

What is "Abuse" Under the Elder Abuse Act?

In 1991, the California state Legislature added Welfare & Institutions ("W & I") Code §15657 to the Elder Abuse and Dependent Adult Civil Protection Act ("the Act") in order to "direct special attention to the needs and problems of elderly persons, recognizing . . . that they are more subject to risks of abuse, neglect and abandonment." W & I Code §15600(b). To encourage lawyers to take on the cause of this "disadvantaged class" of Californians, the Act provides certain enhanced remedies for successful claimants, including attorney's fees and costs, and post-mortem general damages in cases of death when certain burdens of proof are met. The Act states:

Where it is proven by clear and convincing evidence that a defendant is liable for physical abuse . . . or neglect . . . , and that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of this abuse, the following shall apply, in addition to all other remedies provided by law:

(a) The court shall award plaintiff reasonable attorney's fees and costs . . .

(b) The limitations imposed by Section 377.34 of the Code of Civil Procedure [limits on post-mortem general damages] on the damages recoverable shall not apply. However, the damages recovered shall not exceed the damages permitted to be recovered pursuant to subdivision (b) of Section 3333.2 of the Civil Code [MICRA].

While proving malice, oppression, or fraud might sound daunting, *recklessness* provides not so high a hurdle. A reckless act has been committed if the defendant knew it was highly probable that his or her conduct would cause harm and knowingly disregarded this risk. *See*, CACI 3113 "Recklessness Explained." Unlike negligence, recklessness involves "more than inadvertence, incompetence, unskillfulness, or a failure to take precautions but rather rises to the level of a conscious choice of a course of action with knowledge of the serious danger to others involved in it." *See, Delaney v. Baker* (1999) 20 Cal.4th 23, 31-32. Reckless conduct, however, is not intentional conduct.

This article attempts to highlight some of the important considerations to be made before embarking on an elder abuse case, including: (1) how to spot incidents that may rise to actionable abuse under the Act; (2) who can bring an action under the Act; and (3) the implications of MICRA in elder abuse cases.

Identifying Acts of Abuse or Neglect

While most of us could easily spot the abuse of an elder who is assaulted or battered, or who has had his or her life savings stolen by a family member, many viable cases of elder abuse under the Act may be missed because they appear to be single acts of negligence rather than overt acts of abuse.

Neglect is defined in the Act as "the negligent failure of any person having the care or custody of an elder or dependent adult to exercise that degree of care that a reasonable person in a like position would exercise" and includes, among other things, the failure to provide medical care for physical and mental health needs, failure to protect from health and safety hazards, and the failure to prevent malnutrition and dehydration. W & I Code §15610.57(a) and (b).

by Randall R. Walton
Column Editor: Christopher Hagen



Randy Walton practices in Carlsbad, representing individuals and families who have been impacted by personal injury and wrongful death. A significant part of his practice is dedicated to the prosecution of nursing homes and residential care facilities for the abuse and neglect of seniors and dependent adults. He received his undergraduate degree from U.C.S.D., and his Juris Doctor from California Western School of Law. He may be contacted by e-mail at: rwalton@legalpad.com.

Continued on page 8

Consider the following case. Mr. and Mrs. Nice, both in their late seventies, live at home in Pacific Beach. Mr. Nice suffers from fairly advanced Alzheimer's disease which affects his ability to communicate and causes him to spend most of his day in bed. Other than the Alzheimer's, however, Mr. Nice suffers from no serious disease and is able to live at home.

When Mrs. Nice needs to travel back East to attend to some family matters, she decides it would be too difficult to take her husband along, and finds a residential care facility near her home that will take Mr. Nice for the week. While she's gone, Mrs. Nice calls the facility three times to check on her husband and is told each time that Mr. Nice is doing great. When she arrives home a week later, she drives directly to the facility to pick up her husband and discovers him lying in bed, gaunt-looking, feverish, and semi-conscious. She orders the staff to call an ambulance and Mr. Nice is taken to the hospital where he is diagnosed as suffering from dehydration and sepsis, the source of which, doctors believe, is bedsores that had developed during the previous week. Unable to fight off the septic infection, Mr. Nice dies five days later.

Now, clearly these facts suggest something wrong with the care (or lack thereof) provided to Mr. Nice, but is this a case of "elder abuse" under the Act that could potentially trigger the enhanced remedies? Was the conduct reckless?

When evaluating a case involving the custodial treatment of an elderly person or a dependent adult, it is important to investigate all issues that might suggest a pattern of neglect instead of what, at first, might appear to be a single negligent act. A good place to start is the medical file maintained by the facility, specifically the written care plan (or "plan of care") required for all residents of a skilled nursing facility. The plan should address falls, mobility, pain management, nutrition, bladder and bowels, etc. These plans must be continually updated to address a resident's changing needs and must be followed. A failure to follow the care plan can lead to serious injury or death and can be the basis of an elder neglect lawsuit.

For example, you might find that a fall occurred because insufficient staffing only allowed one attendant to assist the resident to the restroom when the care plan called for two. Or a history of bedsores may be noted,

but no action was taken to prevent their recurrence. There may be special nutritional or dietary requirements that are forgotten or ignored. Delving into the facts may reveal that behind a fracture, a rapid weight loss, a bed-sore, or a life-ending infection is a documented risk factor that, if properly addressed, would have prevented the harm.

Facilities that do not provide "skilled" nursing care, such as a residential care facility, are not required to maintain a care plan; however, Title 22 of the California Code of Regulations may provide guidance because the day-to-day care provided by a licensed facility is heavily regulated by the State of California and can provide a solid foundation to build a case under the Act. For example, if the case involves bedsores, the regulations require an ongoing assessment of a resident's skin [Cal. Code Regs., tit. 22 §87713, subd. (a)(3)]. If the case is about a failure to obtain appropriate medical care, the regulations address that as well [Cal. Code Regs., tit. 22 §87575, subd. (a)].

It is also important to check if the Department of Health Services or the Department of Social Services was notified about the claims of abuse or neglect. Upon a complaint, these

Continued on page 25

Executive Presentations

Delivers Trial Services



*Unmatched in creativity,
quality and service!*

- Digital Trial Presentations
- Event & Site Photography
- Legal Video Services
- Design Consulting & Exhibit Preparation
- Trial Equipment Rentals
- Animations & Re-creations
- PowerPoint Presentations
- Photo Enlargements

tel: 213.480.1644 www.epdelivers.com fax: 213.480.1838

agencies are required to conduct an investigation into any allegations of abuse or neglect and these investigations, once completed, can be an excellent source of information.

Finally, be aware that the Department of Health Services evaluates all skilled nursing facilities yearly and these results are available to the public. A fall case takes on new significance when you discover there have been several other reported falls in the previous year. Specific information about all licensed facilities can be found on the web site of the California Advocates for Nursing Home Reform in San Francisco at: canhr.org.

Who Can Sue For Elder Abuse?

If the injured elder or dependent adult does not die as a result of the misconduct, then he or she is the real party in interest who can sue on his or her own behalf, although the appointment of a Guardian ad Litem, usually a family member, may be required.

If the injured party dies as a result of the misconduct, the court does not lose jurisdiction for claims made under the Act. W & I Code §15657.3(c). Upon petition, the right to maintain the action after death (the survival action) can be transferred to a personal representative of the decedent or to the decedent's successor in interest. W & I Code §15657.3(d). Remember, the limitations in a survival action imposed by Code of Civil Procedure §377.34 do not apply, and unlike most death cases, the decedent may claim his or her full measure of pain and suffering damages incurred before death.

In order for a personal representative or successor in interest to bring an action or continue an action after the death of the real party, an affidavit or declaration under penalty of perjury seeking the appointment must be submitted. The affidavit must make the assertions set forth in Code of Civil Procedure §377.33 and is usually filed concurrently with the complaint.

It is a fairly simple process and judges routinely make the appointment.

In addition to the survival action, the death of an elder or dependent adult also gives rise to a wrongful death action for the eligible surviving heirs. Code of Civ. Proc. §377.60. The differences between the survival action and the wrongful death action are huge. The survival action looks at the decedent's injuries and becomes an asset of the decedent's estate, whereas the wrongful death action is meant to compensate the heirs for their own losses. These are, in effect, separate cases with separate damages requiring an entirely separate analysis. See, *Atkins v. Strayhorn* (1990) 223 Cal.App.3d 1380, 1394-96.

What Role Does MICRA Play in Cases Brought Under the Act?

The application of the Medical Insurance Compensation Reform Act (MICRA) to claims brought under the Act can be confusing. On the one hand, the Act expressly states that "damages recovered shall not exceed the damages permitted to be recovered [under MICRA]," but, on the other hand, case law holds that elder neglect under the Act covers "an area of misconduct distinct from professional negligence" and is, therefore, not subject to some of the limitations of MICRA. *Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 783, citing *Delaney v. Baker* (1999) 20 Cal.4th 23, 34.

Whether MICRA will be applicable to an elder abuse case essentially depends on two things: (1) the type of facility you are suing and (2) the type of misconduct alleged. The first one is easy. Unless you are suing a licensed "health care provider" from the list of such providers enumerated in the code, MICRA will have no applicability to your case. Only facilities considered "skilled nursing facilities" are considered health care providers under MICRA (presuming a license of course). This means the thousands of other providers in California such as residential care facilities, board and

care homes, and assisted living providers are not considered to be health care providers and will not be subject to MICRA.

If the defendant is a licensed skilled nursing facility (or another licensed health care provider), the application of MICRA gets more complicated. Because the case law now recognizes a distinction between injury that arises from the substandard rendering of medical services (professional negligence) and harm that arises from the failure to carry out custodial obligations (neglect), it appears that MICRA will not apply to cases in which the allegations are rooted in a failure to carry out duties that are "custodial" in nature and not "professional." For example, in *Covenant Care, supra*, at 783, the court noted, "the statutory definition of neglect speaks not to the *undertaking* of medical services, but of the failure to *provide* medical care."

What's the difference? It's not clear. But many lawyers are now making sure that their pleadings recognize this distinction, so the court knows from the outset that the injury or death arose from acts of abuse and neglect in the carrying out of custodial duties rather than the undertaking of professional care.

CONCLUSION

Whenever you are consulted about injuries or death of an elder or dependent adult in a custodial facility, consider whether the Elder Abuse and Dependent Adult Civil Protection Act applies to the claim. If it does, and certain burdens of proof are met, the case can have significant compensatory value and that doesn't even consider the potential for punitive damages. Plus, you will be doing your part to "protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect" [see, *Delaney v. Baker, supra*, 20 Cal.4th at 33] just like the Legislature intended. **TBN**