doing enough to combat the problems in our nation's nursing homes.

Litigation is one way to supplement regulatory mechanisms. Unfortunately though, too few lawsuits are being brought to redress these horrendous conditions. The plaintiffs' bar overlooked the possibility of filing nursing home negligence cases prior to the early 1990s because they believed "that the patients were too old and the damages too limited."62 It is only recently that trial lawyers have begun specializing in these cases.63 The rise of nursing home litigation was a direct result of elder abuse statutes, which established new remedies for abuse and neglect.64 Even since these developments, not enough lawsuits are being brought. For example, a trial lawyers' study found only twenty-eight nursing home cases where there was any award of noneconomic damages in all jurisdictions for the period 1986–2004.65 In most jurisdictions, there were only a few nursing home cases in which noneconomic damages were awarded. New Mexico, for example, reports only a handful of verdicts in nursing home cases over the last quarter century.66 In the vast majority of jurisdictions, there are simply too few nursing home verdicts to even make meaningful data comparisons. Florida, Texas, and California are nursing home litigation hotspots, yet even in these jurisdictions, verdicts are rare.67

In the remainder of Part I of this Article, we will return to the hypothetical about our young law firm associate, Charlotte Fitzsimmons, to explore the reasons why there are so few nursing home lawsuits being brought, given the nationwide problem of substandard care. As in the earlier discussion, policy issues will be examined

59. Thompson, 223 F. Supp. 2d at 79.
60. Id. (citing 42 U.S.C. §§ 1395i-3(g), 1396r(g) (2000)).
61. Id. at 108.
63. Stevenson's empirical study of nursing home litigation claims suggests "that attorneys mobilized in this area in the mid-1990s and the claims and the size of recoveries have grown substantially in recent years." Testimony of David Stevenson, supra note 26.
66. My Lexis/Nexis search of The New Mexico Blue Sheets Verdict Reporter uncovered only a few nursing home cases decided for the period 1994–2004. A Lexis/Nexis search uncovered only six cases for the decade 1994–2004 and most of these cases were settlements rather than verdicts. A Westlaw search of the New Mexico Verdict Reporter uncovered five cases for that same period. The rarity of nursing home cases in New Mexico reflects a nationwide trend of most litigation occurring in a few hotspots. Dr. Stevenson found that most nursing home cases occurred in either Texas or Florida. Testimony of David Stevenson, supra note 26.
67. Dr. David Stevenson's study found that most nursing home cases were not litigated in the mid-1990s and more than half of the 8000 filed claims were in two jurisdictions, Texas and Florida. Testimony of David Stevenson, supra note 26.
through the vehicle of Fitzsimmons’ memorandum about the pros and cons of her law firm representing Granny Smith’s estate in a nursing home neglect case.

A. Our Associate’s Memo on the Decision to Represent Granny Smith’s Estate

1. Financial Difficulties in Nursing Home Litigation

It will be a difficult financial decision for a small firm like ours to take Granny Smith’s case even though it is apparent that Granny Smith’s care was substandard. We must balance the financial costs and the opportunity costs involved in taking her case against the damages we might obtain if we prevail. One major expense in nursing home litigation is expert witness fees. Because Over the Hill rendered deficient medical care, our firm will need to retain medical experts. In many nursing home cases alleging medical malpractice, expert witness fees may be $100,000 or more. We may also need to retain experts to testify on the standard of care or damages. In one Florida case, for example, the defense presented the testimony of a family practitioner to testify on the standard of care in nursing homes. One of the difficulties in a case like this is that a jury may award little by way of damages, and any damages must be weighed against the cost of discovery, retaining experts, and other trial expenses. As a result, the victims of elder mistreatment in nursing homes

68. “Opportunity cost is a term used in economics, to mean the cost of something in terms of an opportunity foregone (and the benefits that could be received from that opportunity), or the most valuable foregone alternative.” Dictionary.LaborLawTalk.com, Definition of Opportunity Cost, at http://encyclopedia.laborlawtalk.com/Opportunity_cost (last visited May 16, 2005). For example, if a trial attorney decides to file a nursing home case, he or she must take into account not only the time and money that will be spent on the case, but also the opportunity cost, in terms of other cases that might have been filed using those financial and temporal resources. If the attorney decides to file a nursing home case, he or she may have forgone the opportunity to take on a premises liability or products liability case where the compensatory damages are typically greater than those recoverable in nursing home cases. The public perception is that the contingency fee attorney risks nothing by filing a nursing home lawsuit. This perception is mistaken because it does not take into account the hidden opportunity costs of nursing home cases.


70. This estimate was based upon the author’s interviews in the early 1990s with trial lawyers conducting nursing home cases where medical malpractice was at issue. See Michael L. Rustad & Thomas Koenig, Reconceptualizing Punitive Damages in Medical Malpractice: Targeting Amoral Corporations, Not “Moral Monsters,” 47 Rutgers L. Rev. 975 (1995). We should expect that the cost of litigation would be even greater in the early twenty-first century. In many of the recent nursing home neglect cases where plaintiffs prevailed, trial lawyers retained multiple experts to establish the standard of care or damages. In a California case, for example, parties retained a pulmonologist and an entomologist who gave his expert opinion about the source of maggot infestation in the pressure sores of an elderly resident. Trials Digest, Perry v. Sun Healthcare Group, Inc. (2005), available at 2002 WL 32122460. The plaintiffs contended that the “defendants so neglected decedent’s care that he developed ulcerative sores, severe infections, a foul-smelling discharge from his tracheostomy, and [widespread] maggot infestation.” Id.; see also Trials Digest, Lawson v. Skyline Healthcare Center (2005) (noting that experts included a neurologist, a family practitioner, and a skilled nursing facility administrator in a case where a resident was injured in a nursing home fire), available at 2000 WL 675409.


72. In Powell v. Parkview Estate Nursing Home, Inc., 240 So. 2d 53, 56–57 (La. Ct. App. 1970), the plaintiff received $2,000 for noneconomic damages in a negligent supervision case where the elderly resident fell and was
are at a great disadvantage in finding attorneys willing to represent them because the costs of these lawsuits are prohibitive.

2. Special Problems Representing the Elderly

Many nursing home victims have chronic physical or mental diseases that make them unable to seek out legal representation. In many nursing home cases, the elderly plaintiff is reluctant to become ensnared in the years-long stress of litigation. Amicable settlements are particularly important to a nursing home resident who may fear retaliation from nursing home care personnel. The reality is that elderly nursing home residents do not have years to devote to litigation. Even if they survive to testify, elderly plaintiffs may be too ill to appear in court. “Often the elderly plaintiff suffers from memory loss or an inability to communicate” which will make them poor witnesses.

Another difficulty arises in interviewing potential witnesses. Usually, lawyers must travel to the nursing home to interview witnesses, because elderly witnesses will not have the ability to come to lawyers' offices. Elderly witnesses also have less credibility than plaintiffs in other age categories. Granny’s roommate, Daisy, for example, suffers from dementia and is not a credible witness. Another acquaintance in the home, who witnessed Granny being left in her own urine for hours, is in her nineties and is too disabled to testify in court. Granny’s former roommate is also concerned about testifying because she is worried that staff will retaliate against her.

While it would be useful to interview Over the Hill staff members, that may also prove challenging. There is often a rapid turnover of staff at nursing homes, and it can be difficult to locate and convince staff to testify on behalf of the injured resident. One nurse’s aide at Over the Hill was eager to speak with the firm about the conditions at the home but is reluctant to testify because she needs her job. Another nurse’s aide has personal knowledge of Granny’s treatment, but has transferred to another facility. These difficulties in obtaining witnesses may make it hard for us to build our case against Over the Hill.

hospitalized for five days.


74. Id.


77. Another barrier to representing victims of nursing home neglect is that elderly patients may have mental or physical conditions that make it difficult to tell their “side of the story.” Or, an elderly injury victim may be too disabled or injured to return to an accident scene. See O’Reilly, supra note 73, at 23.

78. Id. at 216.

79. See id.
3. Available Causes of Action in Nursing Home Litigation

a. Intentional Torts of Assault & Battery

Nursing home cases may involve deliberate physical or sexual abuse in addition to physical neglect. The nursing home records indicate that Granny Smith was left with bruises and contusions on her face after a nurse’s aide slapped her. The nurse’s aide was immediately terminated from his position. Granny will likely have a good cause of action for common law battery against the nurse’s aide, since the slap was harmful and offensive and clearly unprivileged. In addition, the nursing home may be liable for negligence in hiring and retaining the abusive aide. However, Granny Smith’s estate will likely receive minimal economic damages for the physical abuse. In an Arizona nursing home case, for example, one dollar was awarded to an Alzheimer’s patient slapped by a nurse’s aide. Thus, even though it is a gross departure from standards of social decency to slap an elderly patient, we are not likely to obtain meaningful damages on our intentional tort theories.

b. Corporate Liability for Employee’s Intentional Torts

Over the Hill may be vicariously liable for the intentional tort of its employee if a court finds that the abuse occurred during the scope of employment duties.

80. Frank Glendenning, Elder Abuse and Neglect in Residential Settings: The Need for Inclusiveness in Elder Abuse Research, in Elder Abuse and Neglect in Residential Settings: Different National Backgrounds and Similar Responses 3 (Frank Glendenning & Paul Kingston eds., 1999) (citing study of 1000 nursing homes in Texas and reporting “that deliberate physical abuse was known but less common than physical neglect”).

81. An intentional tort occurs when the defendant desires the result of his or her actions or knows with a substantial certainty that the result will occur. RESTATEMENT (SECOND) OF TORTS § 8A (1979). The tort of assault likely occurred when a nurse’s aide at Over the Hill caused Granny’s reasonable apprehension of immediate harmful or offensive action. See id. § 21. If, however, Granny was attacked while asleep, there would be no apprehension prior to contact and therefore no assault. The nursing home employee committed battery when he intentionally slapped Granny. See id. §§ 13, 16, 18.

82. In the typical case, the nurse’s aide who abuses a patient is terminated or criminally prosecuted, but not sued in common law tort. In intentional torts lawsuits arising out of nursing home care, the lawsuit is typically brought against the nursing home for negligently retaining the abusive employee. See, e.g., Texas Reporter—Soele’s Trial Report, Steward v. Hillside Manor Nursing Home, Inc. (1983) (reporting $175,000 settlement against nursing home arising out of battery by nursing home employees); North Texas Reports, Threlkeld v. Buckner Benevolences Baptist (1999) (reporting recovery of $185,000 against nursing home arising out of assault of patient by a male certified nursing assistant in a Texas mediation).

83. See, e.g., Rodebush v. Okla. Nursing Homes Ltd., 867 P.2d 1241, 1243–44 (Okla. 1993) (affirming a judgment against defendant nursing home that awarded plaintiff resident actual damages of $50,000 and $1.2 million in punitive damages for negligence and wilful misconduct for retaining abusive nurse’s aide who slapped Alzheimer’s patient).

84. Magma Copper Co. v. Shuster, 867 P.2d 1241, 1243–44 (Okla. 1993) (affirming a judgment against defendant nursing home that awarded plaintiff resident actual damages of $50,000 and $1.2 million in punitive damages for negligence and wilful misconduct for retaining abusive nurse’s aide who slapped Alzheimer’s patient).

85. Magma Copper Co. v. Shuster, 575 P.2d 350, 353 (Ariz. Ct. App. 1977) (holding that the discrepancy between compensatory and punitive damages was so great as to render the total award “excessive”).
However, the nursing home will likely argue that it is not liable for this intentional tort because the employee was acting outside the scope of his duties. Over the Hill may also be liable for its employee’s abuse on a negligence theory. There is a strong argument that the nursing home negligently screened, supervised, or retained an employee with vicious propensities. If there were prior similar incidents of abuse involving nursing home employees, a jury might award punitive damages to punish and deter the facility for not having taken preventative steps to protect its residents.

Patients’ Bill of Rights: Winners and Losers, 65 ALB. L. REV. 17, 37 (2001) (citing BLACK’S LAW DICTIONARY 927 (7th ed. 1999)). A nursing home, like a hospital, may be vicariously liable for negligent hiring or review of the credentials of employees, or negligent retention of an unfit employee, because failure to scrutinize the credentials of staff can foreseeably result in injuries to residents. For example, the Oklahoma Supreme Court upheld a nursing facility’s liability for punitive damages when a nurse’s aide assaulted an Alzheimer’s patient. Rodebush, 867 P.2d at 1246–52 (affirming punitive damages for a nursing home’s failure to screen or train a nurse’s aide who physically abused Alzheimer’s patient).

Another basis for holding the nursing home liable is breach of the duty to use reasonable care in the maintenance of a safe and adequate facility.

The duty which was adopted by the states in recognizing corporate liability of hospitals for negligent hiring has been expressed as “due care” in selection and retention of competent physicians, “reasonable care” to maintain a safe facility, “reasonable care” or “ordinary care” to grant hospital privileges only to competent physicians.


Nursing homes and their staffs are usually contractually bound to residents, thus establishing this element of duty. In addition, the nursing facility and its staff may owe a legal duty to the patient under theories of direct corporate liability and vicarious liability. Under the direct corporate liability theory, nursing home facilities owe their residents a direct non-delegable duty of care.


86. Under our common law, the principal can be held liable for the acts of the agent under theories of respondeat superior, vicarious liability, or imputed negligence. A principal may be liable for intentional torts “committed by the servant where its purpose, however misguided, is wholly or in part to further the master’s business.” WILLIAM L. PROSSER, THE LAW OF TORTS 476 (3d ed. 1964). The common law, for example, made a common carrier liable for the personal tort of the rape of a passenger. Id. at 478 (citing Co-op Cab Co. v. Singleton, 19 S.E.2d 541 (Ga. App. 1942); Berger v. Southern Pac. Co., 300 P.2d 170 (Cal. App. 1956)). Courts frequently have a difficult time determining whether the agent was committing a tort for personal reasons, rather than for the principal’s business purposes. Id. The doctrine of “frolic and detour” describes an agent stepping outside his employment role to do an act for himself. Id. at 474. If the agent departs from his employment or is on a frolic, the master is not liable. Id. at 477.

87. A Tennessee appeals court reversed a negligent hiring verdict in a nursing home abuse case in Cotten ex rel. Long v. Brookside Manor, 885 S.W.2d 70, 72 (Tenn. Ct. App. 1994) (noting that “[t]he jury was instructed on plaintiff’s negligent hiring claim, retired, and after deliberation, returned the verdict in plaintiff’s favor for $75,000.00 compensatory damages”); cf. Callens v. Jefferson County Nursing Home, 769 So. 2d 273, 278 (Ala. 2000) (reversing the dismissal of, among other things, a claim for “negligent hiring, training, and supervision”). The concept of prior similars is used to prove the nursing home’s neglect in the face of knowledge of a developing profile of danger. In Peñalver v. Living Centers of Texas, Inc., 2004 WL 1392268, at *1 (Tex. Ct. App. June 23, 2004), an elderly nursing home patient died from the trauma of being dropped by a nurse’s aide. The appeals court ruled that the trial court erred in permitting the plaintiff to introduce evidence of 800 prior falls in the nursing home because there was no showing that the falls were substantially similar to that sustained by the decedent. Id. at *3–4.
c. Elder Abuse Statute

Granny Smith’s estate may also have a cause of action under the Texas elder abuse statute.\(^8\) However, Texas has a less protective elder abuse statute than California, where the estate would have the possibility of recovering attorneys’ fees and costs as well as punitive damages.\(^9\) California’s Elder Abuse and Dependent Adult Civil Protection Act\(^9\) 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.\(^9\) Florida’s nursing home statute permits nursing home residents to seek compensatory and punitive damages in any state or federal court of competent jurisdiction.\(^9\) Thus it is particularly desirable to include a count for statutory elder abuse, because of the possibility that a court will award attorneys’ fees and costs.\(^9\)

d. Breach of Warranty

One cause of action that is frequently brought against nursing homes is breach of warranty. A case that is illustrative of this type of claim is Rhodes ex rel. Sellers v. Sensitive Care, Inc.,\(^9\) where the daughter of an elderly nursing home patient alleged that her father received substandard care while he was a resident of the facility.\(^9\) A Texas jury found that the Sensitive Care facility “was negligent and engaged in false, misleading or deceptive practices that caused damage to [the plaintiff], failed to comply with a warranty, and engaged in an unconscionable action or course of action.”\(^9\) The Sensitive Care jury awarded the decedent’s estate $15,000 for mental anguish and pain and suffering and awarded the daughter another $15,000 for her pecuniary loss, loss of companionship and society, and mental anguish.\(^9\) The jury handed down $250 million in punitive damages and also awarded the plaintiff’s counsel “a total of $175,000 in attorneys’ fees.”\(^9\) In Granny’s case, we may be able to obtain damages for breach of warranty by contrasting the representations made by Over the Hill in its glossy brochures and CD-ROM with the substandard care that led to Granny’s deterioration and death. This evidence is probative of the difference between the nursing care advertised and that delivered. Because of this difference,
it may also be possible to recover damages for breach of contract, negligent misrepresentation, or deceptive trade practices.

e. Medical Malpractice in Nursing Home Litigation

It is unclear whether Granny’s death was the result of medical treatment or abuse not categorized as medical malpractice. The doctrinal distinction matters most in states such as Texas that place caps on noneconomic damages in medical liability cases.\textsuperscript{100} Medical malpractice constitutes “any unintentional tort or any breach of contract based on health care or professional services rendered.”\textsuperscript{101} In general, medical malpractice is 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.”\textsuperscript{102} In many nursing home cases, the basis for a finding of medical malpractice is the failure of the nursing staff to properly identify the decedent’s symptoms or heed the resident’s requests to be hospitalized.\textsuperscript{103} Granny’s death occurred at the hands of a poorly trained and overtaxed nursing staff, and it is unclear whether all of the harm she sustained would be within the realm of professional medical services.\textsuperscript{104} It could prove problematic for us if Granny’s death was found to be the result of medical malpractice, because under Texas law, any noneconomic damages we are awarded based on malpractice would be subject to a damage cap.\textsuperscript{105}

f. Negligent Nursing Home Care

Even if there is no cause of action for medical malpractice, Over the Hill may still be liable for negligent nursing home care. The nursing home owes a duty to Granny Smith to provide her with a quality of care that complies minimally with federal

\begin{footnotesize}
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\item[102.] 36 CAL. JUR. 3D Healing Arts and Institutions § 388 (2005).
\item[103.] See, e.g., Texas Reporter-Soele’s Trial Report, May in re Estate of May v. Monahans Senior Care Center (2000), available at 2001 WL 252709.
\item[104.] A Louisiana appellate court examined six factors to determine whether conduct by a qualified health care provider constitutes “malpractice” to which a statutory cap on damages applies: (1) whether the particular wrong is treatment-related or caused by dereliction of professional skill; (2) whether the wrong requires expert medical evidence to determine whether the appropriate standard of care was breached; (3) whether the pertinent act or omission involved assessment of the patient’s condition; (4) whether the incident occurred in the context of the physician-patient relationship or was within scope of activities which a hospital is licensed to perform; (5) whether injury would have occurred if the patient had not sought treatment; and (6) whether the tort alleged was intentional. Martin, 880 So. 2d at 1024 n.1.
\item[105.] TEX. CIV. PRAC. & REM. CODE ANN. § 74.301 (Vernon 2004) (capping noneconomic damages at $250,000 effective for cases filed after September 1, 2003). Fortunately, any portion of the award based on the intentional torts of Over the Hill or its employees would likely not be subject to the cap. A Louisiana court found taunting and teasing of a resident by a nurse’s aide to fall outside of the scope of medical treatment, whereas neglect of pneumonia and decubitus ulcers was classifiable as medical malpractice. Martin, 880 So. 2d at 1025.
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quality standards. My research reveals that our firm may use federal Medicare and Medicaid regulations governing the quality of nursing home care to show that Over the Hill’s numerous deficiencies, uncovered in the course of Texas state inspections, constituted negligence per se.

However, in any negligence-based nursing home case, there are difficulties proving that the facility’s negligence was the cause-in-fact of the plaintiff’s death or injuries. My research reveals that proving causation is a challenge in these cases.

106. A nursing home is required by federal regulation to comply with federal, state, and local laws and professional standards. 42 C.F.R. § 483.75(b) (2004). In the typical nursing home cases, the violation of statutes may be used to prove negligence per se. All nursing homes, for example, are required to complete nursing home surveys, which are admissible in nursing home negligence cases. See, e.g., Montgomery Health Care Facility v. Ballard, 565 So. 2d 221 (Ala. 1990). Nursing homes are required to describe and post resident surveys. 42 C.F.R. § 483.10 (2004). All long-term facilities must notify residents of their rights and services on admission. 42 C.F.R. § 483.10(b) (2004). Evidence that a long-term care facility fails to comply with this federal statutory requirement will be useful in a nursing home negligence case. A nursing home failing to comply with staffing requirements under 42 C.F.R. § 483.30 (2004) may also be found to be negligent. Facilities that fail to retain and maintain records documenting residential care may also be found negligent. See 42 C.F.R. § 483.75(f) (2004). Every nursing home must have a sufficient nursing staff to provide nursing and related services to maintain the “highest practicable physical, mental, and psychosocial well-being of each resident, as determined by resident assessments and individual plans of care.” 42 C.F.R. § 483.30 (2004). It would be strong evidence of negligence if a facility failed to have a registered nurse on duty for eight hours per day and licensed professional nurses on duty twenty-four hours per day. 42 C.F.R. 483.30(b) (2004).

107. The Centers for Medicare & Medicaid Services (CMS) is the component of the federal government’s Department of Health and Human Services that oversees the Medicare and Medicaid programs. A large portion of Medicare and Medicaid dollars is used each year to cover nursing home care and services for the elderly and disabled. Medicare.gov, About Nursing Home Inspections, at http://www.medicare.gov/Nursing/AboutInspections.asp (last visited Apr. 19, 2005). The CMS contracts with the states to inspect and oversee the licensing of nursing homes. State governments oversee the licensing of nursing homes. In addition, States have a contract with CMS to monitor those nursing homes that want to be eligible to provide care to Medicare and Medicaid beneficiaries. Congress established minimum requirements for long-term care facilities that want to provide services under Medicare and Medicaid. These requirements are broadly outlined in the Social Security Act (the Act). The Act also entrusts the Secretary of Health and Human Services (DHHS) with the responsibility of monitoring and enforcing these requirements. CMS, a DHHS Agency, is also charged with the responsibility of working out the details of the law and how it will be implemented, which it does by writing regulations and manuals. Id. “CMS contracts with each State to conduct onsite inspections that determine whether its nursing homes meet the minimum Medicare and Medicaid quality and performance standards.” Id. Trial lawyers representing nursing home residents will often base their cases upon statutory violations uncovered by state inspections. The CMS “regulations cover a wide range of aspects of resident life, from specifying standards for the safe storage and preparation of food to protecting residents from physical or mental abuse or inadequate care practices. There are over 150 regulatory standards that nursing homes must meet at all times.” Id. For example, the long-term care facility is required initially to assess the resident’s functional capability (within fourteen days after admission). See 42 C.F.R. § 483.20 (2004). The nursing home is required to take steps to prevent the deterioration of a resident’s ability to bathe, dress, groom, transfer and ambulate, toilet, eat, and use speech. See 42 C.F.R. § 483.25 (2004). Incontinent residents, for example, must be provided appropriate treatment and services to restore as much normal bladder functioning as possible and urinary tract infections must be treated. Id. The CMS has the authority to fine or “deny payment to the nursing home, assign a temporary manager, or install a State monitor” for violations. Medicare.gov, supra. “CMS considers the extent of harm caused by the failure…. Id. Trial lawyers representing nursing home residents should also examine whether a facility has established a care plan for the claimant.


109. We must prove that Over the Hill’s culpable conduct was the actual cause of Granny Smith’s deterioration and death. The traditional test was that the plaintiff must prove that the defendant’s misconduct was a “but for” cause of her injury. JOHN L. DIAMOND ET AL., UNDERSTANDING TORTS § 11.04[E] (1996). However, the traditional “but for” test has been supplanted by the “substantial factor” test for causation. Id. at 202. We must also
because elderly nursing home residents tend to have complicated preexisting conditions, making it difficult to determine whether their injuries are a result of abuse or neglect or a result of their preexisting health problems. For example, I read about a Texas case where the nursing home argued that a diabetic’s own negligence, rather than the nursing home’s failure to provide adequate hydration and nutrition and to prevent multiple pressure sores from developing, was the cause of his injuries. Similarly, in our hypothetical, Granny had a complicated medical history with several preexisting conditions including hypertension, thin skin, and complications from her recent hip replacement surgery. As a result of this difficulty in diagnosing the cause of ailments in elderly residents, attorneys must often hire high-priced medical experts in order to show that the nursing home was responsible for the patient’s injury or death.

g. Spoliation & Alteration of Nursing Home Records

Another problem in nursing home litigation is spoliation of evidence. I have requested all of Granny’s medical records as well as records of medical care rendered at Over the Hill. I have discovered that parts of Granny’s records are missing, including information about the severity of her pressure sores. If we can demonstrate that the nursing home deliberately altered or destroyed these records, we may have grounds for discovery sanctions, though Texas has yet to recognize the tort of spoliation.

4. Assessment of Granny Smith’s Damages

In Granny Smith’s case, a jury could theoretically award three kinds of tort damages: nominal damages, compensatory damages, and punitive damages. Nominal damages may be awarded when a plaintiff has established liability on at least one claim but has suffered little if any compensable harm. Nominal damages are rarely awarded—generally only in intentional tort cases, where actual damages may be slight. In contrast, compensatory damages are “awarded in a lump-sum, for all

prove that Over the Hill’s neglect was the proximate cause of Granny’s injury. ‘Proximate’ or ‘legal’ cause modifies and adds to the requirement that the defendant’s culpable conduct be the actual cause of the plaintiff’s injury. Even when the plaintiff establishes actual cause, courts will preclude recovery when the causal relationship between the defendant’s conduct and the plaintiff’s injury is too attenuated, remote, or freakish to justify imposing responsibility on the defendant.” Id. at 214. Over the Hill will, for example, argue that the nurse’s aide’s physical abuse was unforeseeable and too remote or bizarre for it to be liable.


111. A defense attorney specializing in nursing home cases observes that the plaintiffs’ bar frequently “seeks to demonstrate that the defense undertakes to destroy records that pertain to liability and damage issues. This is commonly termed ‘spoliation of evidence.’” Michael J. Brady, Avoiding or Mitigating Punitive Damages Exposure in Nursing Home Litigation, FICC NURSING HOME LITIGATION SEMINAR MATERIALS, at http://www.thefederation.org/documents/BRADY%20(pun).htm (last visited Apr. 19, 2005); see, e.g., Cresthaven Nursing v. Residence Freeman, 134 S.W.3d 214, 225–28 (Tex. Ct. App. 2003) (discussing spoliation of evidence claim in nursing home case in which $9 million was awarded but remanding for remittitur).

112. See, e.g., Garcia v. Columbia Med. Ctr. of Sherman, 996 F. Supp. 617 (E.D. Tex. 1998) (refusing to recognize a spoliation of evidence claim since the Texas Supreme Court had yet to recognize such an action).


114. The jury in Magma Copper Co. v. Shuster, 575 P.2d 350 (Ariz. Ct. App. 1978), awarded the nominal sum of $1 in a case where an elderly resident was slapped across the face by a nursing home administrator. In that
losses that have proximately resulted from the tort and all losses that will so result in the future.” Punitive damages are awarded to punish and deter the nursing home or caretaker for neglect or abuse of residents. It is unlikely that Granny Smith’s estate will receive punitive damages in the medical malpractice action, but it is possible that we will recover punitive damages for the physical abuse she suffered, as well as compensatory damages for her death.

a. Compensatory Damages in Nursing Home Cases

Compensatory damages are sub-divided into economic and noneconomic losses. Economic damages are special damages defined as direct costs, such as loss of income, medical expenses, rehabilitation expenses, and expenses incurred in obtaining custodial care of the nursing home resident. Noneconomic damages include any non-pecuniary damages, such as pain and suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation, and loss of enjoyment of life. The biggest problem with taking this case is the small likelihood of obtaining any compensatory damages, since Granny was an elderly woman without earnings. An elderly, disabled, and vulnerable plaintiff like Granny has no direct losses incurred as a consequence of neglect; she has no lost wages and no future earnings; reduced life expectancy damages are unavailable to her, and she is highly unlikely to receive hedonic damages.

As a result, the “she-used-to-be-a-vegetable, she’s-still-a-vegetable, these-things-happen-and-who-cares?” or “no damages” defense is likely to be asserted in Granny’s case. However, it is possible that a jury would come back with a sizable noneconomic award that would make this case cost-efficient.

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116. Id. (uncovering less than 300 punitive damages awards in three decades of medical malpractice cases decided between 1963 and 1993).
119. The typical plaintiff is over 80 years old, has numerous health problems and dies before the case is resolved. Traditional measures of personal injury damages, like lost wages, loss of enjoyment of life and reduced life expectancy, don’t apply, leaving pain and suffering as the foundation of most cases.

To boot, most nursing home care is paid by Medicare or Medicaid, which asserts liens of $100,000 or more against any recovery. These suits also require extensive and costly preparation, which includes hiring medical experts, finding and deposing nursing home employees who may have switched jobs, and wading through reams of hand-written patient care reports. It’s common for nursing home lawyers to decline a case after obtaining costly expert reports that fail to establish that a patient’s death or suffering was clearly related to the acts of the nursing home rather than the patient’s pre-existing health problems.

i. Economic losses

Granny Smith is fairly typical of nursing home residents because she has no lost wages or future earnings. The low or nonexistent imputed earnings of residents make these cases difficult to settle even where there are egregious circumstances such as abuse or neglect. For example, in a California elder abuse and nursing home negligence case where the elderly female resident died as a result of neglect, the plaintiff’s attorney sought $200,000 and the first offer by the defendant was only $40,000.\(^{121}\) Thus, since the elderly generally have no imputed earnings, nursing home cases usually turn on noneconomic damages.\(^{122}\)

ii. Noneconomic damages

Granny Smith has no past, present, or future economic damages, but is likely to have “non-pecuniary harm such as pain, suffering, mental anguish, inconvenience, physical impairment, disfigurement, loss of capacity to enjoy life,”\(^{123}\) damages that have accrued from the time of her injury from neglect. Granny likely did suffer extreme pain prior to her death. It is a myth that elderly nursing home patients do not feel pain, and it is quite clear that a person suffering from advanced decubitus ulcers would suffer severe pain.\(^{124}\) But because Granny did not suffer much in the way of compensable economic harms, damages for pain and suffering are the best option for obtaining recovery for her estate.

b. Hedonic Damages

Granny Smith’s estate is entitled to recover for all forms of pain and suffering including “hedonic damages.”\(^{125}\) In the 1980s, trial attorneys began to use the term “hedonic damages” to refer to compensation for loss of the pleasures or enjoyment of life.\(^{126}\) A leading tort treatise contends that most jurisdictions permit compensation for the loss of enjoyment of life:

> If the plaintiff’s injury makes it impossible for her to see a sunset, or hear music, engage in sexual activity, or pursue a chosen vocation, she may have no physical sensation of pain but she is suffering. Almost without exception, loss of

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125. Hedonic damages compensate an individual for the loss of life and loss of the pleasures of living. They encompass the “larger value of life...including [the] economic...moral...[and] philosophical...value with which you might hold life.” Other elements of the hedonic value of life may include an individual’s expectations for the future as well as enjoyment of past activities. In contrast to damages for pecuniary loss, these damages involve a more subjective analysis of the pleasure that the particular individual derived from living. Mister v. Illinois C.G.R. Co., 790 F. Supp. 1411, 1421 (S.D. Ill. 1992) (quoting Tina M. Tabacchi, Note, Hedonic Damages: A New Trend in Compensation?, 52 OHIO ST. L.J. 331, 331 (1991) (footnotes omitted) (alterations in original)). Many states do not permit juries to award hedonic damages for the loss of the pleasures of life as a separate item of damages. See Moore v. Kroger Co., 800 F. Supp. 429, 436 (N.D. Miss. 1992).
126. DOBBS, supra note 115, § 377, at 1053.
enjoyment of life in this sense is as compensable as any other emotional state.\textsuperscript{127}

It is a basic principle of Anglo-American jurisprudence that you take your victims as you find them.\textsuperscript{128} Even though Granny Smith did not have a high quality of life in the nursing home before her death, Apple Hall is willing to testify that Granny enjoyed activities such as crocheting, visiting with family, and playing card games with co-residents. She was no longer able to enjoy these activities after she developed pressure sores. Still, it is very unlikely that Granny Smith’s estate will win a hedonic damages award.\textsuperscript{129} There has been only one hedonic damages award in a nursing home case in Anglo-American history.\textsuperscript{130} In that case, a Texas jury awarded an estate a symbolic payment of one dollar in hedonic damages where the death of a 78-year-old male resident was caused by nursing home neglect and surgical error in placement of a feeding tube.\textsuperscript{131} One explanation for the failure to obtain hedonic damages in nursing home cases is that courts are reluctant to recognize hedonic damages as a separate category of recovery.\textsuperscript{132} But even if a court permitted the itemization of hedonic damages, elderly or disabled patients warehoused in nursing homes would have a steep evidentiary burden in proving any loss of enjoyment of life.\textsuperscript{133}

c. Punitive Damages

A recent survey of 278 nursing home attorneys (representing plaintiffs as well as defendants) found awards of punitive damages in nursing home cases to be increasing rapidly, especially in litigation hotspots.\textsuperscript{134} Punitive damages are not available unless a nursing home’s misconduct is intentional, malicious, recklessly

\textsuperscript{127} Id. § 377, at 1052.
\textsuperscript{128} “So read, the finding would be inconsistent with the ‘thin skull’ or ‘eggshell skull’ or ‘you take your victim as you find him’ rule of the common law.” Stoleson v. United States, 708 F.2d 1217, 1221 (7th Cir. 1983).

The notion that one takes your victim as you find him, remains an accepted part of the legal lexicon in this respect.” Nat’l Shipping Co. of Saudi Arabia v. United States, 95 F. Supp. 2d 482, 496 (E.D. Va. 2000).

\textsuperscript{129} See McDougald v. Garber, 536 N.E.2d 372, 375 (N.Y. 1989) (holding that hedonic damages were not available to claimant whose oxygen deprivation left her without post-injury cognitive awareness). While there is little case law on the topic, elderly residents suffering from dementia or Alzheimer’s disease would be unlikely to receive awards for diminished enjoyment of life. See Lori A. Nicholson, Note, Hedonic Damages in Wrongful Death and Survival Actions: The Impact of Alzheimer’s Disease, 2 Elder L.J. 249 (1994). Medical researchers have “found an association between increasing severity of dementia and blunting of objective, non-verbal physiological pain response.” David Gurwitz, Abnormal Potassium-Channel Function in Platelets in Alzheimer’s Disease, 353 Lancet 325, 326 (1999).

\textsuperscript{130} Id.


\textsuperscript{132} McDougald v. Garber, 536 N.E.2d 372, 375 (N.Y. 1989) (holding that hedonic damages were not available to claimant whose oxygen deprivation left her without post-injury cognitive awareness).

\textsuperscript{133} David G. Stevenson & David M. Studdert, The Rise of Nursing Home Litigation: Findings from a National Survey of Attorneys; The Diversion of Substantial Resources Now Required to Defend and Pay for Nursing Home Lawsuits Is Likely to Have a Negative Impact on Quality of Care, HEALTH AFFAIRS, Mar.–Apr. 2003, at 219, 221, 223.
indifferent to patient safety, or at least grossly negligent, and they are not recoverable in medical malpractice actions absent extreme recklessness or intent. Nonetheless, punitive damages serve an important function in nursing home litigation. Absent the punitive damages remedy, plaintiffs' attorneys have little incentive to file cases on behalf of nursing home residents since these persons have little economic value under American tort law. Punitive damages awards are the functional equivalent of deputizing nursing home residents and their attorneys to prosecute misdeeds when government enforcement is lax.

d. Evaluation of Damages

Even where there are egregious circumstances of abuse, neglect, and mistreatment, as in Granny Smith's case, nursing home lawsuits are rarely filed because frequently the contingency fee a lawyer will make from taking a case of this kind is not enough to cover the expected costs of litigation. Essentially, the lawyer would be paying out of pocket to cover the costs of representing a victim of nursing home abuse or neglect. If our firm does take the case, it is likely that the case will settle, and an early settlement will reduce the cost of medical experts as well as other expenses. The average payout in nursing home cases is approximately $400,000 per claim. However, if the case does go to trial, the substantial costs for medical expert witnesses, as well as other litigation expenses, would make this sum much lower.

The cost of experts and discovery could result in litigation expenses exceeding $100,000. Thus, assuming a $400,000 recovery, the firm would receive

135. See, e.g., Georgia Trial Reporter, Davis ex rel. Estate of Davis v. Fairburn Health Care Ctr. (1993) (awarding punitive damages against nursing home when patient in his seventies died as a result of home's negligent care in a 1988 Georgia case); Hackman v. Dandamudi, 733 S.W.2d 452, 454, 458 (Mo. Ct. App. 1996) (awarding punitive damages to elderly resident who suffered amputation from infected heel blister).


137. TEx. Civ. PRAC. & REM. CODE ANN. § 41.008(l)(b) (2004) (capping punitive damages at a multiple of two times compensatory damages plus the amount of noneconomic damages not to exceed $750,000 or $200,000). In Estate of Beale v. Beechnut Manor Living Center, a punitive damage award was reduced from $950,000 to $200,000 in order to comply with the Texas cap, which limits punitive damages to four times actual damages. Rustad & Koenig, supra note 69, at 1013–14 (noting that punitive damages award was reduced from $950,000 to $200,000 to conform to a Texas cap). See also Horizon CRM Healthcare Corp. v. Ault, 34 S.W.3d 887 (Tex. 2000) (applying cap to $90 million punitive damages award in a nursing home neglect case).

138. See infra Part II.

139. A study of nursing home claims by Dr. David Stevenson found that few of the cases went to trial, though ninety percent resulted in some payment to the plaintiff. Medical Liability in Long-Term Care: Is Escalating Litigation a Threat to Quality and Access? Hearing Before the Special Committee on Aging, FED. NEWS SERV., July 15, 2004 (statement of David Stevenson, Assistant Professor, Harvard University).

140. Id.

141. Even if the case does not go to trial, the firm is on the hook for substantial expenses in conferring with medical experts. In addition, there are expenses associated with discovery.

142. Interview with Steven Charpentier, Plaintiff's Attorney in Florida (Nov. 16, 2004) (reporting that litigation expenses can be $100,000 or greater in nursing home cases).
up to $120,000, or forty percent of the payout after expenses were paid. Of course, if the case went to trial and there were a defense verdict, the firm would suffer a substantial loss.

e. Strategic Bankruptcy to Avoid Paying Judgments

Assuming arguendo that a jury awards high noneconomic or punitive damages on behalf of Granny Smith’s estate, there is a significant risk associated with collection. A Florida trial lawyer specializing in nursing home litigation found that defendant nursing homes frequently file for Chapter 11 reorganization in the aftermath of large jury verdicts. Small or medium-sized nursing homes often make a strategic decision to file for bankruptcy in order to avoid paying large judgments. Nursing homes have also employed other aggressive strategies to avoid paying large damage awards such as “compartmentalizing assets (and thus related risks) in separate legal entities.” In one case, a jury awarded a Florida man $3.3 million in noneconomic damages for enduring at least two falls, a fractured ankle, and grossly negligent care at a nursing home. The Colorado company that managed the Florida facility filed for bankruptcy as soon as the nursing home resident’s lawsuit was filed. In our hypothetical, we face the possibility of a pyrrhic victory if Over the Hill files for bankruptcy in the wake of a verdict.

f. Nursing Homes Going Bare

In many instances, payment of a nursing home verdict depends upon the facility’s insurance coverage. Small or medium-sized nursing homes will typically not have the necessary coverage to pay a nursing home judgment. Many nursing homes in Florida “carry such scanty insurance coverage, they could not pay a claim even if a resident did file a successful lawsuit. Some nursing homes carry as little as $20,000 in coverage.” A Florida attorney specializing in nursing home cases said that inadequate insurance coverage was a significant issue in more than half of the cases he has filed. Florida’s state legislature enacted a law requiring nursing homes to carry insurance by the date of January 1, 2002, but Texas has no such statute. Thus, even if we were to prevail against Over the Hill, it is unclear whether they have insurance sufficient to cover a large damage award. If the firm decides to take this case, we will need to do further discovery to determine whether Over the Hill is a viable defendant.

143. Id.
144. See, e.g., Cheryl Meyer, Fountain View Exits Chapter 11, DAILY DEAL, Aug. 21, 2003 (noting that the California nursing home chain and its subsidiaries exited from Chapter 11 reorganization after a two-year period).
148. Charpentier Interview, supra note 142.
150. Id.
151. Jenkins, supra note 146.
g. Medicare and Medicaid Liens on Nursing Home Judgments

A Medicaid or Medicare lien is an action by the state to offset a judgment or settlement to reimburse the state for services rendered but not paid for by a nursing home resident. The state may place a claim or lien on a "Medicaid recipient’s pending personal injury lawsuit, to recover from the liable third party the cost of Medicaid provided to the recipient." Even if Granny’s estate is awarded damages, the judgment will surely be offset by a Medicare or Medicaid lien for her care at the home. When plaintiffs prevail in nursing home cases, their judgment is subject to Medicare or Medicaid liens, which must be paid in full before there is a disbursement. The government must be reimbursed for Granny’s care before the plaintiff’s estate is paid, and before our firm’s share is drawn from any judgment or settlement.

5. Defenses in Nursing Home Cases—Blaming the Victim

“Victim’s talk” in the tort arena is used not only to disavow responsibility for defective products, bad medicine, and unsafe practices, but also to sway the public against nursing home residents:

Neo-conservatives often employ the theme of a “culture of victimization gone wild” to ridicule plaintiffs seeking compensation for mass torts. The tort reformers, for example, attacked the plaintiff in a landmark tobacco product liability action by arguing that she should have taken personal responsibility for the cancer caused by her smoking rather than blame the tobacco industry. Few themes resonate more with the American public than “blaming the victim.” The American Tort Reform Association uses the theme of victim blaming to justify limiting the liability of corporate defendants in its “Lawsuit Abuse” campaign. “Such tort tales distort real life cases to create the ideological motif of unworthy claims and claimants.”

Nursing home cases filed against corporate nursing homes frequently result in defenses based upon blaming the elderly victim to deflect attention away from grossly inadequate care. Nursing home patients are blamed for their obesity, their inactivity, and for contributing to decubitus ulcers by refusing to turn over.

153. The Social Security Act, 42 U.S.C. §§ 301-1397 (2000), established the Medicare program that will provide participating nursing home operators with reimbursement for certain costs. Medicare, for example, will pay the costs of Medicare-eligible patients who need follow-up skilled nursing care following a hospital stay. If a nursing home patient requires nursing care for more than 100 days and is unable to pay, reimbursement generally is made by Medicaid, a joint federal-state insurance program. The reimbursement rates paid by Medicaid are significantly less than those paid by Medicare.
homes will argue that a patient died of a Stage IV pressure sore that resulted in amputation and sepsis because she was "predisposed to infection," when, in fact, the truth might be that the staff "allowed her to lie in her feces and urine for extended periods of time." For example, in a Florida case, a nursing home resident's decubitus ulcers were blamed on her morbid obesity and refusal to permit aides to turn or reposition her due to pain. In a Texas case, the defense attempted to blame an elderly female resident's severe decubitus ulcers on her underlying medical condition. The nursing home contended that she was suffering from skin breakdowns, diabetes, congestive heart failure, hypertension, chronic liver disease, and advanced cirrhosis with ascites. The defense contended that it was these and other underlying conditions that made the decedent highly susceptible to developing decubitus ulcers. The plaintiff countered with evidence that the pressure sores developed because she was bedridden and unable to feed, turn, or reposition herself. The plaintiff's evidence that the defendant nursing home staff could "offer no excuse for their failure to turn the decedent with sufficient frequency to prevent the onset or development of the severe pressure sores" was effective in countering the "blame the victim" defense.

It is also not uncommon to see cases where nursing homes try to dodge responsibility by asserting that an elderly resident consented to participating in certain behavior. For example, in one Arkansas nursing home case, a nurse's aide hired by Beverly Enterprises raped a quadriplegic resident. Beverly claimed sodomy by consent in an effort to place blame on the victim. The orderly subsequently confessed, pleaded guilty at a criminal hearing, and was sentenced to ten years in the state penitentiary. Beverly Enterprises claimed it was not negligent in its hiring. Beverly brought the orderly from the penitentiary to testify that his confession and guilty plea were coerced, and to claim he was not guilty. The jury rejected the nursing home's defenses, awarding $50,000 in compensatory damages and $100,000 in punitive damages.

The nursing home victim is also blamed in many fall down cases, where defense verdicts are common. Even if a victim of a fall in a nursing home prevails, the award

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161. Id.
162. Id.
163. Id.
164. Id.
166. Id.
167. Id.
168. Id.
169. Id.
170. Id.
may be reduced by the jury on grounds of comparative negligence. In light of these cases, we must try to carefully pinpoint the ways in which Over the Hill might try to blame Granny for the events leading to her death.

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A cautious approach is dictated given all of these potential risks to the firm’s bottom line. This case presents the classic profile of a resident in a long-term care facility who developed serious health problems leading to her death as a result of neglect and abuse. Even though liability is clear, the economic worth of this case is non-existent, except for the possibility of recovering noneconomic or punitive damages. It is also unclear whether Over the Hill will file bankruptcy in the wake of a large judgment or whether the facility has sufficient insurance coverage to cover a damage award. Despite the horrible pain that Granny likely suffered, I regretfully conclude my memo with the recommendation that our firm decline representation in Granny Smith’s case—the case is simply too risky, because the tremendous investment in expert witnesses and litigation expenses cannot be cost-justified.

II. THE FUNCTIONS OF NURSING HOME CASES

A. Supplementing Public Regulation

Public regulation has proved insufficient to combat the problems in our nursing homes. States differ in the effectiveness with which they enforce Medicare and Medicaid nursing home regulations. Some states have mechanisms to enforce regulations such as “ombudsmen, adult protective services,...state survey agenc[ies] responsible for licensing nursing homes, [and] state agenc[ies] responsible for the operation of the nurse aide registry,” which also perform the various regulating functions for the states. States also vary in the efficacy of Medicaid fraud units in their attorney generals’ offices, and in the enforcement by “professional licensing boards, such as the Board of Nursing or Boards of Nursing Home Administrators.”

Although every jurisdiction has a reporting requirement for elder abuse, the regulation of the reporting is not consistent and there is widespread underreporting of elder abuse despite criminal penalties for omissions.

Moreover, inspectors are often too lenient when it comes to protecting our most

173. Id.
174. It is well-recognized that there is underdetection [sic] and underreporting of elder maltreatment despite the fact that all 50 states have either mandatory or voluntary reporting laws. These vary from state to state and are often inappropriately based on child abuse laws. In addition, funding to develop programs, well-staffed protective services, and public and professional education are often all inadequate.

vulnerable elderly citizens. The Center for Medicare and Medicaid Services has expressed concerns that inspector leniency leads to substandard facilities and patient care. For example, Figure One, below, shows that eighty-six percent of Texas nursing homes have substantial deficiencies in safety, causing potential or actual harm to nursing home residents. Nearly forty percent of the nursing home violations in Texas facilities cause actual harm to patients or place them at risk of imminent death or serious injury. Further, ninety-four percent of Texas nursing homes failed to comply with Health and Human Services’ minimum staffing levels. While Texas is just an example of substandard living conditions in nursing homes, the record of failure in nursing home compliance is a serious issue in most states. Something needs to be done to ensure that safety standards—governmental standards as well as societal standards—are met. Often regulation by litigation, in the form of nursing home lawsuits, can provide a remedy for the problem.

**FIGURE ONE: TEXAS NURSING HOMES’ COMPLIANCE**

86% of Texas Nursing Homes Fail To Meet Health and Human Services Standards

- Full or Substantial Compliance
- Potential to Harm
- Conditions Posing Actual Harm

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175. The Center for Medicare & Medicaid Services (CMS) has long been concerned that nursing homes are violating health and safety requirements because of lax state enforcement. CMS launched an educational campaign acknowledging: “Ongoing monitoring found that many nursing homes continued to violate rules and that enforcement by some states—which conduct on-site inspections for HCFA and recommend penalties against homes that violate health and safety rules—remained lax.” Centers for Medicare & Medicaid Services, *HCFA Asks Nursing Homes to Join Education Campaign to Reduce Abuse and Neglect of Residents*, at http://www.cms.hhs.gov/media/press/release.asp?Counter=134 (last visited Mar. 22, 2005).

176. Id.

177. Id.

178. Id.

B. Corporate McNursing Homes and the Dangers of Tort Reform

McDonaldization...is the process by which the principles of the fast-food restaurant are coming to dominate more and more sectors of American society as well as of the rest of the world.

George Ritzer

[N]ursing homes represent the nation's longest-running experiment in privatization—one that, after half a century, offers a graphic portrayal of what happens when private interests are permitted to monopolize public services.

Eric Bates

The privatization of nursing homes has accelerated over the last four decades. Prior to the 1970s, most nursing homes were individually owned and operated, and many were run by non-profit institutions. Today, the operation of nursing homes is "big business," where profits flow from local facilities to corporate headquarters. In fact, investor-owned nursing homes are more than six times more likely to run on a for-profit basis than general hospitals, and currently, seventy percent of nursing homes are run on a return-on-investment basis for the wealth of their shareholders. Many of these corporate nursing home chains are run by healthcare corporations such as Beverly Enterprises, which are often licensed to one entity and run by affiliated for-profit management companies. By 1998, ten publicly traded companies controlled one in five nursing beds. Figure Two, below, demonstrates how non-profit nursing homes have been eclipsed by for-profit facilities.

183. For-profit general hospitals only receive eleven percent of the total revenue generated by all general hospitals, while for-profit nursing homes and home care companies receive seventy percent of nursing home revenue. GEYMAN, supra note 182, at 6.
184. Id.
186. Good Nursing Home Care Includes Good Regulation, PALM BEACH POST, Nov. 25, 1998. The ownership and organizational structure of corporate nursing homes are governed by elaborate federal regulations. See also 42 C.F.R. § 483.75 (describing facility licensure regulations). It is interesting to note that the "six largest nursing home companies in Florida are traded on Wall Street." Peterson & Stanley, supra note 185.
Unfortunately, the move to for-profit nursing homes has resulted in a decrease in the quality of care at these facilities. Many for-profit nursing homes lack the quality standards of the famous restaurant chain, because a rigid cost-benefit formula for allocating patient care works far better for hamburgers than for sick, elderly patients. For-profit nursing homes tend to have underpaid and inadequately trained staff, and they discourage the development of a unionized workforce. These for-profit homes prioritize profits over residential well-being by short-changing staffing and training.

Trial lawyers have had some success in obtaining redress for those injured by the negligent corporate practices of nursing home chains. Nursing home chains are

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187. Scully, supra note 182, at 5.
188. See Geyman, supra note 182, at 28.
189. Beverly Enterprises' nursing homes have been the target of a large number of nursing home lawsuits filed by patients harmed in their facilities. See, e.g., Tamar Lewin, Jury Finds Nursing Home Liable for Routine Neglect, N.Y. TIMES, July 12, 1990 ($12 million punitive damage award for negligent supervision); see also Florida Jury Verdict Reporter, Spilman v. Beverly Enter. (1994) (reporting a $12 million punitive damage award for negligent supervision in a 1993 Florida case); Verdicts, Settlements & Tactics, Saunders v. Beverly Enter. (1992) (reporting action by terminal cancer patient who alleged neglect by Beverly Enterprises nursing home in a 1991 Oregon case). In Saunders, a computerized nursing order form required that the patient be restrained twenty-four hours a day. Id. A Foley catheter ordered by the physician was not in place, nor did the staff administer medication to control the patient's brain edema. Id. Thirty-six hours after he was admitted, the patient began to "act out" from the combination of his unchanged, soiled clothing and constant restraint. Id. See generally Charlotte Grimes, Civil Suits Aimed at Nursing Home Care, ST. LOUIS POST-DISPATCH, Apr. 15, 1990 (reporting that Beverly Enterprises paid the state of Missouri $1 million in fines to avoid prosecution on allegations of poor care in nursing homes). See also Medical Malpractice: Verdicts, Settlements & Experts, 09-85-10-4 (reporting settlement of case in which nursing home patients sued for injuries arising out of short-staffing) (on file with author).

particularly vulnerable to negligence cases because they are “chronically understaffing their facilities, not providing enough nurses’ aides, and spending $2 per resident on food per day, [which] outrages a jury.” Regulation by litigation has played a crucial role in the battle to ensure safe living conditions and adequate care for our nation’s nursing home residents. The following section addresses this role more fully.

C. The Private Attorneys General’s Role in Neglect and Abuse

Judge Jerome Frank used the term “private attorney general” to refer to “any person, official or not,” who brings a proceeding “even if the sole purpose is to vindicate the public interest. Such persons, so authorized, are, so to speak, private Attorney Generals.” The private attorney general is a powerful engine of public policy, especially when it comes to using litigation to expose dangerous products or practices.

Historically, the private attorney general has played a socially beneficial role in mass products liability actions involving dangerously defective products. The Dalkon Shield intrauterine device, for example, caused an epidemic of infections, septic abortions, infertility, and death in many women. After lawsuits by private litigants, A.H. Robins finally agreed to remove the devices from the market and pay the medical costs of removal. It took the chastening message of products liability litigation to remove this hazardous product from the marketplace. The private attorney general’s role in ensuring public safety is also demonstrated by the litigation involving the oral contraceptive Ortho-Novum 1/80. Women who sustained life-threatening injuries sued the manufacturer, and, subsequently, the


191. Associated Indus. v. Ickes, 134 F.2d 694, 704 (2d Cir. 1943).

192. Id. at 704.

manufacture lowered estrogen levels in the contraceptive, thus protecting the consuming public.\textsuperscript{194}

Plaintiffs who bring nursing home lawsuits can similarly be dubbed private attorneys general because they sue not only for individual compensation, but also for the safety of other residents. Suing for safety is especially necessary to help regulate the nursing home industry, whose practices routinely violate state and federal safety standards. The private attorney general’s role is critical in uncovering and correcting neglect, abuse, and mistreatment in nursing homes where the residents do not have a voice. As in the field of products liability, the private attorney general’s role of enforcement in the nursing home arena is a market-based solution for the serious social problems of neglect and abuse.

There are many reported instances of private attorneys general suing nursing homes, resulting in an increase in the homes’ overall living conditions. In \textit{Estate of Beale v. Beechnut Manor Living Center},\textsuperscript{195} a Texas jury awarded one million dollars to an elderly nursing home resident’s estate when the resident slipped, fell, and drowned in a bathtub.\textsuperscript{196} The decedent, who had Alzheimer’s, was left unattended in the bathtub.\textsuperscript{197} Water flowed over the edge of the tub for fifteen minutes before the staff discovered the elderly patient drowning.\textsuperscript{198} After the litigation, the defendant nursing home installed safety strips in bathtubs throughout its facility.\textsuperscript{199} The publicity from the case also led to the enactment of an elder abuse statute benefiting all Florida nursing home residents.\textsuperscript{200} Similarly, in \textit{Davis v. Fairburn Health Care Center},\textsuperscript{201} a seventy-year-old male stroke victim died because of severe bowel impaction that resulted in toxic shock. His death was due to excessive, preventable danger brought on by the nursing home’s failure to follow stated protocol for discovering and preventing impaction.\textsuperscript{202} In the wake of this case, the nursing home instituted new protocol to prevent fecal impaction.\textsuperscript{203} As in \textit{Beale}, the private attorney general’s suit resulted in increased safety in the nursing home: after the \textit{Davis} verdict, the nursing home administrators, as well as the chief nurse, were terminated and new staff training programs were implemented.\textsuperscript{204}

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\textsuperscript{196} Son Wins $1 Million Suit, HOU. CHRON., May 23, 1992.
\textsuperscript{197} Id.
\textsuperscript{198} Id.
\textsuperscript{199} Questionnaire of Vanessa Gilmore, Esq., Plaintiff’s Counsel in \textit{Beale} (May 10, 1994) (on file with author).
\textsuperscript{200} Id.
\textsuperscript{203} Rustad & Koenig, \textit{supra} note 69, 1064 n.342 (citing Questionnaire of Warner Wilson, noting that “improved staff training programs were instituted [to prevent impaction] in the wake of a punitive damage award against a nursing home”).
\textsuperscript{204} See id.
If private attorneys general did not bring these suits, nursing homes would not have the same impetus to ameliorate substandard conditions. Private litigation for the public interest fills the breach caused by lax public enforcement at the state level. Currently, tort remedies result in social control of long-term care facilities without the need for an overly cumbersome state bureaucracy. However, if noneconomic damages are capped, as they will be if certain tort reform proposals succeed, it will have a dramatic effect on the willingness of the private attorneys general to use private enforcement to advance the public interest. It is not within the rational interest of a private attorney to undertake litigation against powerful corporate nursing homes if there is a swirl of uncertainty over the availability of noneconomic damages. Private attorneys general, whose work has helped to improve living conditions in nursing homes, will no longer have the incentive to represent the abused elderly in nursing home cases, and social control over nursing home conditions will be vastly decreased. Part III explores these dangerous implications of tort reform.

III. TORT REFORM, BABY BOOMERS AND CAPS: THE PERFECT STORM FOR AN EPIDEMIC OF PAIN AND SUFFERING

The book *The Perfect Storm* is about the Andrea Gail leaving Gloucester, Massachusetts, in the fall of 1991 and heading for the fishing grounds of the North Atlantic. Two weeks later, an event took place that had never occurred before. An unusually intense storm caught commercial fishermen in the North Atlantic by surprise and put them in mortal danger. The perfect storm was a once in a century event where a confluence of two massive weather fronts collided, causing waves up to ten stories high and winds of 120 miles an hour.

In a similar way, our nursing home environment creates the potential for a "perfect storm" where already overcrowded, substandard nursing home facilities are flooded with residents needing long-term care. The population of Americans who are sixty-five or over is expected to reach 22.9% of the population by the year 2050. The “dependency ratio” of elders to active workers will be 37 per 100 workers by 2030. The dependency ratio was 7 per 100 workers in 1900. There will be 7 million persons 85 or over in 2025, which will increase the number of Americans with severe chronic conditions. Two in five Americans "who turned

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205. See supra Part II.A.
207. Id.
208. O’REILLY, supra note 73, at 7. A large surge in the older population will occur during the period from 2005 to 2020. Id. For the period 2010–2020, there will be a 31% growth within the demographic category of persons sixty-five and older. Id.
209. Id.
210. Id.
211. Id. at 8.
65 in 1990 or later will enter a nursing home at some point before they die." More than half of that total will stay in a nursing home a year or more.

Despite these startling demographic trends, and despite the fact that elderly nursing home residents are uniquely vulnerable to abuse and neglect at the hands of their caretakers, tort reformers propose limiting legal remedies for victims of nursing home abuse. Proposals to cap noneconomic damages in nursing home cases are aimed at reducing insurance premiums. Tort reformers argue that nursing home lawsuits are "forcing many doctors to quit serving patients in nursing homes and...draining resources that should be used to provide quality patient care to nursing home residents." Nursing home lawsuits are also blamed for doctors having difficulties "obtaining or renewing their medical liability insurance." Noneconomic damages present an easier target for tort reformers than economic damages, which have fixed standards. Legal scholars criticize noneconomic damages for being unpredictable and for creating a liability insurance crisis. Pain and suffering damages in particular have long been criticized as creating unwarranted inducements to litigate and providing windfalls to plaintiffs. Pro-tort-reform scholars postulate an ethereal world of zero transaction costs in which consumers would not choose to insure against accidents that cause only mental pain. Tort reformers imply that pain and suffering damages are frivolous, granted

212. Hawes, supra note 172, at 447.
213. Id.
214. On February 10, 2005, Senator John Ensign (R-NV) introduced Senate Bill 354 to improve patient access to health care services and provide improved medical care by reducing the excessive burden the liability system places on the health care delivery system. See http://www.govtrack.us/congress/bill.xpd?bill=s109-354 (last visited Apr. 19, 2005). The short title to S. 354 is "Help Efficient, Accessible, Low-Cost, Timely Healthcare Act of 2005" or the "HEALTH Act of 2005." The sponsors note that a principal purpose of the proposed statute is to "reduce the incidence of 'defensive medicine' and lower the cost of health care liability insurance, all of which contribute to the escalation of health care costs." Id.
215. Hearing of the Senate Special Committee on Aging, Medical Liability in Long-Term Care: Is Escalating Litigation a Threat to Quality and Access?, 108th Cong. 2004 (statement of Sen. Larry Craig), reported in FED. NEWS SERV.
216. Id.
220. See 3 PETER HUBER ET AL., THE LEGAL SYSTEM ASSAULT ON THE ECONOMY, THE INSURANCE CRISIS, TORT REFORM AND ALTERNATIVE SOLUTIONS 15 (1986) (arguing that limiting pain and suffering damages will prevent windfall recoveries greater than the plaintiff’s actual loss and lead to more determinable award sizes).
for phantom or imaginary pain.\textsuperscript{222} Professor Neil Komesar critiques those who view noneconomic damages as a plaintiff’s windfall, positing the following hypothetical:

\begin{quote}
The importance of these nonpecuniary losses can be seen by asking yourself whether you would be indifferent or even nearly indifferent between an uninjured state and a severely injured state, such as paraplegia, blindness, or severe brain damage, so long as your income and wealth remained constant.\textsuperscript{223}
\end{quote}

Despite the epidemic of suffering in our nation’s nursing homes, caps on noneconomic damages are fast becoming a reality. While there is currently little empirical evidence on the impact of caps in nursing home cases, caps have enormous and troubling implications in this area. A Florida trial lawyer specializing in nursing home cases argues that caps on noneconomic damages will be the death knell for this type of litigation because “[v]ery, very few of the tragedies in a nursing home could ever result in any compensation for family members.”\textsuperscript{224} In the Granny Smith hypothetical case, the associate concluded that because elderly patients have little by way of compensable economic damages, the single most important factor for an injured resident in obtaining representation in a nursing home case is the possibility of noneconomic damages.

Yet a growing number of states already cap noneconomic damages at a fixed ceiling. Texas caps noneconomic damages at $250,000, while Mississippi caps them at $500,000.\textsuperscript{225} Florida significantly cut back on remedies available in nursing home cases by capping noneconomic damages recently.\textsuperscript{226} The nursing home industry is lobbying for further caps on noneconomic damages contending that the tort reforms in Florida did not give them sufficient protection against excessive nursing home verdicts.\textsuperscript{227}

California’s Medical Injury Compensation Reform Act of 1975 (MICRA) caps noneconomic damages in medical malpractice cases at $250,000.\textsuperscript{228} The MICRA cap is applied by the court to reduce all noneconomic awards for professional liability handed down against physicians, nursing homes, hospitals, and other licensed health facilities.\textsuperscript{229} In many nursing home cases, the MICRA cap has a drastic impact on the damages awarded. In a California nursing home case, a minister died of severe decubitus ulcers.\textsuperscript{230} The court applied MICRA’s noneconomic damages cap, reducing a $1 million gross award to $250,000.\textsuperscript{231} In a case of neglect that occurred

\begin{footnotesize}
\textsuperscript{226} Id.
\textsuperscript{228} See CAL. CIV. CODE § 3333.2 (1997).
\textsuperscript{229} See id.
\textsuperscript{231} Id.
\end{footnotesize}
at a California convalescent home, a diabetic resident suffered bilateral amputations. In the jury awarded $3 million in noneconomic damages, the home moved to reduce the award base to $250,000. In a nursing home neglect case against another California convalescent hospital, $100,000 out of the $105,000 total verdict was for noneconomic damages.

Some states also cap punitive damages, which can have a drastic effect in nursing home cases where reckless or intentional abuse, neglect, or mistreatment of nursing home residents has occurred. In an elderly female resident was sexually abused by an employee at a nursing home. The nursing home resident’s award of $4.5 million in punitive damages was reduced to $350,000 because of Virginia’s cap on punitive damages. Likewise, a Texas court capped both noneconomic damages and punitive damages in a case where the elderly woman’s neglect was so severe that she weighed only fifty-eight pounds and her decubitus ulcers exposed her hipbone. It is difficult to believe that the state legislatures in these states intended these immoral subsidies to corporate wrongdoers.

The tragic irony of tort reform is that it imposes limitations that favor powerful corporations at the expense of the most vulnerable Americans, who are often elderly, disabled, or suffering from dementia or Alzheimer’s disease. Caps on noneconomic damages in nursing home cases threaten the core of these causes of action. Since few elderly persons have income that would be diminished by physical injury, noneconomic damages are central to these cases. As it stands now, nursing home cases are rarely filed primarily because a young plaintiff is worth more than an old plaintiff; a working plaintiff more than a non-working plaintiff. Compensatory damages are usually piddling and are even worse for dead plaintiffs. Caps on noneconomic damages will make it even more difficult to redress harms caused by nursing home abuse and neglect.

Tort reform, as already implemented in certain states, has harmed nursing home residents’ access to justice through litigation. Shutting the courthouse door to injured nursing home residents will cripple private litigation that has a laudatory public purpose. Given the epidemic of pain and suffering in our nation’s nursing
homes because of deliberate corporate policies of trading safety for profit, it is bad public policy to cap or limit the recovery of noneconomic damages in nursing home lawsuits. These caps are discriminatory against the elderly, because they foreclose compensation for very real pain and suffering—that caused by pressure sores, sexual assault, and abuse. Moreover, if nursing home litigation becomes prohibitively expensive because of the unavailability of noneconomic damages, the important regulatory function of these lawsuits will be thwarted and the living conditions in nursing homes will continue to degenerate.

CONCLUSION

The current political climate, as evidenced by the policy of the Bush administration, has created an environment in which tort reformers are more likely to succeed. In 1995, then Governor-elect of Texas George W. Bush spearheaded a tort reform bill “to prevent frivolous and junk lawsuits,” which included a $200,000 cap on punitive damages. In his 2004 State of the Union Address, President Bush again called for tort reform in the area of medical liability: “To protect the doctor-patient relationship and keep good doctors doing good work, we must eliminate wasteful and frivolous medical lawsuits.”

The actions of the Bush administration evidence a lack of concern for the welfare of nursing home residents. When The New York Times reported a GAO study showing that nine of ten U.S. nursing homes were understaffed, President Bush “wasted no time in responding [to the GAO study]: It was too soon, he said, to impose staffing requirements on nursing homes.” President Bush did not delineate what events would lead him to support improved nursing home staffing. President Bush explained that the nursing staff crisis was a function of “market demand created by an informed public,” ignoring the shameful conditions in our nation’s nursing homes. President Bush also supported a Health and Human Services proposal making it more difficult for nursing home inspectors to uncover substandard conditions and fine poorly performing nursing homes, and his 2005 budget cuts continue to target nursing home residents, the disabled, and other vulnerable groups.

Changes in the judiciary may also make the tort reform movement more successful. In the 2004 elections, a large number of “tort-reform friendly” Republican judicial candidates ousted Democratic incumbents by campaigning for
tort limitations in medical liability cases. On the federal level, President Bush nominated Judge Janice Brown to the D.C. Circuit Court of Appeals. As a California Supreme Court Justice, Judge Brown argued for a rule “that could require government agencies to compensate nursing home owners for the costs of compliance with nursing home safety standards,” a policy decision that would paralyze government regulation of these facilities. Judge Brown believes that “[t]oday’s senior citizens blithely cannibalize their grandchildren because they have a right to get as much ‘free’ stuff as the political system permits them to extract.” Overall, it is clear that despite its stated goal of addressing the needs of the vulnerable, this administration’s proposals for tort reform undermine the well-being of elderly Americans who are among the most vulnerable in society.

There is a chasm between the glossy brochures of facilities like Cherry Street Manor, Sensitive Care, and Fair Oaks Convalescent Center, and the reality. For decades there have been troubling reports about widespread and serious mistreatment of nursing home residents, involving abuse, neglect, and theft of personal property. Four in ten nursing home residents “have persistent, severe pain. Yet several studies have found that complaints of pain often go unrecognized and that nursing home residents are inadequately treated—or not treated at all.” The Bush Administration contends that nursing home residents “have better care,” but acknowledges that “much more can be done.” However, a Boston Globe study of the Medicare database found that the federal government’s policies had no “significant impact on the problems with pressure sores or other problems.”

An unfortunate consequence of President Bush’s plan for his second term is the restriction of the legal rights of elderly Americans to redress neglect and abuse in nursing homes. “The argument that our prosecution of cases makes nursing homes more expensive would be sort of like saying racketeering laws make it hard for the mob to operate.” Noneconomic damages must not be gutted at a time when there is an epidemic of nursing home neglect and abuse threatening the elderly and disabled population of the United States.

President Bush has remarked that “faith often inspires compassion.” Thus far, compassionate conservatism has revealed a cold heart of stone toward our elderly

250. Judge Janice Brown has not yet been confirmed because Democrats have blocked her nomination. Philip Terzian, The Fairness Option, WEEKLY STANDARD, Apr. 25, 2005.
252. Id.
253. Hawes, supra note 172, at 450.
254. Brown Medical School; Nursing Homes Register 41% Drop in Resident’s Pain, AGING & ELDER HEALTH WEEK, Jan. 2, 2005 (reporting research that nursing home patients’ pain is inadequately treated and can be reduced with improved protocols).
255. Alice Dembner, U.S. to Push for Better Nursing Home Care, BOSTON GLOBE, Dec. 23, 2004 (quoting Secretary of Health and Human Services Secretary Tommy Thompson).
256. Id.
257. Scott Barancik, Law Firm’s Success Against Nursing Homes Has a Price, ST. PETERSBURG TIMES, July 24, 2004 (quoting plaintiff’s attorney James Wilkes).
258. George Bush and God: A Hot Line to Heaven, supra note 1, at 40.
and vulnerable Americans in nursing homes. A change of heart on the part of those who have supported tort reform and restrictions on noneconomic damages is necessary to truly reduce the pain and suffering of our senior citizens.