1-1-2001

The Nursing Home Dilemma in America Today: The Suffering Must be Recognized and Eradicated

Christine V. Williams

Follow this and additional works at: http://digitalcommons.law.scu.edu/lawreview

Part of the Law Commons

Recommended Citation

Available at: http://digitalcommons.law.scu.edu/lawreview/vol41/iss3/5

This Comment is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Law Review by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.
THE NURSING HOME DILEMMA IN AMERICA TODAY: THE SUFFERING MUST BE RECOGNIZED AND ERADICATED

Christine V. Williams*

I. INTRODUCTION

Headlines and lawsuits about nursing home neglect and abuse frequently grab the nation’s attention. Oftentimes, pictures and stories reported by the media shock and horrify America. Sadly, however, most injuries of neglect and abuse do not make headlines. Most victims suffer in silence, their injuries consisting most often of bedsores, too many and ill-applied restraints, and sitting in their own waste for extended periods of time. Frequently, long-term care facilities pose dangers to the residents resulting from understaffing and overworking their personnel. This situation creates working conditions that leave staff feeling unappreciated and vulnerable to injuries.

As the population ages and national expenditures on nursing home care continue to rise, the public must turn its attention to nursing homes and their problems before the facilities become inundated with clients they are already ill.

* Ethics Editor, Santa Clara Law Review, Volume 41. J.D. candidate, Santa Clara University School of Law; B.A., University of Alaska, Anchorage.

1. See generally infra Part II.A.
2. See generally infra Part II.A.
3. See generally infra Part II.A.
4. See generally infra Part V.
5. See generally infra Part V.
equipped to handle. While the federal and state governments attempt to rectify long-term care problems with slow-moving legislation and implementation, tort law moves faster to respond to the needs of elders in danger. The compliance with, or implementation of, criminal background checks by nursing homes exemplifies one such slow-moving governmental enforcement tool. Convicted criminals working in nursing homes, a situation occurring more and more, can be avoided with simple criminal background checks. These criminals in nursing homes prey upon the elderly who many times are either too afraid to report the abuse or simply cannot remember the attacks.

In contrast, nursing homes are being held responsible in civil suits, often brought by the next of kin, for neglect and abuse in cases that attorneys avoided in the past, but now, willingly champion. These high profile civil suits increase public awareness of abuses in nursing homes. As successful lawsuits win substantial settlements, the corporations that own long-term care facilities also take notice.

Even with the higher profile championing of the problems in nursing homes today, more needs to be done. Seventy-seven million Baby Boomers will retire early in this century. Undoubtedly, some of them will reside in long-term care facilities, which in California alone studies have shown to be

8. See generally infra Part II-IV.
9. See infra Part II.C.
10. See generally infra Parts II.A, III-IV.
11. See generally infra Part II.A.
12. See generally infra Parts II.A, III-IV.
13. See infra Part II.A.
14. See infra Parts II.A, III.
15. See infra Parts II.A, III. Nursing home suits are one of the fastest growing trends in the law. See Michael Higgins, Getting Sued by Seniors: Verdicts Growing in Suits Citing Poor Nursing Home Care, 84 A.B.A. J. 28 (1998). The publicity of these lawsuits has also brought personal fame to Jim Wilkes, a successful attorney who has handled many multi-million dollar cases. Ironically, critics argue that Wilkes himself abuses the system by creating a working mill for lawsuits while aiming for large settlements through intimidation, rather than an interest in the outcome and the justice of the suits. See Geoff Dougherty, Mr. Nursing Home Lawsuit: Wild, Wild Wilkes, ST. PETERSBURG TIMES, Aug. 29, 1999, available in 1999 WL 3338614.
16. See The United States Senate Special Committee on Aging, Aging Committee Hearing will Examine Challenges Facing an Aging Baby Boom Generation (Nov. 2, 1999) <http://www.Senate.gov/~aging/ad991102.htm> [hereinafter Challenges].
so deficient that over a third of the homes pose a danger to the residents.17 As bad as California may sound in that report made to the U.S. Senate, William Scanlon, the senator in charge of the Special Hearings on Aging, said the national average was worse.18 Already in danger, the stresses that long-term care facilities face in the future will likely break the system at the expense of one of the most vulnerable groups in society: the aged and infirm.

This comment addresses the substantial abuse occurring in long-term care facilities and some solutions the country will need to implement in order to correct the exploitation and mistreatment that exists in nursing homes today.19 First, the background section traces the funding and the history of long-term care facilities.20 Next, the analysis section explains the problems that plague nursing home care and current strategies for dealing with abuse.21 Finally, this comment proposes more forward-looking, problem-solving approaches to address the heavier stress long-term care facilities will meet in the future.22

II. BACKGROUND

In 1997, the national expenditure on health services and supplies hit an all-time high of over $1 trillion.23 Of that amount, personal health care, including nursing home care, made up almost eighty-nine percent of the total spent.24 From that eighty-nine percent, nursing care home costs came in third, following hospital care and physician services, respectively.25

Those national expenditures on health care place the

17. See Poor Care in CA Nursing Homes Mirrors National Problem, GAO Tells Congress, 6 No. 2 ANDREWS HEALTH L. LITIG. REP. 17 (Sept. 1998) [hereinafter Poor Care].
18. See id.
19. See discussion infra Part III-IV.
20. See discussion infra Part II.
21. See discussion infra Parts III-IV.
22. See discussion infra Part V.
24. See id.
25. See id.
United States first in spending of all the major industrialized countries. Moreover, the United States spends 13.5% of its gross national product on health care.

Also in 1997, thirteen percent of the nation's population consisted of people sixty-five years of age and older. This aging population will continue to grow, as government estimates put the population of sixty-five years of age and older at twenty percent of the total population by the year 2030. Moreover, the U.S. Senate Special Committee on Aging estimates that seventy-seven million Baby Boomers will retire early in this century.

As a significant percentage of the population grows older, life expectancy for this population also rises. Medicare, the national insurance coverage for the aged, covered 33.4 million elderly in 1996. As life expectancies rise, Medicare statistics show that health care costs, on the whole, rise with the age of the patient. Studies show that Medicare pays out, on average, for enrollees sixty-five to sixty-six years of age, $2,574 per year. The average payout rose to $6,666 per year for enrollees aged eighty-eight and older.

Medicaid is the national medical coverage for needy Americans. Medicaid also covers care for enrollees eighty-five years of age and older and long-term care for the elderly. These costs are also rising. By 2008, the government estimates that the costs for Medicaid will reach

---

27. See id.
28. See id.
29. See id.
30. See Challenges, supra note 16.
32. See Life Expectancy, supra note 6.
33. See id.
34. See Center for Disease Control and Prevention, Expenditures by Type of Care and Source of Funds (last modified Sept. 27, 1999) <http://www.cdc.gov/nchs/products/pubs/pubd/hus/heaexpn.htm>.
35. See id.
36. See id.
39. See id.
close to $70 billion, up from a projected $43.2 billion in 1999. These figures help bring the projected national health expenditures to a total of $2.2 trillion, to hit the all-time high of over sixteen percent of the gross national product of the United States in 2008.

Both Medicaid and Medicare have traditionally played a role in nursing home care since their inception. Medicare was given force in 1965 as a part of President Lyndon B. Johnson's Great Society health insurance package. This insurance package also included Medicaid, which provides assistance to the aged, disabled, and single parent homes. These programs have progressively grown to include an estimated 1.6 million elderly and disabled Americans in nearly 17,000 nursing homes in 1999. Specifically, in 1995, Medicare funded almost 9.5% of nursing home care, while Medicaid funded 46.5%.

As the nation's Baby Boomers near retirement and life expectancies rise, the number of nursing homes with Medicare and Medicaid funding will increase proportionately with the population.

Overall, approximately one percent of persons aged sixty-five to seventy-four years old resides in nursing homes. The admission figure increases directly with age, with six percent of persons aged seventy-five to eighty-four years old admitted to nursing homes. This admission figure reaches its peak admission rate of twenty-four percent for people aged eighty-five to seventy-four years old.
As the population ages, more people than ever will enter the nursing home system—a system that is already replete with abuse and neglect. Focusing on abuse and neglect occurring today, this comment will specifically examine the stresses on the nation's nursing homes, a system screaming for a comprehensive overhaul. The background section will first investigate the current state of nursing homes. Next, it will scrutinize changes and developments in the past, specifically dealing with funding and oversight. This will lead to an in-depth analysis of changes that should occur so that, rather than reacting to negative events and reports, the industry can better deal with forward change.

A. Nursing Homes Today: Headlines and Lawsuits

Nursing homes, also known as long-term care facilities, often take care of society's most vulnerable: the aged, the infirm, and those who simply cannot take care of themselves. Headlines and lawsuit judgments often capture national attention, but once the smoke clears, complex legal and social issues remain unanswered. "Often, someone has to die. Then, in a flurry of tough talk and news releases, regulators impose punishments that often are watered down in subsequent months as a home's owner files appeals or bring the business to minimum standards."

Headlines and lawsuits provoke quick and powerful emotions because nursing homes care for people society

53. See id.
55. See infra Part II.A.
56. See infra Part II.B.
57. See infra Part IV-V.
58. See Tanner, supra note 54.
59. See id.; see also Poor Care, supra note 17; Salladay, supra note 54; Hooper, Lundy & Bookman, Inc., supra note 54.
naturally wants to protect. But those emotions are not as forceful as needed, according to some. Tim Fuller, executive director of the Gray Panthers, a seniors’ advocacy group, said: “If the tragedies occurring in American nursing homes were happening in our day care centers, there would be immediate and appropriate outrage.” Often, people who work in nursing homes have criminal backgrounds, making the residents the easy victims of theft, sexual assault, and assault and battery.

Newspapers clearly reflect what Fuller has said about the frequent victimization of long-term care facilities residents. A recent newspaper article reported the story of Mrs. Heide, who had entered a nursing home because she had broken her hip and required rehabilitation; a situation that should have been temporary. Within a year, she had died from what a court categorized as gross negligence. Three months after Heide, aged eighty-eight, entered a nursing home, a record of a small abrasion to her shin appeared in her medical file. Even though the infection of sores is a leading cause of nursing home complications, the nursing home employees did not call a doctor for six weeks. When the doctor finally arrived, he found the shin badly infected, with nursing home documents revealing her treatments as irregular and infrequent.

Over five months, the sore grew twenty times in size, eating into Heide’s body until her anklebones disintegrated. The records also showed that months went by with no indication that she got medicine prescribed for her depression, and that despite screams of pain, she received only half her doses of narcotic pain medication. On April 3, Heide’s right leg was amputated at the hospital. She died on July 17, 1997. As Heide lay dying, she would cry in fear at the nurses who approached her.

62. See id.
63. Tanner, supra note 54.
64. See id.
65. See id.
66. See id.
67. See id.
68. See id.
69. See Tanner, supra note 54.
70. See id.
71. See id.
72. See id.
Sadly, Heide is not an anomaly in nursing home care.\textsuperscript{73} Like Heide, Mrs. Forester entered a nursing home for what should have been a limited recovery time.\textsuperscript{74} When her granddaughter came to visit on a Friday, she noticed Forester was groggy and disoriented.\textsuperscript{75} Assured that nursing home workers would call a doctor, the granddaughter left to go on a camping trip for the weekend.\textsuperscript{76}

The next day, Forester screamed in pain, but still no one called a doctor.\textsuperscript{77} However, the staff paid her great attention in its attempt to quiet her down, since her screams disturbed other residents.\textsuperscript{78}

After her granddaughter returned Monday to check on Forester, and found her nearly comatose, she was finally taken to a hospital.\textsuperscript{79} At the hospital, doctors found three times the normal level of a therapeutic cardiac drug called Digoxin in her system, despite Forester's documented trouble tolerating the medication.\textsuperscript{80} For the next nine days, Forester's organs painfully and slowly shut down, as her family kept a gruesome deathwatch.\textsuperscript{81}

In fact, a common complaint against nursing homes is that patients do not get the proper medication, as the case of Forester demonstrated. When it comes to pain medication, nursing home staff often under-dose patients and the rest of the medication "mysteriously" disappears.\textsuperscript{82}

Further, many times the Certified Nursing Assistants have no idea from what the patient suffers from and cannot recognize simple medical indications. More often than not, nursing homes overwork and underpay the staff, with many workers overloaded with patients who need almost constant care and attention.\textsuperscript{83}

In addition to physical abuse like Heide and Forester

\textsuperscript{73} See id.
\textsuperscript{75} See id.
\textsuperscript{76} See id.
\textsuperscript{77} See id.
\textsuperscript{78} See id.
\textsuperscript{79} See id.
\textsuperscript{80} See Bates, supra note 74.
\textsuperscript{81} See id.
\textsuperscript{82} See Charlie Hanger, Getting Beyond the Obvious: Scrutiny at America's Nursing Homes, IRE J., May 1, 1999, at 18, available in 1999 WL 14273783.
\textsuperscript{83} See id.
suffered, a number of residents fall victim to sexual assaults.\textsuperscript{84} Edgar J. Manalansan faces eight charges of aggravated sexual assault for allegedly abusing three women, aged 75, 78, 84.\textsuperscript{85} One of the victims’ daughters was told of the abuse when Manalansan’s co-worker called to tell the daughter that she had seen Manalansan abusing the mother.\textsuperscript{86} All three of the women suffer from Alzheimer’s disease and none could recall the abuse.\textsuperscript{87} The defense attorney confidently told the jury that the state would not be able to prove its case.\textsuperscript{88} Regrettably, as with many legitimate elder abuse victims, the defense attorney’s prediction will probably be right.\textsuperscript{89}

The cases of Heide and Forester, as well as the allegations of sexual abuse, are not isolated cases.\textsuperscript{90} Nationwide, statistics report that forty percent of nursing home residents are at risk.\textsuperscript{91} When risk figures reach such an alarming level, the system is clearly failing one of the most vulnerable groups in society. Long-term care facilities must face stricter accountability to provide adequate safeguards and oversight.

B. Oversight: Funding and the Agencies

In 1996, the government paid for an estimated fifty six percent of all nursing home care through Medicare and Medicaid.\textsuperscript{92} In fact, the federal government pays for seventy percent of all oversight in the nation.\textsuperscript{93} Because of this extensive funding, the government is also responsible for conducting oversight reviews, evaluations, and audits.\textsuperscript{94}

Thankfully, accountability accompanies this funding from the government.\textsuperscript{95} The Budget and Accounting Act of
1921\(^6\) established the General Accounting Office (GAO), an investigative arm of Congress.\(^7\) As such, the GAO examines all subjects relating to the “receipt and disbursement of public funds.”\(^8\)

The GAO works with state licensing boards and statutes, through its Health and Human Services Division, to put together comprehensive oversight programs on nursing homes.\(^9\) In turn, the Health Care Financing Administration, (HCFA) was given enforcement authority, under federal regulations,\(^10\) against all facilities that receive federal funds.\(^11\) The HCFA also works with state officials in enforcing regulations and monitoring and sanctioning nursing homes that fall below an acceptable compliance level.\(^12\) But the monitoring and sanctioning of the nursing homes by these agencies have legitimately received severe criticism.\(^13\) The agencies received some of their harshest criticism for not fully executing the authority they have when they find a deficient nursing home. Once the hubbub surrounding the sanctions and fines dissipates, the nursing homes often negotiate much lower settlements.\(^14\) Critics charge that knowing this helps enable nursing homes to maintain a pattern of abuse without real fear of retaliation by the government.\(^15\)

On July 27 and 28, 1998, the Senate Special Committee on Aging held hearings to address these violations and criticisms.\(^16\) William Scanlon, GAO director,\(^17\) testified to the committee, relying on an extensive report compiled by the Health and Human Services Division of the GAO.\(^18\) Scanlon reported that the federal government paid the nation’s 17,000 nursing homes $28 billion in 1997.\(^19\) He noted that in a year

\(^{96}\) See id.


\(^{98}\) Id.

\(^{99}\) See generally Poor Care, supra note 17.

\(^{100}\) See 42 U.S.C. § 1395-3(a)-(h).

\(^{101}\) See id. § 1395i-3.

\(^{102}\) See generally Poor Care, supra note 17.

\(^{103}\) See id.

\(^{104}\) See generally infra Part II.C-D.

\(^{105}\) See Poor Care, supra note 17.

\(^{106}\) See id.

\(^{107}\) See id.

\(^{108}\) See AOA and HCFA, supra note 46.

\(^{109}\) See Poor Care, supra note 17.
that saw record expenditures, "the committee had received complaints that 3,000 residents died in more than 900 California nursing homes as a result of malnutrition, dehydration, urination infections [sic] and other serious conditions that were not handled with an acceptable level of care." These abuses happened even as the HCFA and the California Department of Health Services conducted more extensive surveys of the residents then had ever occurred in the past. In fact, that same report by the GAO noted that only two percent of the state's nursing homes met every Health and Safety Code standard, while finding thirty-four percent so deficient that they posed a danger to residents. The GAO reported that 407 homes received serious violations between 1995 and 1998. This represented one-third of the 1,370 nursing homes in the survey. As bad as California sounds, Scanlon reported that the national average was worse.

C. Federal Legislation and Compliance

The scathing report by Director Scanlon came despite of a federal law Congress enacted in 1987 to curb nursing home abuse and fraud. Congress enacted the Omnibus Reconciliation Act of 1987 (OBRA) in response to recommendations made by the Committee on Nursing Home Regulation of the Institute of Medicine and the GAO. The goal of Congress in enacting OBRA was to codify the federal authority applicable to nursing homes participating in the Medicaid and Medicare programs. Specifically, OBRA established the following: "(1) requirements for those providers participating in the federal health programs, (2) survey and certification processes to evaluate compliance with the participation requirements, and (3) stricter sanctions

---

110. Id.
111. See id.
112. See id.
113. See id.
114. See id.
115. See Poor Care, supra note 17.
116. See id.
118. See id.
and enforcement procedures to address non compliance with
these requirements." In 1999, Senator Charles Grassley,
the Chairman of the Senate Special Committee on Aging,
wrote that ten years after the enactment of OBRA, it
"remained toothless in the prevention of noncompliance by
long-term facilities under the Medicare and Medicaid
programs." Other federal legislation has passed since ORBA, but the
more recent legislation has not been as extensive as ORBA
and has had even less effect. In fact, one study found that:

Eighty-one percent of nurses and aides in nursing homes
said that they had witnessed at least one form of employee
abuse toward a patient, including insulting, yelling,
threatening to commit physical violence or isolating a
patient beyond what is necessary. Physical abuse was less
frequent, but 36% of the staff had seen at least one
incident of physical force (including pushing, grabbing,
pinching, slapping or hitting a patient) during a one-year
period. Still another study found that "10% of nursing-home
assistants admitted to committing at least one act of patient
abuse during a 12-month period." Likewise, in Ohio in 1998, patients reported 2,395
complaints of abuse, neglect, and misappropriation by
nursing home workers. Also in Ohio in 1998, the
Department of Health found that 100 nurses' aides abused
residents—abuse so serious that the Department of Health
barred those aides for life from working in nursing homes. These circumstances existed in a state that requires a
criminal background check for anyone "applying for a job
directly involved in providing care." Similarly, in 1997, a Florida survey found "that at least
one in five nursing home workers had arrest or criminal
records for crimes including rape, assault, armed robbery and

119. Id.
120. Id.
121. See generally AOA and HCFA, supra note 46.
122. Deborah J. Crumb & Kenneth Jennings, Resolving Cases of Patient
Triggers Patient Abuse?, USA TODAY, Apr. 1989, at 6).
123. Id.
124. See Tatge & Solov, supra note 61.
125. See id.
126. Id.
drug dealing."  

In one case, a man who had been convicted of rape a few years earlier raped patients at the nursing home where he was employed. . . . "You have people with drug convictions with access to all sorts of medication, or who have been convicted of theft and people's belongings are out in the open."  

Lax compliance with the criminal background check requirement in the thirty-three states with that requirement is often cited as a contributing factor to nursing home abuse.  

Because nursing home compliance, like ensuring background checks, falls under the jurisdiction of both state and federal authority, frequently long term care facilities slip by the enforcement of regulations. The GAO "found evidence that homes could generally predict when their annual on-site reviews would occur, and if inclined, could take steps to mask problems otherwise observable during normal operations."  

On-site reviews consist of three components: special surveys, standard surveys, and extended surveys. Special surveys generally happen after a reported incident at the nursing home, while standard surveys are generally done at least once a year. Standard surveys evaluate nursing, medical and rehabilitative care, diets and nutrition, the physical environment of the patients, and infection control. When a standard survey finds violations of any state or federal regulation, the nursing home may then be found non-compliant. When a standard survey finds at least one element of non-compliance rising to the level of deficiency,
The extended survey must occur immediately, to prevent the long-term care facility from covering its tracks.137

D. How and When a Home Is Found to Be Deficient

Using the surveys, both state and federal agencies evaluate the facilities.138 However, a recent article summarized how the concurrent jurisdiction really works:

HCFA and the individual state each have their own classification systems for deficiencies, which are used to determine which sanctions or other actions should be taken against non-compliant nursing homes. HCFA, however, is the primary agency that imposes sanctions and is ultimately responsible for ensuring that those nursing homes participating in Medicare and Medicaid comply with OBRA 87.139

But the enforcement by the HCFA is lax at best,140 even after issuing in 1998 the “toughest nursing home regulations in the history of the Medicare and Medicaid programs.”141 Further supporting the assertion of lax compliance, a GAO report found the HCFA had been ineffective in ensuring that most deficiencies “are corrected and remain corrected.”142 While the HCFA may be the primary agency for imposing sanctions on long-term facilities,143 the HCFA generally uses the system set up by the state for classification and sanctioning.144 Using the state's system thus allows for “penalties and other actions under state enforcement laws.”

Frequently, when a nursing home is found to have substantial deviations for which citations should be issued, grace periods are allowed, even for “repeated serious

136. See Poor Care, supra note 17.
137. See id.
138. See id.
140. See Hooper, Lundy & Bookman, Inc., supra note 54.
141. Id.
142. AOA and HCFA, supra note 46.
143. See id.
144. See Quin, supra note 139.
145. Id.
violations” that should have brought immediate sanctions.146 A March 19, 1999 report by the GAO found that “sanctions initiated by the HCFA against non[-]compliant nursing homes were never implemented in a majority of cases and generally did not ensure that homes maintained compliance with standards.”147

While it seems that the HCFA has power because of federal funding and survey responsibilities, often its actions become inaction during the grace periods, rather than the sanctions the HCFA has the power to impose. The HCFA can, and does, accept a facility’s written assurance of compliance “in lieu of a revisit or imposition of remedies.”148 Basically, the long-term care facility fills out the reverse side of a survey sheet, vouching for its own compliance in meeting the standards of the survey.149 In addition to accepting a facility’s letter of compliance, Congress has not given the HCFA the authority to prohibit a provider from becoming “recertified for a specified period of time after being terminated from the Medicare/Medicaid program.”150 Plainly stated, this means that immediately after a nursing home loses its certification, usually for some egregious offenses discovered in the survey, it could immediately reapply for certification.151

III. IDENTIFICATION OF THE PROBLEM

Too often, long-term care facilities pose dangers to their aged and infirm residents.152 Personnel working in the facilities are frequently overworked and staffing levels fall below safe standards of staff-to-patient ratios.153 Residents, who subsequently become victims in long-term care facilities, suffer in silence, with many unable or too afraid to speak against their abusers.154 Both the state and federal

146. See Hooper, Lundy & Bookman, Inc., supra note 54.
147. Grassley’s Amendment, supra note 93.
148. Id.
149. See Russell S. Balisok, Actions Against Skilled Nursing Facilities, in ELDER LAW LITIGATION: REMEDIES FOR PHYSICAL AND FINANCIAL ABUSE PROGRAM GUIDE (Sept. 1999).
150. Id.
151. See id.
152. See infra Part V.
153. See id.
154. See supra Part II.A.
governments have programs to monitor compliance with guidelines and have the power to impose sanctions if nursing homes fall below prescribed standards. The power that lies with the government, however, is slow moving and many times lets society's weakest fall through the cracks. Yet, other trends are emerging in the law that may bring hope to this seemingly bleak landscape. These emerging trends raise the question: can government organizations come up with novel approaches to save our seniors?

IV. ANALYSIS

As bleak as the future may seem for the fourteen million Americans expected to enter nursing homes by 2020, it is not without hope. Although the federal government acts slowly and with frustrating deliberation, other avenues of recourse have begun to open up.

A hodgepodge of solutions has come from different parts of the country. For example, in 1991, California passed a tough law that imposed greater penalties on all those who abuse elder and dependent adults. Although many thought that the language of the statute was overly broad and would not be held constitutional, on March 4, 1999, the California Supreme Court examined the history and background of the law and provided workable definitions to ambiguous parts. That decision allows private plaintiffs to bring suits against health care providers, with heightened damages, without the restrictions that would usually be applicable under the standards for professional negligence.

155. See supra Part II.B-D.
156. See supra Part II.B-D.
157. See infra Part V.
158. See Bates, supra note 74.
159. See supra Part II.B-C.
160. See Grassley's Amendment, supra note 93.
163. See id. On January 20, 2000, criminal charges were added to an abuse case in Santa Clara County. See Sandra Gonzales, Charges Added in Abuse Case: Nursing Home Chain Faces Felony Counts in Wake of 2 Deaths, SAN JOSE MERCURY NEWS, Jan. 20, 2000, at B1. This is one of the first times a nursing home chain has faced criminal charges. See id. Deputy District Attorney Randy Hey stated, "This is a continuation of what we had observed previously—a basic lack of nursing care, both in terms of quality and the fact that the nurses didn't have time to care for them. They were overworked." Id.
Like the California statute, tort law in general recently moved to the forefront of fighting nursing home abuse. Armed with new laws and aimed at nursing homes as big business, tort lawyers have aggressively pursued claims. Gary Stern, an attorney specializing in elder abuse litigation in California, stated: "It used to be that lawsuits were rarely pursued by families victimized by nursing homes because the justice system did not put much value on old people. Today the victims of nursing home abuse can fight back, thanks to a legal system that now listens."

The California legislature does not act alone. The December 1998 American Bar Association Journal examined nursing home suits as a trend. Robert Milligan, head of the health care practice in his Phoenix, law firm said, "Ten years ago, nursing home tort cases were, frankly, a training ground for the 'real cases.' . . . That has changed dramatically." Ken Bennet, an elder law attorney in Indianapolis, agrees. Bennet said that he first saw an increase in nursing home cases about four years ago. Now, "they take up all of his time."

Florida, like California, has also seen a rising trend in nursing home lawsuits. In 1976, Florida enacted a law with the express purpose "to promote the interests and well-being of the patients of health care providers and health care facilities." The Florida legislature titled the law "The Patient's Bill of Rights." Although on the books, few lawyers knew of it until plaintiffs brought and won some

---

165. See id.
166. Id. Stern was surprised by the endorsement of the legislature for tort lawyers bringing about nursing home reform through lawsuits. See id. "[G]iven the predominant view that lawyers are the cause of all problems in the world" it was unexpected that the legislature "made the remarkable statement 'It is the . . . intent of the Legislature . . . to enable interested persons . . . to engage attorneys to take up the cause of abused elderly persons.'" Id.
167. See Higgins, supra note 15.
168. Id.
169. See id.
170. See id.
171. Id.
172. See Dougherty, supra note 15.
173. FLA. STAT. ANN. § 381.026 (West 2000).
175. FLA. STAT. ANN. § 381.026.
substantial lawsuits.\textsuperscript{176}

Some attorneys are even gaining notoriety while pursuing claims against nursing homes using the Florida law.\textsuperscript{177} Attorney Jim Wilkes seems to be on a personal crusade.\textsuperscript{178} A year before he handled his first big nursing home lawsuit, Wilkes checked his own grandmother into a nursing home.\textsuperscript{179} When he came back to check on her, he found her naked, hiding under the bed, with aides nowhere in sight.\textsuperscript{180} Wilkes found a way around the traditional negligence laws by using the Patient's Bill of Rights.\textsuperscript{181}

Wilkes received national attention when he won a $15.2 million lawsuit, but it is his closing argument from a $2.7 million verdict three years ago that reveals Wilkes' style and emphasizes the growing trend in nursing home lawsuits.\textsuperscript{182}

You heard a lot of lawyer talk from [defense lawyer] Mr. Kelly, telling you how tough it is, how sorry you should feel for this company, this publicly traded, largest nursing home corporation in the world, this for-profit institution. How sorry you should feel for them, how tough it is that they can't hire good people. That's not what this is about. It's about, did they treat him bad? Did they do bad things to him?\textsuperscript{183}

Wilkes, after hitting the nursing home as big business, went on to further appeal to the jury's emotions.

Some of the things were evil. Letting him lie there until his feces dried to his body. Letting him lie there turning blue with no air. That's wrong. Allowing a man like Mr. Lowe to be abused and neglected, his wife to be fooled, the state lied to, and all paid for in the name of the State of Florida . . . that's heinous.\textsuperscript{184}

The jury took Wilkes's point well.\textsuperscript{185} The corporations that own nursing homes also took notice. "I think every CEO in America is familiar with him and his ability to create a

\begin{thebibliography}{185}
\bibitem{176} See Dougherty, \textit{supra} note 15.
\bibitem{177} See id.
\bibitem{178} See id.
\bibitem{179} See id.
\bibitem{180} See id.
\bibitem{181} See id.
\bibitem{182} See Dougherty, \textit{supra} note 15.
\bibitem{183} Id.
\bibitem{184} Id.
\bibitem{185} See id.
\end{thebibliography}
presence and focus on malpractice in the nursing homes.\footnote{\textsuperscript{186}}

Other attorneys and plaintiffs are also pursuing more novel actions. Six years ago, Lydia Dill entered a nursing home where, she alleges, she was subject to abuse and neglect.\footnote{\textsuperscript{187}} Today, Dill, aged eighty-eight, serves as “one of four plaintiffs who hope to represent 600 or more past and present . . . residents in the first class action lawsuit against a nursing home.”\footnote{\textsuperscript{188}}

In addition to groundbreaking statutes\footnote{\textsuperscript{189}} and novel lawsuits,\footnote{\textsuperscript{190}} the federal government is also taking a different avenue of action.\footnote{\textsuperscript{191}} In some states, the federal government has aggressively battled fraud committed by nursing homes.\footnote{\textsuperscript{192}} Government audits show that in 1996 and 1997, nursing homes billed Medicare more than $3 billion in improper claims.\footnote{\textsuperscript{193}} Another report found that approximately eleven cents of every dollar is acquired by fraud.\footnote{\textsuperscript{194}}

Claims to re-address these wrongs come under the False Claims Act.\footnote{\textsuperscript{195}} In one instance, the government brought suit against the city of Philadelphia.\footnote{\textsuperscript{196}} The government charged the city, which ran several nursing homes, with violations of abuse and neglect under the False Claims Act.\footnote{\textsuperscript{197}} The government further charged violations under the Civil Rights for Institutionalized Persons Act.\footnote{\textsuperscript{198}}

That action represents the first time “that the Civil Rights Division has joined with a U.S. Attorney’s Office and [the Department of Health and Human Services (HHS)] to investigate and resolve issues concerning nursing home care.”\footnote{\textsuperscript{199}} A clause in this forty-two-page settlement agreement
limits the use of physical restraints and requires repayment of $50,000 to the federal government. Even more far-reaching in the settlement was the agreement to make sure that residents are not abused, to provide adequate medical, nursing, and psychiatric care, and to set up a fund with $15,000 to improve the quality of life for the residents.

Addressing the lawsuit against Philadelphia, the Inspector General of HHS, June Gibbs Brown, said that this action was a sign of the future and that nursing homes are expected to provide the highest quality of care in safeguarding the welfare of the nation's most needy citizens. The $50,000 settlement seems almost paltry for such praise considering that each fraud violation can carry a fine of $10,000, with the Civil Rights for Institutionalized Persons Act providing for treble damages.

The federal government is also taking steps to reduce the backlog that the HCFA faces. Approximately 700 cases exist in the backlog. The GAO reported that the backlog "increases the pressure on the HCFA to settle cases and also encourages companies to delay the payment of fines." A supplemental appropriation of $1.4 million was added to the $210 million annually given to the states to oversee nursing homes. The $210 million accounts for approximately seventy percent of the overall budget that states have to oversee nursing homes. The new appropriation serves to have all complaints against nursing homes investigated within ten working days; serious complaints, those categorized as life threatening, will be investigated by the government within two working days.

V. PROPOSAL

Although changes in laws and the increased level of

---

200. See id.
201. See Settles CRA, supra note 191.
202. See id.
203. See id.
204. See Grassley's Amendment, supra note 93.
205. See id.
206. Id.
207. See id.
208. See id.
209. See id.
210. See Grassley's Amendment, supra note 93.
attention are occurring, albeit slowly, there still exists a problem in nursing homes which needs immediate correction: the employees. Not enough attention is given to the workers in nursing homes. Since 1973, illness and injury rates in construction work have fallen by fifty-two percent. These falling rates were attributed to the pressure from workplace safety regulators. During the same time, however, "health care workers' injury rates have doubled." The Occupational Safety and Health Administration (OSHA) is aware of the hazards of the workplace for people in the health care field and is attempting to develop more expansive safety rules.

The powerful nursing home industry opposes the new proposals from OSHA. Ironically, former President Clinton, one of the most outspoken presidents on nursing home reform, accepted over $1 million in his last campaign from the Beverly Corporation, a nursing home corporation with one of the very worst records in the country.

Moreover, the people OSHA advocates are not people traditionally well represented by political institutions. Nursing aides' average pay is $6.94 per hour. California comes in at an average of $7.00 an hour. Every year, ninety-three percent of those that enter the profession leave it. One woman, who has worked as a Certified Nursing Assistant (CNA) for fifteen years, travels to and from work by bus and brings home about $450 in pay every two weeks. From that pay the CNA supports herself and a twenty-eight year-old dependent adult son.

In addition to extremely poor pay, CNAs generally lack any serious medical training. Dwana Pinchok serves as the public affairs coordinator at the National Citizens' Coalition

212. See id.
213. See id.
214. Id.
215. See id.
216. See id.
217. See Adams, supra note 211.
218. See id.
219. See id.
220. See Bates, supra note 74.
221. See id.
222. See id.
223. See Adams, supra note 211; see also Hanger, supra note 82.
for Nursing Home Reform. In an interview, Pinchok said, "There's a great analogy that it takes 75 hours to become a CNA and 2,500 to become a beautician." Under-trained staffs represent only one dangerous condition that exists when it comes to personnel.

Under-trained staffs are, more often than not, overworked and short-handed. Activists argue that increasing the staffing level could reduce injuries, both to patients and CNAs. Currently no national standard exists for staff-to-patient ratios, although eighteen states have adopted staffing ratios. One CNA reported that she took care of fifteen patients who all needed constant care and supervision. Often, CNAs do not know the causes of the patients' symptoms. Patients inability to communicate because of feeding tubes frustrate both the patient and the CNA.

Frustration and negative publicity often affect those who work in nursing homes. Overwork and short pay only increase workplace hostility. In the meantime, the corporations that frequently own nursing homes make huge profits. Nothing excuses the conduct of those who abuse the residents of long term care facilities, either intentionally or through neglect. But, for nursing homes to adapt to the demands of the future, they must do more for the people who work in them.

More states must pass legislation mandating staff-to-patient ratios. But, bigger monetary commitments from the states must accompany higher staff-to-patient ratios. This year, California passed its own staff-to-patient ratio, but only after negotiations with the operators of the state's 1,440 nursing homes. California also pledged another $100 million from MediCal to raise salaries and hire new staff.

224. Adams, supra note 211.
225. See id.
226. See id.
227. See id.
228. See id.
229. See id.
230. See Adams, supra note 211.
231. See id.
232. See id.
233. See Bates, supra note 74.
234. See id.
235. See Salladay, supra note 54.
236. See id.
This $100 million accompanies the $72 million included in the state budget for unspecified nursing home reforms. The money will add more than 120,000 nursing home assistants and 30,196 new nurses in the next five years. The measure will require that enough staff is present to devote a minimum of 3.2 hours of care to each resident every day. By 2003, the minimum hours devoted to each patient will increase to 3.5 hours. This new law is the most far-reaching in the country; it is also the most expensive. Few states have the resources to implement such legislation, much less the political fortitude to fight the powerful nursing home lobby.

Other options exist for states that cannot uniformly enact that type of legislation. In addition to pursuing nursing home corporations through their most vulnerable artery, legal liability, activists have also taken innovative steps within the nursing homes themselves.

Citing the successful use of video cameras in banks and child care centers, advocates for the elderly call on families to “place video cameras in their loved ones’ nursing home rooms.” The Coalition to Protect America’s Elders said it was one of the “unfortunate but necessary tools families can use to protect the patients’ well being.” The American Health Care Association, an organization that represents for-profit nursing homes, responded by attacking the coalition and accusing it of exploiting the seniors and their families, as well as violating the privacy of the patients.

Clark Law, chief executive of the Association of Ohio Philanthropic Homes, Housing and Services for the Aging, a trade group that represents nonprofit nursing homes, said he believes that “residents or their representatives with authority to give consent for patients should be able to install cameras in their rooms if they want.” Law continued, “On the one hand, there are the rights of the individual versus[,

237. See id.
238. See id.
239. See id.
240. See id.
241. See Salladay, supra note 54.
242. See Bates, supra note 74.
243. See id.
244. Tatge & Solov, supra note 61.
245. Id.
246. See id.
247. Id.
on the other hand, being able to protect good nursing homes from being lumped in with all the other nursing homes that do have abuses.\footnote{248}

Videotaping has gained support in Ohio.\footnote{249} Gale Sweeney, a woman who placed her mother in a nursing home, advocates the installation of video cameras in rooms.\footnote{250} Five months after placing her mother in the nursing home, Sweeney grew suspicious regarding her mother’s care.\footnote{251} When Sweeney confronted the nursing home with the evidence on the tapes of her mother being yelled at and threatened, her mother’s care improved.\footnote{252}

Medicare already operates a web site\footnote{253} that offers data about all nursing homes.\footnote{254} This site allows access to all the nursing homes in an area and the most recent results of the government’s oversight surveys.\footnote{255} The results of the surveys are supposed to be accessible to all residents by the nursing homes with a prominent posting in a specified area.\footnote{256} However, more could be done with these surveys. The nursing home should furnish each resident, guardian of the resident, or prospective resident with a copy of the survey and, if necessary, the subsequent compliance survey. Furthermore, the nursing homes should publish the survey in the legal notices of the local newspaper.

Additionally, a governmental enforcement agency for the area should put together an information package for every long-term care facility. The package should not only include the last survey results, but should contain survey results for the last five years, to get a perspective of the home overall. The package should also inform the patient of the staff-to-patient ratio at the facility, as well as guarantee maintenance

\footnote{248}{\textit{Id.}}
\footnote{249}{See \textit{id.}}
\footnote{250}{See Tatge & Solov, \textit{supra} note 61.}
\footnote{251}{See \textit{id.}}
\footnote{252}{See \textit{id.}}
\footnote{253}{See \textit{id.}}
\footnote{254}{See Medicare Home Page, \textit{supra} note 135.}
\footnote{255}{See \textit{id.}}
\footnote{256}{See \textit{id.}}

When the author picked a zip code, 95128, the author chose two nursing homes from the group the search pulled up. One home, Winchester Convalescent Center, had 35 health deficiencies in its last survey. The average total health violation in the nation is five, the average in California is ten, and a home loses its accreditation with fifty. \textit{See id.} In contrast, the second home, the O'Connor Hospital, had only two. \textit{See id.}
of a certain ratio. Facilities should also provide a patient’s bill of rights that contractually commits the facility to a certain degree of care. As well as posting the phone numbers for the long-term care ombudsman and the state survey agency, the numbers should be given out in each resident’s package.257

Changes in laws,258 attorneys willing to accept elder abuse cases,259 and increased governmental attention260 all bode well for nursing home residents in the future. However, more needs to be done. Staff-to-patient ratios need codification in state legislation and enforcement. Video and audio-taping, with the patient’s or guardian’s consent, should be allowed, and nursing homes should keep those tapes for at least a week so that if any incidents occur, the tapes may assist the victims. Further, the surveys performed should be published, and the nursing homes should be required to distribute the current surveys to all residents or guardians as well as give the survey results to prospective residents. Additionally, each long-term care facility resident or guardian should have an information package with appropriate names and numbers of state and federal agencies that are in charge of investigating the homes.

VI. CONCLUSION

The machinery of the federal bureaucracy is woefully inadequate in protecting society’s most vulnerable. Compliance with survey standards seems to be a factory of Catch-22s.

As nursing home neglect results in public outrage, tort law seems to hold the most promise for the future. Individual states are the key to passing such laws and in allowing lawyers to hit the nursing home industry where it hurts: the wallet. As lawyers step to the forefront of change, industry giants begin to take notice. As lawyers like Wilkes bring into American homes the abuse that goes on in long-term nursing home facilities, advocates for safe elder care grow more powerful. But the hodgepodge of solutions needs to be more

257. See Medicare Home Page, supra note 135. Ironically, having the last survey available is rated on the current survey. See id.
258. See FLA. STAT. ANN. § 381.026 (West 2000).
259. See Dougherty, supra note 15.
260. See Settles CRA, supra note 191.
uniform.

More states need to pass safe staff-to-patient ratios. States need to recognize, as Florida did, that a patient needs a bill of rights and a standard information package so that he can make more informed choices and address legal wrongs. Tort law has long brought changes to areas reluctant to change, but governments must also be held accountable in making sure that the powers they have—sanctions, fines, and closures—are used in the best interest of the people they protect.

If solutions are to work, nursing homes must implement changes so that, rather than reacting to negative events and reports, the industry can better deal with problems proactively.