California Elders Need Us Now More Than Ever

by Joel R. Bryant

It has been said that how a society treats its elders is a reflection on the character and integrity of the people of that society. If true, I don't feel too good about our society as of late. As many as 1.5 million elders are abused every year, yet experts believe that for every case that does get reported, five more go unreported. Never have the elderly needed committed lawyers to protect their rights more than now. However, the rights of California's elders have been negatively impacted this year in the courts and in the legislature. I will discuss below a few specific examples.

Some California Legislators Care More About $$ than Protecting Elders

Senate Bill 558 was introduced by Senator Simitian early in the 2011 legislative session. The bill is designed to prevent elder abuse and protect elders by changing the burden of proof in an elder abuse action from clear and convincing evidence to preponderance of evidence. Preponderance of evidence is the standard of proof in almost all civil actions, including financial elder abuse actions. How can anyone justify a higher burden of proof in an elder abuse action against a nursing home than in other civil actions? The answer is — you can't. This is particularly true when you consider that elder abuse actions are inherently more difficult to prove than other civil actions because the primary witness to the neglect or other wrongful conduct at issue (*i.e.*, the abused elder) is typically unable to testify due to death or incapacity and the other witnesses to the wrongful conduct are all employed by the defendant nursing home.

Notwithstanding the foregoing, SB 558 was effectively killed this year when it became stalled in the Assembly Appropriations Committee after it had passed in the Senate. As is often the case in California, when you see a legislative action or inaction which negatively impacts Californians and flies in the face of reason and sense, the liability insurance lobby and medical/healthcare lobby are behind it. Those two lobbies spend an obscene amount of money getting their candidates elected to the California legislature and "convincing" said candidates to vote their way or else risk losing the campaign cash. Disturbing, but true. Such a system certainly needs to be fixed, but that is a topic for another article, another day.

The punch line is simply this. As the law currently stands, there are numerous instances of elder neglect in nursing homes which go unpunished due to the high burden of proof coupled with the abused elder's death or incapacity. Changing the burden of proof to preponderance of the evidence, like virtually all other torts in California, would protect California's elderly by making it easier to hold nursing homes accountable when they kill or injure an elder as a result of neglect or other wrongful conduct. Such accountability would give California's nursing homes a real incentive to clean up their act and properly care for our elders. The bad nursing homes who fail to provide proper care and hurt their residents would be more easily identified, would be held accountable and would be weeded out. The nursing homes providing proper care would carry on unaffected by the new burden of proof. The overall winner would be California's elders and their loved ones, and our society overall.

Carter v. Prime Healthcare Paradise Valley, LLC

In *Carter v. Prime Healthcare* (2011) 198 Cal.App.4th 396, the Court of Appeal Fourth Appellate District upheld the trial court's decision to sustain without

Continued on page 4

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leave to amend a hospital defendant's demurrer to a plaintiff's elder abuse cause of action under the Elder Abuse and Dependent Adult Civil Protection Act ("EADACPA," Welfare & Institutions Code §§15600, *et seq*.). The plaintiff alleged in the elder abuse cause of action in his first amended complaint that the hospital failed to treat plaintiff's pressure ulcers, failed to administer prescribed antibiotics, falsely documented his medical records, and caused the plaintiff serious injury as a result. The Court of Appeal, however, found that the plaintiff's allegations were not sufficiently egregious to constitute neglect within the meaning of EADACPA and sustained the hospital's demurrer without leave to amend.

Such a result at the pleading stage is contrary to the stated purpose of EADACPA (*i.e.* , elders are an important, yet extremely vulnerable, group of people in our society who need and deserve protection) and will undoubtedly embolden health care providers and their attorneys to think that they are now immune from elder abuse liability in all but the most egregious situations. That was certainly not what was intended when EADACPA was enacted in 1991, particularly given the heightened burden of proof and the witness difficulties inherent in such cases. Specifically, Welfare & Institutions Code §15600 states in pertinent part:

(a) The Legislature recognizes that **elders and dependent adults** may be subjected to abuse, neglect, or abandonment and that this **state has a responsibility to protect** these persons.

(b) . . . The Legislature desires to direct special attention to the needs and problems of elderly persons, recognizing that these persons constitute a significant and identifiable segment of the population and that they are **more subject to risks of abuse, neglect**, and abandonment.

(c) The Legislature further recognizes that a significant number of these persons have developmental disabilities and that mental and verbal limitations often leave them **vulnerable to abuse** and incapable of asking for help and protection.

(d) The Legislature recognizes that most elders and dependent adults who are at the greatest risk of abuse, neglect, or abandonment by their families or caretakers suffer physical impairments and other poor health that place them in a **dependent and vulnerable position**.

(h) The Legislature further finds and declares that infirm elderly persons and dependent adults are a **disadvantaged class**, that cases of abuse of these persons are seldom prosecuted as criminal matters, and few civil cases are brought in connection with this abuse due to **problems of proof**, court delays, and the lack of incentives to prosecute these suits. (Emphasis added.)

Accordingly, in a situation such as *Carter* when the complaint alleges

Continued on page 25

Visual Evidence Archive: Demonstratives That Made a Difference

Practice Area: Breach of Contract

Background: In the wake of a multi-state E. coli O157:H7 breakout stemming from contaminated hamburger patties sold at fast food restaurants, plaintiff sued one of its meat suppliers for breaching its contract to furnish food safe for human consumption. Damages were sought to recover lost sales revenue in the tens of millions of dollars.

A Demonstrative That Made a Difference: We produced a comprehensive interactive multimedia presentation about how hamburger meat was prepared "from farm to fork" for use during trial. The presentation featured several detailed computer animations that demonstrated how different processes and machines could have promoted cross contamination during processing. The presentation was shown to defense counsel prior to settlement, who later commented that it was influential in their settlement decision.

Outcome: Plaintiff settled for $58 million.

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that an elder has suffered serious injuries as a result of reckless neglect by a health care provider while under its care, the courts should embrace the purpose behind EADACPA and give elderly persons and their attorneys the benefit of the doubt and wait to see how the facts turn out in discovery rather than rejecting their elder abuse cause of action at the pleading stage. I believe that is consistent with the legislative purpose behind EADACPA and necessary to adequately protect our elders.

Stinnett v. Tam

In the August/September issue of ***Trial Bar News***, I explained the adverse and discriminatory effect the Medical Injury Compensation Reform Act ("MICRA") has on America's most vulnerable persons and how it denies full justice to elderly persons due to MICRA's $250,000 cap on non-economic damages. Specifically, when elders are severely injured or killed, they typically have a limited economic loss because they are no longer earning significant income, but they have a substantial non-economic loss. Pursuant to MICRA, the elder's life and enjoyment of life is deemed to be worth no more than $250,000. As a result, and in light of the substantial costs of pursuing medical negligence actions, injured elders often find that it is not economically viable to seek justice against those medical providers who negligently caused their severe injuries or death. I ask again how can anyone in good conscience believe that such a law is good for our elders, good for our society? Not surprisingly, the two lobbies who were an integral part in getting MICRA into law (*i.e.*, liability insurance and medical/healthcare lobbies) are the same ones behind the stalling of SB 558.

Recently, the California Court of Appeal, Fifth District, had a chance to right the ship in the case of *Stinnett v. Tam*, 2011 WL 3862642, and strike down MICRA and its caps on non-economic damages, as other states have done in the past few years. In fact, courts have overturned medical malpractice caps in at least 11 states in recent history. Unfortunately, however, the court rejected the equal protection, due process and right to jury trial arguments and passed the buck by holding that the issue is one for the Legislature to resolve. Yes, the same Legislature which has become subservient in some respects to the insurance and medical lobbies.

As an aside, a trial court in Louisiana recently struck down medmal caps in the case of *Arrington v. Galen-Med, Inc.* In reaching his decision, Judge Clayton Davis reasoned, "The fact that no-cap states and states with caps that limit only noneconomic damages can function without facing a medical insurance crisis or a crisis in medical care is compelling proof that Louisiana's scheme, which admittedly discriminates only against the most severely injured victims of medical malpractice, is no longer the 'reasonable alternative remedy' our Constitution requires." Makes sense to me. Seems fair and logical. Now, if we can only convince our California courts of the merits of such an argument.

Over time, trial attorneys have proven to be the most effective representatives of abused seniors. This is particularly true in California where the government agencies tasked with regulating nursing homes and enforcing nursing home care regulations have become largely ineffective, due in part to grossly inadequate financial resources. **California's elderly need us now more than ever.** We must keep fighting the good fight for them and for the good of our society. The fight must necessarily take place in the California Legislature and in courtrooms across the state, one case at a time. Undoubtedly, we will encounter numerous hurdles. However, together we can overcome them and prevail. **TBN**

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– *McClure v. Donovan* (1947) 82 Cal.App.2d 664, 666

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