

NEGLECTING THE NEGLECTED: THE IMPACT OF NONECONOMIC DAMAGE CAPS ON MERITORIOUS NURSING HOME LAWSUITS

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Meritorious nursing home lawsuits serve as valuable tools for policing a nursing home industry rife with instances of negligence, malpractice, neglect, and abuse. Recent proposals advocate a national cap of \$250,000 on all noneconomic damages awarded in medical malpractice lawsuits. Many states have already adopted similar caps. In this empirical study of three hot-spot jurisdictions (California, Texas, and Florida), Professor Rustad shows the disparate effect of noneconomic damage caps on the elderly residents of nursing homes due to the general lack of meaningful economic damages among typical nursing home claimants. Noneconomic damage caps effectively doom many elder abuse and mistreatment claims by removing incentives for attorneys to accept these meritorious lawsuits.

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Thanks to Thomas H. Koenig of Northeastern University who helped me with constructing the charts in this article. I am grateful to Suffolk University Law students David Coughlin, Shannon Downey, Kara Fratto, and Conway Kennedy for their able research assistance. I would also like to thank Diane D'Angelo, a Suffolk University Law School reference librarian, for assisting me in locating verdicts and other materials. Thanks also to Chrissy J. Knowles for editorial assistance. I would also like to thank Eugene Garmize, Alex Chase, and *The Elder Law Journal* staff for editorial assistance.

Introduction

President George W. Bush has proposed a hard cap of \$250,000 on all noneconomic damages awarded in medical malpractice lawsuit awards.¹ The U.S. Senate is considering capping noneconomic damages awards against all health care providers, including those who treat nursing home patients, also at \$250,000.² President Bush has singled out medical liability reforms, such as caps, as a legislative priority in his second term.³ In the 2004 elections, corporate nursing homes joined for-profit hospitals as the twentieth largest industry donor to the Bush/Cheney campaign of 2004,⁴ and two of President Bush's top donors, classified as "Rangers," were corporate representatives of the nursing home industry.⁵ Beverly Enterprises, the largest nursing home corporate chain, endorsed the Bush administration's medical liability tort reform proposals because

1. Robert Pear, *Bush Begins Drive to Limit Malpractice Suit Awards*, N.Y. TIMES, Jan. 6, 2005, at A18.

2. Press Release, Best Wire, Texas Study Suggests Malpractice Payouts Have Been Largely Stable (Mar. 16, 2005) [hereinafter Texas Study] (on file with The Elder Law Journal).

[C]osponsored by Sens. John Ensign, R-Nev., and Judd Gregg, R-N.H.—[Senate Bill 354 was] introduced last month in the U.S. Senate. The Ensign-Gregg bills include S. 354, a comprehensive reform package similar to California's 30-year-old Medical Injury Compensation Reform Act, which would include a broad, \$250,000 cap on the noneconomic damages that can be awarded in malpractice complaints lodged against all types of health-care providers.

Id. (discussing implications of an academic study of Texas medical liability awards on proposed State Senate Bill 354).

3. *Malpractice: Bush Calls for 'Immediate Action' by Congress*, AM. HEALTH LINE, Jan. 7, 2005; see also *Liable to Fail*, THE HILL, Apr. 19, 2005, available at <http://www.hillnews.com/thehill/export/TheHill/Comment/Editorial/041905.html> (noting that "tort reform has been a top priority for President Bush and the GOP-led Congress" and how "Bush has spoken repeatedly about the need to cap medical liability").

4. OpenSecrets.org, 2004 Presidential Election: George W. Bush Campaign Money, <http://opensecrets.org/presidential/indus.asp?Id=N00008072&cycle=2004> (last visited Sept. 25, 2006); see also Joe Mannies, *Bush Says He Hopes to Usher in the "Responsibility Era"; He Touts Education Plan in Forum at Westport Playhouse; Candidate Gains a Convert*, ST. LOUIS POST-DISPATCH, Sept. 13, 2000, at A1 (quoting Democratic candidate for Lieutenant Governor who compared George W. Bush's support for nursing home resident rights with his vote in Texas in 1995 that diluted nursing home standards, a tort reform supported by "the nursing home industry, which had contributed \$150,000 to Bush").

5. PUBLIC CITIZEN, BUSH'S CAMPAIGN ADS: BROUGHT TO YOU BY SPECIAL INTERESTS 23 (2004), <http://www.whitehouseforsale.org/documents/bushads2.pdf>.

these measures “would slow the growth of liability costs throughout the nursing home industry.”⁶

A decade ago in Texas, then Governor-elect George W. Bush was at the forefront of a 1995 tort reform bill “to prevent frivolous and junk lawsuits,” which included a \$200,000 cap on punitive damages.⁷ In 2003, Texas enacted a medical liability reform bill that capped noneconomic damages at \$250,000 per defendant with an absolute limit of \$750,000 against all defendants.⁸ The Texas tort reforms were enacted despite a lack of clear evidence of an insurance crisis caused by runaway verdicts and settlements. On the contrary, a more plausible explanation is that the insurance liability crisis “in Texas, and in the nation as a whole, was driven primarily by strains on the reinsurance market—arising from such catastrophes as Hurricane Andrew and the Sept. 11 terrorist attacks—and failing investment yields.”⁹

The cover story for the *ABA Journal's* October 2006 issue is about the effect of Texas tort reform on nursing home litigants and other claimants with limited economic damages. The theme of the article is that the \$250,000 noneconomic damages cap hits nursing home neglect lawsuits hard because few elderly residents will have lost income or other economic losses.¹⁰ The tort reform has all but eliminated Texas nursing home cases, and a number of long-term care facilities have either stopped carrying insurance or have switched to \$250,000 policies because they can settle most claims for \$15,000 or less.¹¹ Because the expenses for bringing a suit against a nursing home often exceed the potential recovery, nursing home cases are no longer being filed in large numbers in Texas.¹² Plaintiffs counsel representing nursing home residents are “cherry-picking cases with well-off clients who can show economic damages,”¹³ leaving most elderly nursing home victims without the possibility of legal representation.¹⁴

6. Beverly Enters., Current Report (Form 8-K), at exh. 99.1 (Feb. 20, 2003) [hereinafter Beverly Current Report].

7. R.G. Ratcliffe, *Bush Proposes Tort Reform; Says His Plan Would Prevent “Junk Lawsuits,”* HOUSTON CHRON., June 18, 1994, at A30.

8. See Texas Study, *supra* note 2.

9. *Id.*

10. Terry Carter, *Tort Reform Texas Style: New Laws and Med-Mal Damage Caps Devastate Plaintiff and Defense Firms Alike*, A.B.A. J., Oct. 2006, at 30.

11. *Id.* (quoting San Antonio plaintiff's attorney Glenn Cunningham).

12. *Id.*

13. *Id.* at 33.

14. *Id.* at 35.

The nursing home industry and its insurers employ the rhetoric of a medical malpractice liability crisis to justify radical tort reforms “that limit the ability of residents and their families to sue and to collect claims.”¹⁵ Twenty-five states have already imposed caps on noneconomic damages in medical liability cases.¹⁶ In 2003, Mississippi capped noneconomic damages in nursing home litigation at \$500,000, and Arkansas raised its punitive damages standard in civil suits.¹⁷ Insurance executives explain that skyrocketing nursing home premiums are a by-product of excessive litigation, “partly spurred by rich jury verdicts [that] sent much of the nursing home market to alternative risk-transfer approaches several years ago.”¹⁸

Despite unsupported claims about a nursing home lawsuit crisis, little is known about the actual growth, size, ratio, plaintiff-defendant characteristics, factual foundation, and proportions of awards allocated to noneconomic damages, punitive damages, or special damages¹⁹ in nursing home litigation. Almost no empirical data has been collected on either the incidence of nursing home litigation or the conditions that led to these lawsuits.

15. BERNADETTE WRIGHT, AARP PUB. POL’Y INST., NURSING HOME LIABILITY INSURANCE: AN OVERVIEW, EXECUTIVE SUMMARY ii (2003), available at http://assets.aarp.org/rgcenter/health/2003_08_nh_ins.pdf.

16. In 2005, the following states capped noneconomic damages in medical malpractice claims: Alaska, California, Colorado, Florida, Georgia, Illinois, Indiana, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, Virginia, West Virginia, and Wisconsin. See AM. TORT REFORM ASS’N, NONECONOMIC DAMAGES REFORM, <http://www.atra.org/issues/index.php?issue=7340>. The following states have imposed a cap on all noneconomic damages: Hawaii, Idaho, Kansas, and Maryland. *Id.* Finally, caps on noneconomic damages have been struck down as unconstitutional in Alabama, New Hampshire, Oregon, and Washington. *Id.*

17. Cherie Song, *States Move to Curb Nursing Home Suits*, NAT’L L.J., July 7, 2003, at 1.

18. Steve Tuckey, *Insurers Returning to Nursing Home Market*, NAT’L UNDERWRITER PROP. & CASUALTY-RISK & BENEFITS MGMT., Feb. 14, 2005, at 26.

19. Special damages include medical costs and other out-of-pocket plaintiff expenses that arise out of the incident at issue. In contrast, general or nonpecuniary damages such as pain and suffering are intangible. Lost wages also make up a substantial part of most personal injury claims. There are two basic requirements for recovering lost wages. First, the lost wages must be actual and certain. The wages cannot be speculative, remote, or uncertain. Second, the plaintiff must prove that his injury impaired him from being able to work. To recover future lost earnings, plaintiffs must prove that they are permanently disabled and that their disability will diminish their future earning capacity. Kevin S. Willging, Attorney, Niles, Bartone & Wilmer, LLP, Personal Injury Damages in Maryland (1999), <http://library.findlaw.com/1999/Jul/1/129742.html>.

This article reports the findings of a study that collected such empirical data through a comprehensive analysis of nursing home litigation in three jurisdictional hot spots: California, Florida, and Texas. As background, Part I reviews the literature on what we know and still do not know about nursing home litigation. Part II of this article presents a study of the empirical dimensions of pain-and-suffering or nonpecuniary awards in nursing home neglect, abuse, and mistreatment cases in the three jurisdictional hot spots. This multijurisdiction dataset covers all plaintiffs' verdicts reported in nursing home negligence, abuse, and mistreatment cases in California, Florida, and Texas federal and state courts for the period 1990 through 2004.

A close examination of the aggravating circumstances leading to noneconomic damages reveals that nursing home litigation tends to be a by-product of substandard care, not extravagant juries. There would be a nationwide outcry if legislators openly proposed eliminating nursing home claims. Although the tort reformer's focus on capping noneconomic damages appears reasonable because nursing home residents are still permitted to receive full economic damages, the typical nursing home claimant has no meaningful economic damages. Capping noneconomic damages is in effect a death penalty for many elder abuse and mistreatment claims because the victims are unable to find attorneys to represent them when noneconomic damages are downsized.

I. What Do We Know About General Damages in Nursing Home Litigation?

A. The Nursing Home Problem in the United States

In early America, old-age security meant having either wealth or lots of children who could care for their elderly parents.²⁰ The first nursing homes were prefigured by "old folk's homes," founded by nonprofit entities during the first three decades of the twentieth century.²¹ Long-term care facilities developed during a period in which the extended family was being displaced by the streamlined nuclear

20. See Ellen A. Kramarow, *The Elderly Who Live Alone in the United States: Historical Perspectives on Household Change*, 32 *DEMOGRAPHY* 335, 337 (1995).

21. See *A Brief History of Long-Term Care*, *NURSING HOMES*, Dec. 1999, available at http://www.findarticles.com/p/articles/mi_m3830/is_12_48/ai_58572867 [hereinafter *Brief History*].

family. As society urbanized and industrialized, there was not enough physical space in crowded tenements to accommodate aged parents or other relatives.²² In an agrarian society, elderly relatives often contributed with light-lifting roles during the harvest season and assisted with feeding the farm animals or tending the gardens. In an urban setting, however, the elderly parent or grandparent frequently became an economic liability without a role in an increasingly bureaucratic work setting.²³

When U.S. society was predominately agrarian, there was more room to house elderly parents or grandparents, and elders often had viable economic roles.²⁴ However, elderly Americans without financial means or familial support were often consigned to the poorhouse, sometimes called “the poor farm.”²⁵ The elderly poor were also housed in dreary almshouses,²⁶ such as the poorhouse of Virginia’s Prince William County, which opened in 1794 as a facility “intended to be Spartan and uncomfortable.”²⁷ Poorhouses frequently housed orphans, the elderly poor, and the insolvent.²⁸ “By the early twentieth century, healthcare professionals viewed poorhouses negatively, as dumping grounds for the unwanted elderly, characterized by poverty, disease, and filth.”²⁹ The historical precedent was for poorhouses to serve as dumping grounds for elderly persons without means or family willing to take care of them. “Dreary, vermin-infested, and laden with human waste, poorhouses were dreaded as a last resort for the elderly poor population, ‘one of humanity’s great degradations.’ Residents were physically abused and experienced severe social stigma.”³⁰

22. See Elder Web, *Urbanization Created More Problems for Elderly* 6, 8 (July 28, 2005) (on file with *The Elder Law Journal*).

23. See *id.* at 8.

24. *Id.*

25. *Id.*

26. Prince William Forest Park, U.S. Dep’t of the Interior, The Prince William County Poorhouse, 1794–1927, http://www.nps.gov/prwi/Poor_house.htm (last visited Sept. 25, 2006).

27. *Id.*

28. *Id.*

29. *Id.*

30. Kevin C. Fleming et al., *Symposium on Geriatrics, A Cultural and Economic History of Old Age in America*, 78 *MAYO CLINIC PROCEEDINGS* 915 (2003), available at <http://www.mayoclinicproceedings.com/pdf/7807/7807sg2.pdf>.

Federal regulation of nursing homes had its genesis with the enactment of the Social Security Act in 1935.³¹ Individual states also began regulating nursing homes. Missouri, for example, enacted emergency legislation after a 1957 fire at a nursing home killed seventy-three residents.³² When Congress enacted Medicare and Medicaid in 1965, which provided aid to the elderly, the federal government began to take an interest in regulating nursing homes.³³ Today, nursing homes that receive Medicare or Medicaid are subject to the minimum federal quality standards promulgated by the Health Care Finance Administration (HCFA).³⁴ The Omnibus Budget Reconciliation Act of

31. Social Security Act, 42 U.S.C.A. §§ 301–1397 (West 2006); *Beverly Health & Rehab. Servs., Inc. v. Thompson*, 223 F. Supp. 2d 73, 77 (D.D.C. 2002).

32. See *Friedman v. Div. of Health*, 537 S.W.2d 547, 549 (Mo. 1976) (discussing fire). Hundreds of elderly nursing home residents died during the period between 1950 and 1980 when there was little regulation of safety standards in these facilities. Nat'l Fire Prot. Ass'n, *Deadliest Fires in Facilities for Older Adults*, <http://www.nfpa.org> (follow "Fact Sheets" hyperlink under "Research & Reports"; then follow "Safety in other occupancies" hyperlink; then follow "Nursing homes" hyperlink to "Deadliest fires in facilities for older adults" hyperlink) (last visited Sept. 25, 2006). Other multifatality nursing home fires during the period 1950–1980 include thirty-three deaths in a Key Largo, Florida, nursing home fire in 1953, twenty-four deaths in a Chicago, Illinois, fire on January 30, 1976, and sixty-three deaths in Fitchville, Ohio, on November 23, 1963. *Id.*

33. Prior to the enactment of Medicaid and Medicare in 1965, oversight of the nursing home industry was largely the responsibility of the individual states, with some federal guidance. With Medicaid and Medicare came a dramatic increase in federal funding of nursing homes, and the United States Department of Health, Education and Welfare established health and safety standards for nursing homes that wished to participate in federally funded programs.

Jennifer Gimler Brady, *Long-Term Care Under Fire: A Case for Rational Enforcement*, 18 J. CONTEMP. HEALTH L. & POL'Y 1, 6–7 (2001).

34. "Federal Regulations affecting long-term care services are included in the CFR. What was previously 42 CFR Part 405—Medicare regulations for SNFs, and Part 442—Medicaid regulations for SNFs and ICFs are now combined into one set: 42 CFR part 483—Medicare and Medicaid Requirements for Long-Term Care Facilities." Am. Med. Dir. Ass'n, *Synopsis of Federal Regulations in the Nursing Facility* (on file with The Elder Law Journal).

A facility's eligibility for participation in the Medicare and Medicaid programs is jointly monitored by DOH and the federal Health Care Financing Administration (HCFA), an agency of the Department of Health and Human Services, to insure that the facility is complying with the detailed conditions of participation established by federal regulations.

Brownsville Golden Age Nursing Home, Inc. v. Wells, 839 F.2d 155, 156 (3d Cir. 1988). The federal HCFA

is part of the United States Department of Health and Human Services [and] enforces these nursing home regulations. Congress authorized the first set of standards that were to be met by nursing facilities in 1967 and created classifications for the Skilled Nursing Facilities and Intermediate Care Facilities. Both in 1980 and again in

1987 (OBRA-87)³⁵ requires that the facility provide each patient with care that will enable the patient “to attain or maintain the highest practicable physical, mental and psychosocial well-being.”³⁶ Under OBRA-87, nursing home facilities must provide around-the-clock care to residents, be staffed by licensed practical nurses, and provide a minimum of one registered nurse for an eight-hour period each day.³⁷ OBRA-87 delegates the inspection and enforcement of federal nursing home standards to the states.³⁸ In Minnesota, for example, the Department of Health is responsible for the inspection of nursing homes.³⁹

The estimated 1.6 million elderly Americans living in approximately 17,000 licensed nursing homes and the estimated one million living in approximately 45,000 residential care facilities are a population at risk for neglect and abuse.⁴⁰ Members of this at-risk population look “like your typical nursing home resident, often elderly Medicaid

1987 these standards were updated with the most current nursing home regulations imposed under the Omnibus Budget Reconciliation Act of 1987.

Nursing Home Abuse Resource, History of Nursing Homes, http://www.nursing-home-abuse-resource.com/nursing_home_abuse/history.html (last visited Sept. 25, 2006).

35. Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330.

36. *Id.* § 4201, 101 Stat. at 1490–1504.

37. *Id.*

38. *Id.*

Federal law and regulations outline both the general parameters of the inspection process and the specifics of how each inspection must [sic] be conducted. They dictate: (1) how frequently the state must inspect nursing homes, (2) the steps it must go through in conducting the inspections, and (3) the standards that it must apply. Although MDH and other states have asked CMS (Center for Medicare and Medicaid Services) for more flexibility in conducting inspections, federal law does not allow states to obtain waivers to significantly change or implement an alternative inspection program for homes that participate in the Medicare program.

Program Evaluation Div., Office of the Legislative Auditor, State of Minn., Nursing Home Inspections (Feb. 2005), <http://www.auditor.leg.state.mn.us/ped/2005/0505sum.htm> [hereinafter Office of the Legislative Auditor].

39. Minnesota regulators recently stepped up their enforcement effort. “As a result, by May 2004, the variation among inspection teams had decreased significantly. At the same time, however, the average number of deficiencies issued statewide increased from 6.2 to 9.7, putting Minnesota above the national average of 8.4 deficiencies per nursing home.” Office of the Legislative Auditor, *supra* note 38.

40. Catherine Hawes, *Elder Abuse in Residential Long-Term Care Settings: What Is Known and What Information Is Needed?*, in COMM. ON NAT’L STATISTICS, ELDER MISTREATMENT: ABUSE, NEGLECT AND EXPLOITATION IN AN AGING AMERICA 446, 446–47 (Richard J. Bonnie & Robert B. Wallace eds., 2003).

recipients, often with dementia or Alzheimer's disease. . . . More than half [of all claims against nursing homes] involve deaths and allegations of pressure sores,⁴¹ malnutrition and emotional distress"⁴² A large number of governmental studies confirm that there is an epidemic of pain and suffering in our nation's nursing homes. A special report prepared for a U.S. House of Representatives Committee on Government Reform concluded that there was institutionalized neglect and abuse occurring in too many nursing homes.⁴³ The Inspector General of the Department of Health and Human Services (HHS) uncovered "thousands of reported complaints of abuse and neglect of nursing home residents" in an eleven-state study over only a one-year period.⁴⁴ The long-term care facilities were cited for failing to protect vulnerable residents from sexual or physical predators that included staff and co-residents.⁴⁵

A House of Representatives Special Investigations Division report concluded that almost one in three U.S. nursing homes, or 5283 of approximately 17,000 facilities, failed to meet minimum quality standards and were sanctioned during the three-year reporting period between 1999 and 2001.⁴⁶ In more than 1600 of those citations against

41. One court explained pressure sores in this way:

Bedsore, also known as decubitus ulcers and pressure sores, are caused by the compression of body tissue between a bony structure and a supporting structure such as a bed or wheelchair. This pressure obstructs the blood supply to the tissues, resulting in a deprivation of oxygen and nutrients to the area. The early stages of pressure sores involve only superficial tissues. In later stages, fat, muscle, and even the underlying bone can be affected. Bacterial infection of the sore can lead to the patient's death.

Montgomery Health Care Facility, Inc. v. Ballard, 565 So. 2d 221, 222-23 (Ala. 1990). Pressure sores begin at stage I and can progress to stage IV, where they invade the fat, muscle, and bone. *See id.*

42. *Medical Liability in Long-Term Care: Is Escalating Litigation a Threat to Quality and Access?: Hearing Before the S. Spec. Comm. on Aging*, 108th Cong. 6 (2004) [hereinafter *Medical Liability Hearing*] (testimony of David Stevenson, Assistant Professor, Harvard University).

43. H. COMM. ON GOVERNMENTAL REFORM, MINORITY STAFF REPORT, ABUSE OF RESIDENTS IS A MAJOR PROBLEM IN U.S. NURSING HOMES 1 (2001) [hereinafter MINORITY REPORT: ABUSE OF RESIDENTS] (report prepared for Rep. Henry A. Waxman).

44. *Id.* at 1 (reporting on a study by the Inspector General of the U.S. Department of Health and Human Services).

45. *Id.* at ii; *see, e.g., Rodebush v. Okla. Nursing Homes*, 867 P.2d 1241, 1246-52 (Okla. 1993) (affirming punitive damages award against a nursing home where the aggravating circumstance was the facility's failure to train and retain a nurses aid who assaulted an elderly Alzheimer's patient).

46. Terry O'Connor, *Horrible Nursing Home Abuse Justifies Surprise State Probe*, NEW ORLEANS CITY BUS., Nov. 1, 2004.

nursing homes, “the abuses were serious enough to place the residents in immediate jeopardy of death or serious injury.”⁴⁷ The study found that the percentage of violations had increased every year since 1996.⁴⁸

Despite widespread institutional neglect in skilled nursing facilities, relatively few lawsuits were filed against these facilities prior to the 1990s. One hypothesis for the rarity of cases is that few contingency fee attorneys were willing to take on cases where the plaintiff suffered serious injury but had no past, present, or future earnings,⁴⁹ and any recovery may be subject to a Medicare or Medicaid lien for medical care rendered by the government.

Other than anecdotal evidence that nursing home cases began to be more common in the early 1990s, there is no systematic data over time and across jurisdictions on the frequency, size, ratio, or distribution of nursing home neglect, or on the postverdict outcomes of these cases. Nor is there empirical data on the role noneconomic damages play in nursing home litigation. Given the low incidence of special damages, the largest portion of compensatory awards would presumably be general damages because elderly residents are too infirm to work and thus have no imputed earnings. The best available empirical data suggest that nursing home cases predominately implicate pain and suffering damages.

B. Nursing Home Industry Studies of Insurance Costs and Filings

Recovery for physical pain and suffering has long been available as compensatory damages under the law of torts.⁵⁰ Pain and suffering

47. *Id.*

48. MINORITY REPORT: ABUSE OF RESIDENTS, *supra* note 43, at ii.

49. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 194 (6th ed. 2003) (noting that wages are a function of age).

50. In *Ransom v. New York & Erie Railroad Co.*, 15 N.Y. 415, 424 (1857), a case arising out of a railroad accident where the plaintiff was partially paralyzed and lost sensation in his limbs, the court held that recovery for noneconomic damages may be recovered for “bodily pain and suffering, without reference to the time when endured”; *see also* *Aldrich v. Palmer*, 24 Cal. 513, 516–18 (1864) (finding that a pain-and-suffering award was not excessive where the plaintiff endured pain and suffering upon losing portions of two toes twice, and having two other toes mutilated); *Peoria Bridge Ass’n v. Loomis*, 20 Ill. 235, 252 (1858) (reversing punitive damages and stating that “[t]he rule of damages, for personal injury inflicted by negligence, is loss of time during the cure, and expense incurred in respect of it, the pain and suffering undergone by plaintiff, and any permanent injury, especially when it causes a disability from future exertion, and consequent pecuniary loss”); *Morse v. Auburn & Syracuse R.R. Co.*, 10 Barb. 621, 623 (N.Y. Sup. Ct. 1851)

applies only to those injuries that a person sustains while conscious.⁵¹ Such an injury often results in a permanent disability or the loss of life's enjoyment.⁵² Additionally, a plaintiff may recover for future pain and suffering so long as it is reasonably certain to occur in the future and is a result of the present injury.⁵³ Pain and suffering damages are decided by a jury, "which must believe that [the] plaintiff [actually] suffered physical pain."⁵⁴

Historically, nursing homes were insulated from negligence or abuse claims because those facilities were frequently nonprofit entities shielded either by charitable or governmental immunity. The shield of charitable immunity precluded actions against many health care providers on the ground that "the charitable donations that supported a hospital constituted a public trust that could not be diverted."⁵⁵ The doctrine of charitable immunity was either modified or abrogated in the decades following the Second World War.⁵⁶ Governmental immunity has also become less important as nursing homes have increasingly become private facilities.⁵⁷ Nursing home litigation increased as the legal climate changed and juries began to show a greater propensity to award noneconomic as well as punitive dam-

(holding that the general rule for pain and suffering is triggered "where one person has received personal injury and mutilation, by the careless or negligent act of another. The bodily pain and suffering is part and parcel of the actual injury, for which the injured party is as much entitled to compensation in damages, as for loss of time or the outlay of money.").

51. Proof of "conscious pain and suffering" is required before noneconomic damages are recoverable. *See, e.g., Swift v. State Farm Mut. Auto. Ins. Co.*, 796 F.2d 120, 123 (5th Cir. 1986); *McDougald v. Garber*, 504 N.Y.S.2d 383, 386 (1986) (ruling that noneconomic damages were not recoverable for a comatose plaintiff).

52. 25 C.J.S. *Damages* § 92 (2004).

53. *Id.*

54. *Id.*

55. Mark J. Garwin, *Immunity in the Absence of Charity: EMTALA and the Eleventh Amendment*, 23 S. ILL. U. L.J. 1, 2 (1998). Charitable immunity continues to insulate nursing home operators in a few states. *See, e.g., John W. Bellflower, Jr., Respecting Our Elders: Can Tennessee Do More to Protect Its Elder Population from Institutional Abuse and Neglect*, 66 TENN. L. REV. 819, 842, 844 (1999) (noting that Tennessee continues to follow charitable immunity and arguing for the abolition of this doctrine that shields operators in nursing home abuse and neglect cases).

56. By 1969 "[a] substantial majority of jurisdictions [had] abolished charitable immunity." JERRY J. PHILLIPS ET AL., *TORT LAW: CASES, MATERIALS, PROBLEMS* 807 (3d ed. 2002).

57. In *Paulson v. County of De Kalb*, 644 N.E.2d 37, 40 (Ill. App. Ct. 1994), a nursing home resident filed a nursing home neglect suit against a county-operated nursing home. The jury awarded \$20,000, which was trebled by the trial court. The appeals court modified the judgment, holding that Illinois' Tort Immunity Act precluded an award of treble damages.

ages in these lawsuits. Nursing home resident-rights statutes in a number of states also liberalized the legal environment and were enacted because of the perception “that malpractice lawsuits brought under negligence standards were too restrictive.”⁵⁸

A 2003 nursing home industry survey of 108 operators revealed that the liability cost per nursing home bed—a figure that includes both malpractice insurance and litigation costs—climbed to \$2290 in 2003, up from \$1730 in 1999.⁵⁹ The insurance industry reports that claims against nursing homes have been increasing an average of 14% per year since 1995, and that there are now “14.5 claims for every 1,000 occupied beds.”⁶⁰ These nursing home studies, however, do not provide the necessary factual circumstances underlying these claims. What is still missing and necessary to understand the situation is a careful analysis of how the increase in nursing home claims is related to variables such as reduced staffing ratios, the property and casualty insurance cycle, lower returns on investment income, and the “McDonaldization” of long-term care.⁶¹

1. TRIAL LAWYERS' DATA ON NURSING HOME LITIGATION

The Exchange of the Association of Trial Lawyers of America (ATLA Exchange) reported only twenty-seven nursing home cases nationwide that included an award for noneconomic damages from 1986

58. Christopher E. Johnson et al., *Predicting Lawsuits Against Nursing Homes in the United States, 1997–2001*, HEALTH SERVS. RESEARCH, Dec. 2004, available at http://www.findarticles.com/p/articles/mi_m4149/is_6_39/ai_n8577361# (“A study commissioned by the American Health Care Association identified Florida, Texas, Arkansas, California, and Georgia as states that had strong resident rights laws that seem to be impacting the number of claims filed against facilities . . .”).

59. THERESA W. BOUNDON & SHARON C. DUBIN, LONG TERM CARE: GENERAL LIABILITY AND PROFESSIONAL LIABILITY ACTUARIAL ANALYSIS (2004), available at http://www.ahca.org/brief/aon_ltcanalysis2004.pdf [hereinafter ACTUARIAL ANALYSIS].

60. Lisa Bellotti, *Aon Risk Consultants Releases 2003 Long Term Care Study on Continuing Increases in Patient Care Litigation*, HEALTHLINE, July 2003, at 1, 2, available at http://www.aon.com/about/publications/pdf/healthline/2003_ltc_study_july.pdf (summary of ACTUARIAL ANALYSIS, *supra* note 59).

61. An AARP study attributed the cost and availability of nursing home liability insurance to multiple factors, including increased litigation and a number of other factors affecting insurance markets such as, the property/casualty insurance cycle; premium cuts during the 1990s; lower returns on investment income; more claims and payouts and the perceived variability and unpredictability of claims; losses from claims resulting from the September 11, 2001 terrorist attacks; and insurers' business decisions.

WRIGHT, *supra* note 15.

to 2004.⁶² Because the Exchange's database is limited to trial lawyer's reports, however, it underreports the number of awards. According to the ATLA Exchange's verdict reporters, only a handful of jurisdictions witnessed three or more noneconomic awards during this nineteen-year period.⁶³

Most of these states were nursing home litigation cold spots without a single verdict in nearly two decades.⁶⁴ A secondary analysis of these awards revealed that most verdicts against nursing homes were handed down before the new millennium.⁶⁵ Twenty out of twenty-seven nursing home verdicts were awarded to female elderly claimants. The mean compensatory damages award for this sample was \$860,974, and the median was \$250,000. In fourteen of the twenty-seven nursing home cases, the court awarded punitive damages with a median award of \$750,000. This dataset was limited in that many of the compensatory awards were not itemized as special damages or general damages.

There were general and special damages in only eleven of the cases in the verdict reports. For the eleven verdicts itemizing nonpecuniary damages, the awards for pain and suffering ranged from \$10,000 to \$7,500,000. The median noneconomic award in the ATLA nursing home sample was \$250,000, which is the upper limit of the noneconomic damages cap favored by President Bush. President Bush's proposed \$250,000 nationwide cap on noneconomic damages would have downsized five of the eleven nursing home noneconomic awards in the ATLA sample. While the ATLA Exchange dataset is in-

62. Telephone Interview with Juliann Tigart, Staff Attorney, ATLA Exchange (Dec. 15, 2004) (reporting nursing home cases yielding an award in all U.S. jurisdictions from 1986 to Dec. 15, 2004) (on file with author). Nursing home jury awards are rare, judging from all available empirical data. The ATLA Exchange reported only twenty-eight nursing home cases where there was any noneconomic damages award in all jurisdictions for the period 1986–2004. *Id.*

63. *Id.*

64. Florida had four nursing home verdicts, followed by Texas with three. Michael Rustad, Database on Nursing Home Verdicts in California, Florida, and Texas, 1990–2004 [hereinafter Rustad Database] (on file with author). Alabama, Michigan, and Missouri each had one verdict. *Id.* Arizona, Arkansas, Georgia, Illinois, Kentucky, Maryland, Arizona, North Carolina, Ohio, Tennessee, Virginia, and the District of Columbia each had one verdict in the period 1986–2004. Telephone Interview with Juliann Tigart, *supra* note 62.

65. I completed a content analysis of these verdicts, coding each case for the gravamen of the complaint, defendant type, year of verdict, degree of injury, injury category, gender of claimant, jurisdiction, compensatory damages, medical expenses, pain and suffering damages, punitive damages, and the aggravating circumstances leading to an award.

complete and skewed in the direction of large awards, it suggests that nursing home negligence and abuse cases are rare and based on extremely aggravated misconduct.

2. ACADEMIC RESEARCH STUDIES

a. Stevenson and Studdert Surveys A study by Harvard Public Health School researchers David G. Stevenson and David M. Studdert found that most nursing home litigation grew out of serious allegations of abuse, neglect, mistreatment, and reckless indifference to the proper care of residents.⁶⁶ Because few elderly nursing home residents have earnings that would be diminished by physical injury, noneconomic damages are essentially the only component of recoverable damages:

[T]he balance between economic and noneconomic damages is quite different from other types of medical malpractice litigation: economic damages tend to constitute a relatively small portion of nursing home awards, and noneconomic damages constitute a relatively large portion. Our survey results indicate that noneconomic damages account for approximately 80% of residents' awards nationwide—roughly double the proportion in medical malpractice awards.⁶⁷

In contrast with the typical medical malpractice case, which involves either the failure of diagnosis or botched surgery, the typical injuries in nursing home cases involve neglected bedsores and emotional abuse rather than breaches of a professional standard of care.⁶⁸ Elderly patients frequently manifest symptoms of pain that vary significantly from traditional expectations of clinical profiles of pain. In a research study of elderly patients with intestinal blockages, “[p]erforated gastroduodenal ulcer started with a sudden onset of pain in only 47 percent of the cases, and only 20 percent presented with epigastric rigidity.”⁶⁹

66. David G. Stevenson & David M. Studdert, *The Rise of Nursing Home Litigation: Findings from a National Survey of Attorneys*, 22 HEALTH AFF. 219, 221–22 (2003).

67. *Medical Liability Hearing*, *supra* note 42, at 14.

68. *Id.* at 7.

69. *Acute Abdominal Disease in the Elderly*, 26 AM. FAM. PHYSICIAN 287 (1982) (citing Gyorgy Fenyo, *Acute Abdominal Disease in the Elderly: Experience from Two Series in Stockholm*, 143 AM J. SURGERY 751 (1982)).

In *Livingston v. Grand Park Convalescent Hospital*,⁷⁰ a typical case for nursing home negligence and elder abuse, the court awarded an elderly female decedent's estate \$250,000 for the ten days of pain and suffering she endured before her death.⁷¹ The empirical finding that pain and suffering damages comprise 80% of an elderly claimant's award in nursing home negligence and abuse cases⁷² is enormously significant given that the focus of tort reforms is on capping non-economic damages.

Nursing home neglect and abuse cases first arose as a legal specialty in the early 1990s, and the number of claims has increased substantially since then.⁷³ The Stevenson and Studdert survey of 278 nursing home attorneys (representing plaintiffs as well as long-term care facilities) concluded that nursing home litigation is a growing industry, but it is confined to a few jurisdictions.⁷⁴ Three out of four dollars paid out by nursing homes in neglect cases went to claimants in Florida and Texas.⁷⁵

The Harvard researchers also found that the 278 responding attorneys were personally involved in litigating approximately 4700 claims during the twelve months prior to the survey.⁷⁶ Overall, their firms handled approximately 8300 claims.⁷⁷ As in every other substantive field of tort law, most nursing home cases settled, while only 8% of cases went to trial.⁷⁸ Nearly 90% of settled cases resulted in some payment to the plaintiff, a success rate three times higher than in malpractice cases.⁷⁹ The average payout was approximately \$406,000, according to interviews with the attorneys trying these nursing home cases.⁸⁰ Nursing homes paid out 23% of their total expenses as litigation costs in Florida, whereas the percentage in Texas was 15%.⁸¹

70. VerdictSearch, Summary, *Livingston v. Grand Park*, No. BC 177-783 (Cal. Super. Ct. L.A. County 1999).

71. *Id.*

72. *Medical Liability Hearing*, *supra* note 42, at 7.

73. *Id.* at 10. As noted by Studdert in his congressional testimony, "[t]he number of claims and the size of recoveries grew substantially over the period 1996–2001." *Id.*

74. Stevenson & Studdert, *supra* note 66, at 221.

75. *Medical Liability Hearing*, *supra* note 42, at 11.

76. Stevenson & Studdert, *supra* note 66, at 221.

77. *Id.*

78. Stevenson & Studdert, *supra* note 66, at 222.

79. *Id.* at 222–23.

80. *Id.* at 223.

81. *Id.* at 224.

Perhaps the largest barrier to filing nursing home cases is the low likelihood that a nursing home resident will be awarded any special or other economic damages. An attorney who decides to take a case must be convinced that the potential payout justifies the financial and opportunity costs of taking the case. In many instances, this calculus results in declining representation of plaintiffs in nursing home litigation.

b. Effect of Caps on Vulnerable Groups Professor Lucinda Finley conducted a secondary analysis of verdict reporters from California, Florida, and Maryland to study the effects of the proposed \$250,000 federal cap on women, children, and the elderly.⁸² This statistical study of verdict reports demonstrates that a noneconomic damages cap has a disparate effect on these vulnerable groups.⁸³ She also concluded that the tort reform of giving claimants full economic damages but limiting noneconomic damages to the predetermined amount of \$250,000 is not an effective means of reducing insurance premiums for medical providers.⁸⁴ Finley's study demonstrates the importance of noneconomic damages for elderly nursing home claimants, many of whom are disabled, eligible for Medicaid,⁸⁵ and have no significant economic damages.⁸⁶ As a result, the victims of nursing home neglect or abuse can typically receive only noneconomic damages.

After hypothesizing that both men and women receive greater proportions of their tort recovery as noneconomic loss,⁸⁷ Finley concluded that "[w]omen tort victims, the elderly, particularly elderly women, as well as children who suffer the ultimate injury of death, are all disproportionately disadvantaged by a cap on noneconomic

82. Lucinda M. Finley, *The Hidden Victims of Tort Reform: Woman, Children, and the Elderly*, 53 EMORY L.J. 1263 (2004).

83. *Id.* at 1313.

84. An alternative hypothesis for the insurance crisis is that it was caused not by increased medical liability but by plummeting investment returns and "poor underwriting decisions made in the previous decade[.]" *Id.* at 1263.

85. Frank Sloan, Ctr. for Demographic Studies, Duke Univ., *How Do the Elderly Finance Their Stays in Nursing Homes?*, <http://cds.duke.edu/publications/nhome.htm> (last visited Sept. 25, 2006) (citing a study based upon data from the National Long Term Care Survey demonstrating that the majority of disabled elderly persons lacked the earnings or wealth to be eligible for Medicaid).

86. Finley, *supra* note 82, at 1283 (stating that nursing home patients "are compensated almost entirely by noneconomic loss damages" and have no real economic damages).

87. *Id.*

loss damages.”⁸⁸ Elderly men and women are equally unlikely to have lost wages or other types of compensatory damages.⁸⁹ Finley found, however, that “even within the category of elderly plaintiffs, there was a pronounced gender difference: elderly women receive a notably larger share of their compensatory damage awards in non-economic loss categories than elderly men.”⁹⁰

Finley’s analysis of California verdicts centered on the breakdown between economic and noneconomic awards “when the non-economic loss award exceeded \$250,000.”⁹¹ In her California sample of eighteen elderly plaintiffs of both genders whose noneconomic awards exceeded the state’s \$250,000 cap, the postcap mean recovery was 65% of the total average jury award.⁹² Among elderly claimants, Finley uncovered a complex relationship between the cap and a plaintiff’s gender. For the seven elderly male plaintiffs in her sample, the cases decided after California’s 1975 Medical Injury Compensation Reform Act (MICRA)⁹³ resulted in an adjusted mean recovery for non-economic damages of 58% of the total compensatory damages.⁹⁴ After the trial judge applied MICRA’s \$250,000 cap, claimants suffered a 43% reduction in recoverable damages.⁹⁵ For the eleven California elderly women claimants, the reduction due to the MICRA cap was nearly a third of their compensatory awards.⁹⁶ Women claimants as a whole received compensatory awards with a higher proportion allocated to noneconomic or nonpecuniary damages.⁹⁷ But in the elderly

88. *Id.* at 1280.

89. *Id.* at 1283.

90. *Id.*

91. *Id.* at 1282.

92. *Id.* at 1287 tbl.3.

93. As Finley notes, “California . . . has had a cap of \$250,000 on noneconomic damages in medical malpractice cases in place since 1975, instituted in a law known as MICRA, the Medical Injury Compensation Reform Act. The California cap amount has become the gold standard for tort reform proponents.” *Id.* at 1282–83.

94. “As the post-MICRA average recovery was 57.5% of the total average jury award, the cap produced an average 42.5% reduction in recoverable damages.” *Id.* at 1288.

95. *Id.* at 1288 tbl.4.

96. “The median economic award was \$271,320 and the median noneconomic award was \$518,000. After application of the MICRA cap, the median recovery for elderly women was \$521,320, which is 53.7% of the pre-MICRA median. The cap had a more pronounced effect in reducing elderly women’s median recovery than elderly men’s.” *Id.* at 1289.

97. Finley found that in each jurisdiction she studied, “women receive greater proportions of their tort awards in the noneconomic loss damages categories than

population, "men received a greater proportion of their average awards for noneconomic damages, contravening the usual pattern."⁹⁸ Professor Finley explained this apparent anomaly by unveiling a gender effect related to whether the claimant survived. Because women claimants were more likely to survive after a medical mishap or neglect, they incurred greater future medical expenses than deceased men whose estates could not recover these economic damages under California's wrongful death statute.⁹⁹

Finley also studied seventy-one nursing home negligence or abuse cases in Florida between 1992 and 2002.¹⁰⁰ The data were limited because the Florida verdict reporters did not always itemize a breakdown between economic and noneconomic damages.¹⁰¹ In Florida, females were the victims in 62% of the nursing home sample, an artifact of the demographic reality that women have a longer life span than men and are thus more likely to be residents in long-term care facilities.¹⁰²

Professor Finley's sample of elderly claimants had a much higher proportion of noneconomic damages for total awards than among younger claimants.¹⁰³ For the thirteen jury verdicts won by female nursing home residents, 96% of the monetary awards were for nonpecuniary or noneconomic damages.¹⁰⁴ A \$250,000 cap on noneconomic damages would have resulted in eliminating much of these female claimants' noneconomic damages awards, which averaged \$2,107,215.¹⁰⁵ The proposed cap would have a lesser effect on the male

men do and that many of the types of 'female' injuries mentioned above are compensated overwhelmingly through noneconomic loss damages." *Id.* at 1283.

98. *Id.* at 1289.

99. "Most of the elderly men died as a result of the medical error, whereas a majority of the elderly women survived. Consequently, the women faced greater future medical costs than the deceased men. Cases where death is the injury display some of the highest allocations of damages to noneconomic loss categories of any type of case; thus, the apparent gender reversal in this elderly plaintiff sample has more to do with the distinction between death and nondeath than with gender differences." *Id.*

100. *Id.* at 1305.

101. *Id.*

102. *Id.*

103. *Id.* at 1306 ("Elderly plaintiffs, have a much higher proportion of noneconomic damages than general tort awards, so damage cap laws will disproportionately affect the elderly . . . This disadvantageous impact will be particularly pronounced for elderly women, since they have a significantly greater proportion of their damages awarded as noneconomic loss damages.").

104. *Id.* at 1305 tbl.21.

105. *Id.*

claimants in Finley's study because their mean recovery of \$186,115 was only 59.5% of their total compensatory recovery.¹⁰⁶ A non-economic damages cap has a disparate effect on elderly women claimants, who "have a significantly greater proportion of their damages awarded as noneconomic loss damages."¹⁰⁷ Female members of Finley's sample received a median compensatory award of \$233,893 and median noneconomic damages of \$160,000.¹⁰⁸ In contrast, elderly male claimants received a median award of \$163,310 in compensatory damages, which included a median of \$100,000 in noneconomic damages.¹⁰⁹

Because female nursing home plaintiffs have a higher proportion of their awards allocated as noneconomic damages, caps will result in gender injustice.¹¹⁰ Moreover, Professor Finley uncovered only one nursing home case in her Maryland sample, a finding that is emblematic of how difficult it is for elderly claimants to find representation.¹¹¹ Professor Finley's data analysis suggests a powerful connection between tort reform caps on nonpecuniary damages and gender injustice in nursing home litigation.

c. *Rand Study of Caps in Medical Malpractice Litigation* A Rand Institute of Civil Justice ("Rand") study of caps on noneconomic dam-

106. *Id.* at 1306 tbl.22.

107. *Id.* at 1305 tbl.21.

108. *Id.*

109. *Id.* at 1306 tbl.22.

110. *Id.* at 1306.

111. She provided these details about the case:

There was also a single nursing home case, involving serious negligent abuse of an elderly woman in a nursing home. For this type of elderly female plaintiff, noneconomic loss damages are likely to constitute the majority of a tort recovery, because a retired plaintiff suffers no wage loss from life-altering injuries. Moreover, since women on average live longer than men, women comprise a greater proportion of the residents of nursing homes and other long-term care facilities, and thus any malpractice and abuse within these settings falls disproportionately on women. In this case, *King v. Montgomery County Maryland Nursing Enterprise*, a nursing aide poured scalding water into a foot massager bath and placed the elderly female plaintiff's feet into the scalding water for thirty minutes, resulting in third degree burns, a three month hospitalization with skin graft surgery, and permanent impaired mobility. Pain and suffering was 78.6% of the verdict: \$2,000,000 out of a total of \$2,542,557. The cap reduced the verdict by \$1,485,000, removing 58.4% of the woman's compensatory award.

Id. at 1312.

ages in medical malpractice litigation suggests that tort reform caps on nonpecuniary damages will have a negative effect on awards for elderly plaintiffs.¹¹² As with many damage caps, the legislative rationale for California's \$250,000 cap was to lower insurance premiums by reducing medical liability payouts.¹¹³ Plaintiffs in the Rand study prevailed in only 22% of California medical malpractice cases, as opposed to 53% for all recoveries in other substantive fields of litigation.¹¹⁴ In 45% of the 257 awards where plaintiffs prevailed, juries awarded noneconomic damages to at least one plaintiff.¹¹⁵ Forty-one percent of the medical malpractice awards in nonfatal cases exceeded the cap, versus 58% of the wrongful death recoveries.¹¹⁶ Applying the cap to wrongful death recoveries diminished the overall award by 57%, as compared with 33% in injury cases where the claimant survived.¹¹⁷

The caps had the greatest diminishing effect on total awards in cases where the plaintiff had slight out-of-pocket or other economic damages even though the injury had a devastating effect on the plaintiff's overall quality of life.¹¹⁸ Reductions in noneconomic awards were also great in catastrophic loss cases where the plaintiff suffered injuries such as brain damage or paralysis.¹¹⁹ An astonishing 65% of plaintiffs in catastrophic brain damage cases had their awards reduced due to California's MICRA cap.¹²⁰

Nursing home cases frequently involve catastrophic injury and significant pain and suffering. Capping noneconomic damages is likely to have harsh ramifications on the elderly infirm who will be unable to find legal representation to pursue their claims of neglect or abuse.

112. NICHOLAS M. PACE ET AL., *CAPPING NONECONOMIC AWARDS IN MEDICAL MALPRACTICE TRIALS* (2004).

113. *Id.* at 5 (citing the statute's preamble).

114. *Id.* at 19.

115. *Id.* at 20.

116. *Id.* at 21.

117. *Id.*

118. *Id.* at xxi.

119. *Id.* at xxii.

120. *Id.* at 29.

II. Empirical Study of Noneconomic Damages in Nursing Home Cases: California, Florida, and Texas

The 1.6 million elderly, disabled, and vulnerable residents of nursing homes, along with the one million or so who live in residential care facilities isolated from the rest of society, are a population at risk for institutional abuse or neglect.¹²¹ Cases of nursing home neglect, abuse, and mistreatment encompass all liability-producing conduct, including medical liability.¹²² This section presents the first large-scale empirical study of nursing home neglect and abuse cases.

The most significant limitations of prior academic research studies are their small sample size and the nursing home industry's undue emphasis on claims. To investigate the larger patterns of noneconomic damages in nursing home cases, the study collected data for a fifteen-year period from all courts in California, Florida, and Texas, all of which are hot spots for nursing home litigation. The sample consists of all nursing home residents who received at least \$1 in compensation for neglect and abuse claims filed against long-term care facilities and their employees, including treating physicians, nursing staff, and other medical providers. In each of these jurisdictions, female nursing home claimants far outnumbered male claimants.

The nursing home litigation sample includes all cases in the verdict reporters described in the discussion of Table One, but it extends further to include each of the three jurisdiction's verdict reporters on the Lexis and Westlaw databases, as well as cases uncovered through attorney's Web sites, interviews with nursing home specialists, SEC filings of corporate nursing homes, and media reports of nursing home verdicts.¹²³ Additional sources include specialized searches of

121. Hawes, *supra* note 40, at 447.

122. This article focuses on nursing home neglect, abuse, malpractice, and negligence cases arising out of the care of residents rather than injuries to visitors or employees or other forms of nursing home litigation.

123. The database is built from a search on Westlaw and Lexis of all verdict reporters for these states as well as special searches by commercial services. All searches used the search term "nursing home," without data or other limitations, to yield the largest sample. The author and two research assistants read and coded the cases according to a large number of characteristics, including year of verdict, level of injury, specific injury category, jurisdiction, court type, wrongful death or survival, age of nursing home plaintiff, gender of plaintiff, overall compensatory damages, punitive damages, noneconomic damages, special damages, medical expenses, hedonic damages, attorneys fees, adjustments to each damages component, jury polls, and descriptive data on the type of aggravating misconduct lead-

all nursing home litigation cases reported to ATLA Exchange and VerdictSearch, which collects nationwide verdicts in nursing home cases, as well as unstructured telephone and in-person interviews with trial attorneys who litigate nursing home negligence cases or are members of ATLA's nursing home litigation group.¹²⁴ Because of the rarity of nursing home verdicts, the goal was to locate all of the nursing home verdicts handed down in the target jurisdictions, rather than to locate a random sample. These disparate sources resulted in a sample size that is many times larger than the ones used in prior stud-

ing to awards. The Lexis searches focused on individual state reporters for California, Florida, and Texas, as well as more nationally focused reporters: Jury Verdicts and Settlements, Combined, National Jury Verdict Review & Analysis, National Law Journal Annual Verdict and Settlement Review, and Verdicts, Settlements and Tactics. The individual state verdict reporters for California, Florida, and Texas were examined for the research period 1990–2004: VerdictSearch California Reporter, FL Jury Verdicts & Settlements, Combined, FL Jury Verdict Reporter, FL Jury Verdict Review & Analysis, TX Jury Verdicts & Settlements, Combined, VerdictSearch Texas Reporter, North Texas Reporter, TX Reporter Soele's Trial Report.

Parallel searches were conducted on Westlaw using the search term "nursing home" for the California Jury Verdicts All (CA-JV-ALL), California Trials Digest Jury Verdict Summaries (CA-JV), Florida Jury Verdict Reporter (FLPFL-JV), and the Texas Jury Verdicts combined (TX-JV). In addition, searches were completed for the period between 1990 and 2004 using the following national verdict services: Combined Jury Verdicts Review and Analysis (JVRP-JV), National Jury Verdicts Review & Analysis (JVRPNAT-JV), National Law Journal-Annual Jury Verdict Reports (NLJ-RPT-JV), Jury Verdict & Settlement Summaries (LRP-JV), Verdicts, Settlements & Tactics (VST), and Stein on Person Injury Damages (STEIN).

The ATLA Exchange conducted a search of all verdicts and settlements for the period 1980–2004 using the search term "nursing home." I contracted with VerdictSearch to complete a survey of all nursing home verdicts and settlements for the past five years. Additionally, I contacted prominent trial lawyers specializing in nursing home cases and met with nursing home specialists in Fort Lauderdale, Florida, at an ATLA seminar on nursing home litigation. Finally, I searched newspapers, trade publications, and attorneys' Web sites to locate other cases. The advantage of this approach was obtaining a large enough sample for comparisons. The disadvantage is that there are no data points for computing the rate of plaintiff's victories or postverdict adjustments.

124. The names and affiliations of these attorneys are kept confidential at the respondent's request. In the unstructured interviews, questions were asked about settlement practices and postverdict adjustments, as well as aggravating circumstances and basic data about the plaintiffs and defendants. A number of less formal interviews were conducted with many members of ATLA's nursing home litigation group at ATLA's National College of Advocacy Seminar entitled "ATLA's Litigating Nursing Home Cases Seminar" held March 18–19, 2005, at Fort Lauderdale, Florida. These interviews were supplemented by several telephone interviews with members of the ATLA litigation group conducted in January and February of 2005.

ies, but it is limited by the lack of systematic verdict data collected in state courts.

These three jurisdictions warrant further analysis because of their prominence as hot spots in prior research. The “snowball sampling” technique¹²⁵ captures the vast majority of nursing home cases decided in these jurisdictions over the past fifteen years.¹²⁶ One disadvantage of using disparate sources, however, is the difficulty of estimating plaintiff success rates—there are no fixed data points to measure the rate of success of plaintiffs in nursing home cases. To estimate the plaintiffs’ success rate, a content analysis of all nursing home negligence verdicts reported in the California Jury Verdict Reporter, Florida Jury Verdict Reporter, and the Texas Jury Verdict Reporter from 1990 to 2004 were examined.¹²⁷ The analysis revealed that nursing home claims arose from diverse causes of action, including nursing home neglect, breach of warranty, professional negligence, and intentional torts. Another reason for calculating success rates is that verdict reporters do not systematically subdivide compensatory damages into special damages and general damages.¹²⁸

125. Snowball sampling refers to a method of recruiting study participants by which one source recruits more sources for the interviewer. Columbia Ctr. for New Media Teaching & Learning, Quantitative Methods in Soc. Scis. e-Lessons, Samples and Sampling, http://www.columbia.edu/cnmtl/projects/qmss/samp_type.html (last visited Nov. 6, 2006).

126. The use of many sources reduces the bias factor that occurs when relying upon a single-verdict reporter for a given jurisdiction. If there were a bias in the snowball sampling technique here, it would be the failure to uncover small verdicts. The purpose of this study was to look at what was awarded for pain and suffering and what effect the proposed federal cap on noneconomic damages will have on awards with nonpecuniary damages that are \$250,000 or greater. Another difficulty with this dataset has to do with the verdict reporters’ method of reporting. In 149 of the 186 verdicts, complete data was reported on the breakdown between economic and noneconomic damages. In the thirty-seven cases where no breakdown of noneconomic damages was reported, it is unclear whether there was no award for pain or suffering or whether it was simply a function of not delineating what was paid for economic loss versus nonpecuniary damages.

127. This subsample from single-verdict reporters made it possible to compute plaintiffs’ success rates. In contrast, the larger sample does not have fixed data points because the cases were collected from diverse verdict reporters, newspaper reports, attorney Web sites, attorney interviews, and other diverse sources.

128. Still, there were verdict reports that separated the noneconomic or general damages from the general compensatory damages.

Table One**Plaintiff Success Rate by State**¹²⁹

Jurisdiction	# of Cases, 1990–2004	Plaintiff Success Rate in Verdicts	Number of Plaintiff Victories	Number of Defense Victories	Number of Settlements
California	77 ¹³⁰	38%	19	30	28
Florida	178 ¹³¹	68%	66	31	79
Texas	128 ¹³²	66%	35	18	75

Between 1990 and 2004, Florida ranked first in the number of decided cases (178), followed by Texas (128) and California (77). Table One reveals that plaintiffs prevailed in 68% of the nursing home cases in Florida and 66% of the cases in Texas, but plaintiffs prevailed in only 38% of the cases in California.

The success rates of plaintiffs in these nursing home cases was two to three times the rate of success of plaintiffs in the medical malpractice cases reported by the Rand Institute of Civil Justice.¹³³ The nursing home plaintiffs in California prevailed in 38% of the nursing home cases, versus the Rand finding of 22% of California medical malpractice cases.¹³⁴ The California success rate, however, was significantly lower than Rand's finding that plaintiffs prevailed in ap-

129. This dataset consists of all final dispositions of nursing home negligence, abuse, or mistreatment cases as reported in the California Jury Verdict Reporter, Florida Jury Verdict Reporter, and Texas Jury Verdict Reporter Combined for the period 1990–2004. This subsample does not include cases uncovered through other sources but has the advantage of providing data on plaintiff success rates.

130. In the California sample, the average settlement in a nursing home case was only \$146,340. Of the eighty nursing home lawsuits, fifty-six were filed by women and twenty were filed by men. The average age of plaintiffs was 75.7 years. The plaintiff's win rate in nonsettlement cases was 40% (twenty prevailing plaintiffs out of fifty cases). The median compensatory award in the California sample was \$225,000.

131. In Florida, the average award or settlement (excluding confidential settlements) in nursing home cases for the period 1990–2004 was \$1,473,840. One hundred and four cases involved females, whereas only seventy-four involved male nursing home residents. The average age of the plaintiffs was eighty-five years. Every nursing home negligence or abuse case arose out of the death or serious injury of a Florida nursing home resident.

132. In Texas, there were seventy-six female plaintiffs and fifty-two male plaintiffs in the sample of decided cases. The average age of the claimant was eighty-five years. The average or mean award was \$34,848,605. This large figure is explained by the presence of many large punitive damages awards in the Texas sample.

133. See *supra* Part I.B.2.c.

134. PACE ET AL., *supra* note 112, at 19.

proximately one out of two cases outside of the medical liability context.¹³⁵

The most dramatic finding in Table One is the rarity of plaintiffs' verdicts. The California sample revealed an average of slightly more than one plaintiff's verdict per year over a fifteen-year period. Texas claimants fared slightly better with an average of two plaintiffs' verdicts per year. The Florida Verdict Reporter analysis uncovered an average of slightly more than four plaintiffs' verdicts per year. The overwhelming conclusion is that even in hot-spot jurisdictions, juries rarely award damages in favor of nursing home claimants.

These empirical findings are consistent with the anecdotal evidence from ATLA's members, who reported few nursing home verdicts over the past twenty years. The empirical results in the next section are derived from the database of 186 plaintiff victories uncovered through attorney interviews, ATLA's Exchange, VerdictSearch, newspaper accounts, and verdict reporters in California, Florida, and Texas.¹³⁶ This dataset is by far the largest sample of nursing home neglect verdicts yet to be compiled. In the absence of a nationwide verdict-reporting system, it is the best available data.

A. Three-Jurisdictional Study of Nursing Homes: Findings

1. NURSING HOME NEGLECT AND ABUSE VERDICTS ARE NOT SKYROCKETING

The most alarming finding in this study is that there are too few nursing home negligence lawsuits given the epidemic of restraint injuries, decubitus ulcers (bedsores), severe malnutrition, falls, fractures, and physical abuse in long-term care facilities. The relatively low in-

135. *Id.*

136. This dataset of nursing home cases is likely to constitute the vast majority of awards handed down in these bellwether jurisdictions. I interviewed a sample of nursing home attorneys in Florida to obtain anecdotal data on the postverdict history of these awards. Although the database may not constitute every verdict decided, it is likely that it constitutes a very large proportion of decided cases. This dataset is many times larger than prior research studies of nursing home litigation. In the absence of a nationwide verdict reporter, this database is the most comprehensive collection of cases ever assembled. But the dataset is limited by not providing comparable data points to determine what was actually paid after postverdict adjustments. My interviews with Florida nursing home attorneys revealed that postverdict adjustments were common. In many cases against medium and small facilities, bankruptcies and gaps in insurance coverage were common. Future research needs to focus on actual outlays by insurers and whether these settlements are driving skyrocketing insurance premiums.

vidence of negligence and abuse cases suggests there may be too few nursing home liability cases, not too many. In a March 2002 study by the Department of Health and Human Services (HHS), nine out of ten nursing homes nationwide failed to meet minimum federal staffing standards.¹³⁷ State inspections uncovered 1600 nursing homes with substantial, life-threatening infractions of federal minimum quality standards.¹³⁸ A nationwide study conducted by a committee of the U.S. Congress concluded that nearly one-third of all U.S. nursing homes were cited for violations of federal statutory requirements for long-term care facilities in the period between 1999 and 2001.¹³⁹

The research finding that there were only 186 plaintiff victories in the hot-spot states of California, Florida, and Texas reinforces the notion that far too few cases are filed given the shameful conditions found in nursing homes in these states. Table Two demonstrates that 86% of nursing homes in Texas have substantial deficiencies that pose potential or actual harm to vulnerable elderly nursing home residents.¹⁴⁰ Ninety-four percent of Texas nursing homes failed to comply with HHS minimum staffing levels.¹⁴¹ Nearly 40% of the nursing home violations in Texas facilities were so serious that they posed the risk of imminent death or serious injury to residents.¹⁴² In light of this finding, Texas's thirty-five nursing home negligence verdicts over the last fifteen years hardly constitute a litigation explosion.

137. MINORITY STAFF, H. COMM. ON GOV'T REFORM, SUMMARY: H.R. 3355, THE NURSING HOME STAFFING ACT OF 2003 (2003), *available at* <http://www.democrats.reform.house.gov/Documents/20040624113353-11190.pdf>.

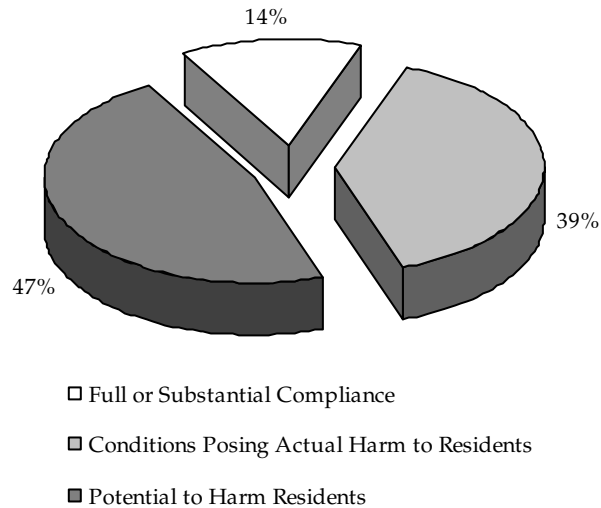
138. *See* Rep. Henry A. Waxman, Opening Statement at the Special Investigations Briefing on Nursing Home Abuse 1 (July 30, 2001), *available at* <http://www.democrats.reform.house.gov/Documents/20040830113807-03715.pdf>.

139. *See id.*

140. *Id.* at 2.

141. *Id.* at 3.

142. *Id.* at 2.

Table Two**Texas's Nursing Homes and Minimum Quality Standards¹⁴³**

A U.S. House of Representatives committee study uncovered systematic nursing home neglect and abuse in California nursing homes.¹⁴⁴ The study also revealed “that many nursing homes throughout the country are severely understaffed, impeding their ability to effectively care for patients.”¹⁴⁵

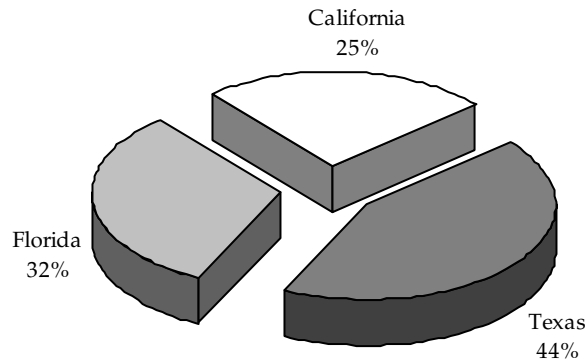
143. MINORITY STAFF, SPECIAL INVESTIGATIONS DIV., H. COMM. ON GOV'T REFORM, NURSING HOME CONDITIONS IN TEXAS: MANY NURSING HOMES FAIL TO MEET FEDERAL STANDARDS FOR ADEQUATE CARE (2003), available at <http://www.democrats.reform.house.gov/Documents/20040830114327-83314.pdf>.

144. MINORITY STAFF, SPECIAL INVESTIGATIONS DIV., H. COMM. ON GOV'T REFORM, NURSING HOME CONDITIONS IN LOS ANGELES COUNTY: MANY HOMES FAIL TO MEET FEDERAL STANDARDS FOR ADEQUATE CARE 2 (2003), available at <http://www.democrats.reform.house.gov/Documents/20040624114555-60143pdf> (finding that of the 439 nursing homes in Los Angeles County, only twelve homes—less than 3%—were in full substantial compliance with federal standards).

145. MINORITY STAFF, SPECIAL INVESTIGATIONS DIV., H. COMM. ON GOV'T REFORM, ABUSE OF RESIDENTS IS A MAJOR PROBLEM IN U.S. NURSING HOMES 1 (2001), available at <http://www.democrats.reform.house.gov/Documents/20040830113750-34049.pdf> (observing that in addition to the California study, fifteen additional reports for U.S. House of Representatives members “have investigated nursing home conditions in Chicago, the San Francisco Bay Area, Long Island, Texas, Oklahoma and other areas”); see also MINORITY STAFF, SPECIAL INVESTIGATIONS DIV., H. COMM. ON GOV'T REFORM, NURSING HOME STAFFING LEVELS ARE INADEQUATE IN CHICAGO 10 (2001), available at <http://reform.democrats.house.gov/Documents/20040830114736-16350.pdf>.

In the state of Florida, one in four nursing homes failed to meet minimum quality standards between 1997 and 1998. A 2001 study of nursing home facilities found that deficiencies in nursing home care were 40% higher at investor-owned facilities because of aggressive cost-cutting.¹⁴⁶

Table Three
Number of Plaintiff Victories by Jurisdiction



(N = 186)

In Table Three, Texas ranks first in number of plaintiffs' verdicts (44%), followed by Florida (32%) and California (25%). The Texas figure may be bolstered by the state's elder abuse statute, which allows a decedents' estate to also have a cause of action.¹⁴⁷

Florida's relatively large number of nursing home claims is likely the product of the demographic reality that many seniors retiring to the Sunshine State end up in long-term care facilities. In 1980, Florida enacted a pioneering elder abuse statute that created incentives for the elderly victims of abuse and neglect to file suit against residential care facilities.¹⁴⁸ Florida's elder rights statute enables such

146. JOHN P. GEYMAN, *THE CORPORATE TRANSFORMATION OF HEALTH CARE* 29 (2004) (quoting Charlene Harrington et al., *Does Investor Ownership of Nursing Homes Compromise the Quality of Care?*, 91 AM. J. PUB. HEALTH 1452, 1453 (2001)).

147. TEX. HUM. RES. CODE ANN. § 48.001–.051 (Vernon 2001).

148. "The Nursing Home Resident's Rights Act, section 400.022, was originally enacted after a Dade County Grand Jury investigation of nursing homes revealed substantial elder abuse occurring in many nursing homes without any remedial action being taken." *Romano v. Manor Care, Inc.*, 861 So. 2d 59, 62–63 (Fla. Dist. Ct. App. 2003) (discussing FLA. STAT. § 400.022 (2005)). "Nursing home legislation

victims to obtain compensatory damages as well as punitive damages in state or federal courts.¹⁴⁹ In 2001, however, Florida significantly cut back the remedies available in nursing home cases by limiting punitive damages and capping statutory attorneys' fees.¹⁵⁰

California ranks third in the number of successful claims, which is not surprising given the size of that state and its favorable nursing home rights statute. California's Elder Abuse and Dependent Adult Civil Protection Act¹⁵¹ provides plaintiffs with the possibility of recovering noneconomic damages, punitive damages, and attorneys' fees where there is proof of physical abuse, neglect, or fiduciary abuse of elderly or dependent adults.¹⁵² Although California limits noneconomic damages in medical malpractice cases to \$250,000,¹⁵³ there are no longer caps on punitive damages,¹⁵⁴ which may make it possible for elderly claimants to find representation.

Table Four demonstrates that nursing home and abuse cases took off in the early 1990s and have leveled off in recent years. Nursing home awards were infrequent in the three hot-spot jurisdictions prior to 1990, and there were only a few awards per year until the mid-1990s. The number of nursing home verdicts in these states dropped off from the high-water mark of twenty-five in 2002 to only seventeen in 2003. By 2004, the number of verdicts had dropped to less than half of the 2002 number. Although 43% of all damage awards in nursing home cases have come since the millennium, nursing home verdicts are still not commonplace. There was an annual average of only twelve nursing home plaintiffs' victories during the past fifteen years. This low number does not represent an elder abuse lawsuit landslide. The following subsections explain why there are too few nursing home lawsuits.

and litigation have been contentious issues since the Nursing Home Residents' Bill of Rights, Florida Statutes Chapter 400, was enacted in 1980 in response to revelations of widespread neglect and abuse of patients." Dan Cordtz, *Appeals Court Sends Strong Message Against Effort by Homes to Restrict Patient Access to Courts in Abuse, Neglect Cases*, BROWARD DAILY BUS. REV., May 31, 2005, at 1.

149. FLA. STAT. ANN. § 400.023 (West 2004).

150. "In Florida, legislators three years ago capped attorneys' fees in nursing home litigation, limited punitive damages and reduced the statute of limitations for filing lawsuits." Bruce Rushton, *A Legal Matter: Litigators and Legislators Play Chicken-or-Egg with Nursing Home Issues*, PHOENIX NEW TIMES, Dec. 2, 2004.

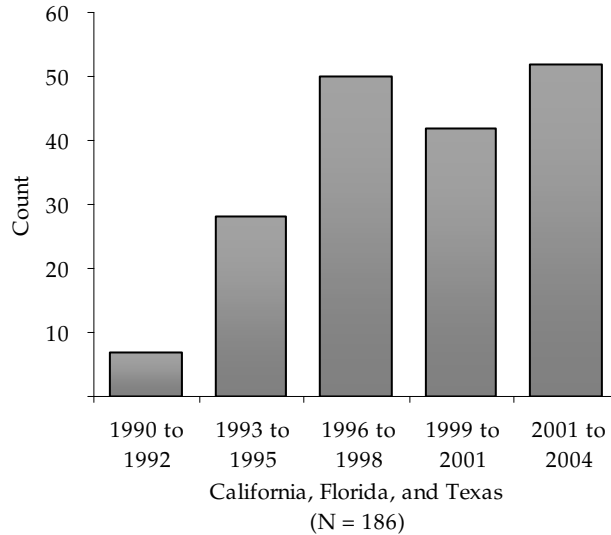
151. Elder Abuse and Dependent Adult Civil Protection Act, CAL. WELF. & INST. CODE §§ 15600-15660 (West 2001).

152. *Id.* § 15657.2.

153. See CAL. CIV. CODE § 3333.2 (West 1997).

154. *Baker v. Sadick*, 208 Cal. Rptr. 676, 681 (Cal. Ct. App. 1984).

Table Four
Year of Nursing Home Plaintiff Win



a. Finding Representation Is Difficult, and Litigation Is Impractical
 Nursing home claimants have few desirable litigant characteristics because of their preexisting illnesses, nonexistent imputed earnings, and low overall economic damages. In the contingency fee system, a trial lawyer assumes the risk of recovery and advances the costs for discovery, expert witnesses, and other pretrial expenses. Because elderly plaintiffs have no loss of past, present, or future earnings, and little by way of special damages, the typical nursing home case is not cost-effective without the possibility of noneconomic damages.¹⁵⁵ Nursing

155. In the seventy cases for which complete data was available, the median recovery for economic damages was only \$34,600, and the average award was \$114,036. Because the typical contingency-fee attorney recovers 33% to 40% of the award after expenses are deducted, the attorney's share of the award seldom exceeds expenses. In the nursing home cases in this dataset, damages for loss of wages were nonexistent. It was uncommon for claimants to recover burial expenses even though nearly two out of three cases was a wrongful death or survival action. Medical expenses in these cases ranged from zero to \$2 million. In 119 of the 186 cases, there was no specific award for medical expenses. In addition, medical costs were subject to Medicaid liens. The median medical expenses were \$73,310 in the cases where there was complete data. One reason for the relatively small role of economic damages was the large number of wrongful death cases in this dataset. Sixty-four percent of the cases were based upon wrongful death-

home negligence cases tend to be expensive because many of them require medical experts to prove a breach in the standard of care.¹⁵⁶ A Florida plaintiffs' attorney estimated that "a well-prepared lawyer will spend \$250,000 to \$350,000 for investigators, experts, accountants and paperwork."¹⁵⁷ Capping noneconomic damages makes it unlikely that nursing home patients will find representation because they will typically not have significant economic damages. According to a trial lawyer specializing in nursing home neglect cases, however, attorneys systematically undervalue the potential payouts in these cases:

Personal injury claims against nursing homes have been greatly undervalued by attorneys. Even where the neglect is clear, most attorneys do not recognize the extent of damages. Rarely will the nursing home resident have a claim for lost income. The resident usually has a limited life expectancy. Usually, the elderly resident had numerous health problems prior to the neglect which creates a defense that the claimant had a preexisting condition not attributable to the facility's level of care.¹⁵⁸

survival actions. Special damages ranged from \$590 to \$2 million, with a median special damages award of only \$34,600 and a mean award of \$114,036. Assuming noneconomic damages and punitive damages are stricken from recovery, these cases result in a median recovery for the attorney of \$11,533—not taking into account the costs of litigation.

156. One hundred percent of the trial lawyers representing nursing home victims were paid on a contingency-fee basis. The costs of experts alone are many times the cost of potential recovery. Information on expert testimony used in these cases was coded from the verdict reporters and also obtained in personal interviews with members of ATLA's nursing home litigation group. It was common to retain multiple experts in nursing home negligence cases. In these cases, experts included specialists in nursing home care, certified public accounting, oncology, dermatology, internal medicine, geriatric medicine, pathology, nutrition, neurology, pulmonology, nursing, vascular surgery, and podiatry.

For example, in one case a nursing home resident suffered through thirty days of conscious survival after being left unattended for extended periods of time in his own waste. In that case, an expert in convalescent care and an elder care expert were retained. An expert in nursing care, nursing procedures, and sexual assault was retained in a case where a female nursing home resident was raped in a long-term care facility. In another case there was video testimony from a physician and live testimony from an economist, life care planner, and physical medicine specialist. An engineer, metallurgist, family practitioner, and plastic surgeon testified in a case where the resident suffered decubitus ulcers. Geriatric psychiatrists, gerontologists, and geriatric nursing home experts were frequently retained in these cases. A neurologist, forensic psychiatrist, and nursing home administrator testified in another neglect case. An entomologist was retained in a case involving the infestation of maggots in an elderly patient's wounds. In cases that went to trial, litigation expenses were \$100,000 or greater.

157. Stephen Nohlgren, *Task Force Becomes Nursing Homes' Ally*, ST. PETERSBURG TIMES, Dec. 15, 2000, at 1B (on file with The Elder Law Journal) (quoting James Wilkes, Esq.).

158. Kevin A. McLean, *Bed Sores to Broken Bones: Assessing Damages in a Nursing Home Case*, NURSING HOME LITIG. (1999) (on file with The Elder Law Journal).

In addition, many meritorious cases are never filed because nursing home victims often have chronic physical or mental diseases that render them incapable of seeking legal representation. The median age for nursing home claimants in the dataset was seventy-six years old, and the mean age was seventy-eight. Nearly one in five prevailing plaintiffs was age eighty-six or older. The reality is that elderly nursing home residents are too infirm and have such a short life expectancy that they simply cannot wait for a settlement or jury verdict.¹⁵⁹ The empirical data in this study demonstrate that few claimants live long enough to receive a judgment or settlement. In 58% of nursing home cases in these jurisdictions, there was either a wrongful death action or survival action, and in some cases both.

Nursing home residents may also fear retaliation by nursing home staff.¹⁶⁰ Nursing homes are total institutions separate from the larger society, and this may make it difficult for residents to seek legal representation. Where the decedent has no living children or other estate beneficiaries,¹⁶¹ no other person has standing in many jurisdictions to file a nursing home neglect or abuse case. In the typical nursing home negligence or abuse case in the sample, the claimant received no compensation and the award went to the estate.¹⁶² Ageism, meanwhile, is part of our cultural fabric, and jurors may be suspicious about elderly fact witnesses.¹⁶³ In our youth-oriented society, elderly nursing home patients are a grim reminder of our own mortality.

b. Compulsory Arbitration Clauses Limit Lawsuits Arbitration clauses are systematically removing a large number of nursing home

159. In the vast majority of nursing home cases, the victim of nursing home neglect, abuse, or mistreatment does not live long enough to receive a settlement check. In my sample of 186 cases, it took an average of 2.89 years from the incident that led to filing a claim to the jury's award. In 14% of the cases, it took four or more years for a case to be tried to a verdict. This analysis does not take into account the postverdict period during which many nursing home verdicts are reversed, reduced, or settled for a lesser amount.

160. Interviews with Trial Attorneys from California, Florida, Minnesota, and Texas, at ATLA's Litigating Nursing Home Cases Seminar, in Fort Lauderdale, Fla. (Mar. 18-19, 2005). The names and law firms of the confidential respondents are withheld.

161. *Id.*

162. See, e.g., *White v. Healthcare of Iowa, Inc.*, No. 96392 (Iowa Dist. Ct. 2003).

163. See Narina Nunez et al., *The Testimony of Elderly Victim/Witnesses and Their Impact on Juror Decisions: The Importance of Examining Multiple Stereotypes*, 23 *LAW & HUM. BEHAV.* 413 (1999) (concluding that jurors react negatively to some categories of the elderly).

neglect and abuse cases from the legal system. The relatively low number of verdicts in recent years may partially be a result of the recent rise in corporate nursing homes that require new residents to submit to arbitration as a condition of being admitted to the facility.¹⁶⁴ For example, three out of four newly admitted nursing home patients to Beverly Enterprises facilities acceded to arbitration clauses.¹⁶⁵

2. NURSING HOME RECOVERIES ARE LARGELY ABOUT GENERAL DAMAGES

In the vast majority of nursing home cases, general damages constitute a major slice of the overall damages award.¹⁶⁶ Table Five documents the significant role general damages for pain and suffering play in nursing home litigation. General damages are a major portion of overall compensatory damages awards for the three jurisdictions in the dataset. Compensatory damages verdicts in nursing home cases are subdivided into *economic losses* and *noneconomic losses*.

Economic damages are *special damages* that encompass “objectively verifiable monetary losses including medical expenses, loss of earnings, burial costs, loss of use of property, costs of repair or replacement, costs of obtaining substitute domestic services, loss of employment and loss of business or employment opportunities.”¹⁶⁷

164. See generally Katherine Palm, *Arbitration Clauses in Nursing Home Admissions Agreements: Framing the Debate*, 14 ELDER L.J. 453 (2006) (exploring arguments for and against mandatory nursing home arbitration agreements).

165. See Beverly Current Report Loss, *supra* note 6.

166. As one commentator noted:

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.

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 handwritten 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.

Charles Toutant, *Aggressive Firms Make a Niche of Nursing Home Negligence Suits*, 177 N.J. L.J. 899 (2004); see, e.g., *Ogden v. J.M. Steel Erecting, Inc.*, 31 P.3d 806, 812 (Ariz. 2001).

167. *Scalice v. Performance Cleaning Sys.*, 57 Cal. Rptr. 2d 711, 729 (Cal. Ct. App. 1996) (quoting California's workers' compensation statute).

Nursing home claimants are unlikely to have special damages such as loss of income, and their medical care is typically covered by Medicare, Medicaid, or third-party health insurers. Because the typical nursing home resident has no past, present, or future economic damages, his or her recovery is largely based upon “non-pecuniary harm such as pain, suffering, mental anguish, inconvenience, physical impairment, disfigurement, loss of capacity to enjoy life, and loss of consortium, which [has] accrued at the time” of the injury from neglect.¹⁶⁸ Like all of the prior academic research on nursing home litigation, which highlights the importance of noneconomic damages and the insignificance of special damages,¹⁶⁹ this three-state dataset supports the hypothesis that nursing home litigation is largely about general damages.

None of the elderly, disabled, and defenseless nursing home claimants in this sample had any recovery for lost wages, future earnings, or reduced life expectancy. Special damages for burial expenses, medical expenses, or other out-of-pocket losses had a median of \$33,102.¹⁷⁰ The range for special damages awards was between \$590 and \$2 million in the seventy cases for which complete data was available. In roughly one in four of the cases where special damages were recovered, the award was \$10,000 or less. The median amount for special damages, which includes burial, medical, and other out of pocket costs, was only \$34,600, versus a mean special damages award of \$114,360. Eighty percent of the claimants received special damages awards of less than \$100,000.

Noneconomic damages comprised either all of the compensatory damages awards or most of the total recovery in these nursing home cases. Only a single dollar of hedonic damages for loss of enjoyment of life was awarded in this three-state sample. Data on the recovery of general damages was available for 149 out of the 186 nursing home verdicts. The median general damages award for these three jurisdic-

168. *Wyatt v. United States*, 939 F. Supp. 1402, 1412 (E.D. Mo. 1996).

169. *See supra* Part I.B.

170. In 116 out of 186 cases (62%), the verdict reporter did not delineate any special damages. Data on special damages was available in only seventy of the cases (38%). This data gap is largely a function of the limitations of verdict reporters. A number of verdict reports did not break down compensatory damages beyond specifying pain-and-suffering damages. Other verdict reports specified a general breakdown between compensatory damages and punitive damages without further breakdowns. The dataset supports earlier research highlighting the limited role special damages play in nursing home litigation.

tions was \$400,000.¹⁷¹ Thirty-four percent of the cases had noneconomic damages awards of \$250,000 or less. Roughly two in three awards in favor of nursing home claimants were greater than \$250,000. Thirty-seven percent of the 149 awards where noneconomic damages were itemized exceeded \$1 million.

In most nursing home cases, damage awards are composed of almost entirely noneconomic damages for painful conditions that were largely preventable.¹⁷² The Rand sample of medical malpractice cases found that in 45% of the 257 awards where plaintiffs prevailed, at least one plaintiff received noneconomic damages.¹⁷³ Eight out of ten claimants received noneconomic damages in the present three jurisdictional study.

The pain and suffering of nursing home residents is exacerbated by mismanaged palliative care.¹⁷⁴ It is a widespread misconception that the elderly do not feel pain.¹⁷⁵ The failure to notify a physician

171. The noneconomic or general damages component could not be delineated in thirty-seven out of the 186 cases because of the incomplete reporting in the commercial verdict reporters. I was able to learn the percentage of noneconomic damages in some cases from interviews or newspaper reports. In the 149 cases for which noneconomic damages were itemized, the mean award was \$2,010,851 and the mode was \$1 million.

172. See, e.g., *Fuqua v. Horizon/CMS Healthcare Corp.*, No. 98-00-CV-1087-4, 2001 WL 267650 (N.D. Tex. Feb. 14, 2001) (awarding \$2,710,000 in noneconomic damages and \$310,000,000 for abject neglect that caused the resident to develop late-stage decubitus ulcers); *Marsalese v. Park Imperial Convalescent Ctr.*, No. 4C 027366, 1997 WL 372874 (Cal. Super. Ct. 1997) (awarding \$45,000 in noneconomic damages to an eighty-one-year-old nursing home resident who developed bacterial pneumonia, "influenza, dehydration, hypoxia and decubitus ulcers surrounding his genitals and buttocks" while in the care of the defendant nursing home); *Jane Doe v. Roe Nursing Home*, No. 70-59-96 (Cal. Super. Ct. 1995) (awarding \$425,000 for "multiple fractures of the left leg and an intraarticular fracture [where] [t]here was a malunion of . . . healed fractures"); *Estate of Dixon v. S. Park Rehab. & Nursing Ctr.*, 2000 WL 33231753 (Tex. Dist. Ct. 2003) (awarding \$6,970,000 in noneconomic damages to a nursing home resident whose injuries included severe dehydration and malnutrition as well as multiple pressure sores); *Estate of Deakins v. Senior Living Props.*, No. 017-184243-00, 2002 WL 32374392 (Tex. Dist. Ct. 2002) (awarding \$3,500,000 in noneconomic damages to the estate of an elderly man who "sustained a stage IV decubitus ulcer with an MRSA, an antibiotic-resistant infection" that resulted in his death).

173. Rustad Database, *supra* note 64.

174. A recent study of pain management at the end of life concluded that "[t]here is abundant literature indicating that dying individuals do not receive adequate pain medication or palliative care." Diane E. Hoffman & Anita J. Tarzian, *Dying in America—An Examination of Policies That Deter Adequate End-of-Life Care in Nursing Homes*, 33 J.L. MED. & ETHICS 294, 294 (2005) (proposing reforms for pain management of nursing home residents).

175. Julie A. Steele & Ellen Taylor, *Guidelines Released on Acute Pain Management*, 84 J. NAT'L CANCER INST. 481 (1992).

while permitting a resident to lay “there with an untreated, severe, life-threatening wound” is an aggravating factor in many nursing home neglect cases.¹⁷⁶ In a Texas nursing home case, a terminal cancer patient was treated only with pain killers for a shoulder injury before she succumbed to cancer.¹⁷⁷ The lawsuit filed by the resident’s daughter also alleged that her mother had not been bathed for “19 days in a month.”¹⁷⁸ The misuse of pain medication is even more serious when the elderly nursing home patient is unable to protest. In a Florida case, an elderly woman suffered having a Foley catheter removed “with the bulb still fully inflated.”¹⁷⁹ The staff could offer no explanation about “how this painful event occurred, and no pain assessment or pain management was initiated.”¹⁸⁰

In *Bergman v. Chin*,¹⁸¹ the plaintiffs were awarded \$1.5 million for the nursing home’s failure to manage the pain experienced by an elderly nursing home patient dying of cancer.¹⁸² The plaintiff’s expert testified that the medical care rendered to the decedent was “‘appalling’ and ‘egregious’” and that there was an abject failure “to provide proactive pain treatment.”¹⁸³ In North Carolina, a jury awarded \$15 million in compensatory and punitive damages against a nursing home that reduced a terminal patient’s prescribed dosage of morphine, eventually replacing the pain medication with a placebo.¹⁸⁴ None of these cases of abuse and neglect were frivolous lawsuits.

176. J. Thomas Rhodes, III & Juliette Castillo, *Association of Trial Lawyers of America Winter Convention Reference Material: Proving Damages in the Nursing Home Case: Overcoming Defense Arguments for Limited Damages*, 2004 ATLA-CLE 363 (on file with *The Elder Law Journal*).

177. VerdictSearch, Summary, *Heirs of Annie Sprinkle v. Sensitive Care Briarwood*, No. 95-14545, 1997 WL 33350173 (Tex. Dist. Ct. Nov. 10, 1997) (reporting a jury verdict of \$201,897 in a case where a terminal cancer patient was not bathed over a nineteen-day period and fell while under the custody of the facility).

178. *Id.*

179. *Estate of Youngblood v. Halifax Convalescent Ctr., Ltd.*, 874 So. 2d 596, 598 (Fla. Dist. Ct. App. 2004) (reversing and remanding for a new trial because the nursing home resident rights statute provides for punitive damages).

180. *Id.*

181. VerdictSearch, Summary, *Bergman v. Chin*, No. H205732-1 (Cal. Sup. Ct. June 13, 2001).

182. *Id.*

183. *Id.*

184. *Faison v. Hillhaven Corp.*, No. 89 CVS 64, 1991 WL 453508 (N.C. Super. Ct. Nov. 1991); see also *Hillhaven Is Ordered to Pay \$15 Million To Ex-Patient’s Estate*, WALL ST. J., Nov. 26, 1990, at B7 (discussing the *Faison* decision).

In *Copeland v. Dallas Home for Jewish Aged*,¹⁸⁵ an elderly man who arrived at a nursing home facility was observed to be “crying out in severe pain,” yet the nursing staff did not call a doctor.¹⁸⁶ Despite the patient’s obvious distress¹⁸⁷ and classic indicators of a bleeding gastric ulcer, there was a five-day delay before he was sent to a hospital.¹⁸⁸ By the time the elderly man arrived in an emergency room, he was beyond the state where effective treatment would be possible, and he died.¹⁸⁹ The jury awarded \$16 million in compensatory damages and \$34 million in punitive damages to the decedent’s estate.¹⁹⁰ In general, the nursing home neglect and abuse cases go far beyond ordinary negligence. In many instances, the nursing home’s culpability implicated a reckless indifference toward the welfare of its residents.

Table Five confirms that there are substantial differences among the hot-spot jurisdictions. It is not surprising that California, which caps noneconomic damages at \$250,000, has the lowest dollar amounts for general damages. Texas leads the three states in the number of large noneconomic damage awards, probably a result of that jurisdiction’s abysmal record of nursing homes failing to comply with minimum federal statutory standards.

185. VerdictSearch, Summary, *Copeland v. Dallas Home for Jewish Aged*, No. 98-04690, (Tex. Dist. Ct. 2001).

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. The award was reduced subject to Texas’s cap on punitive damages. *Id.*

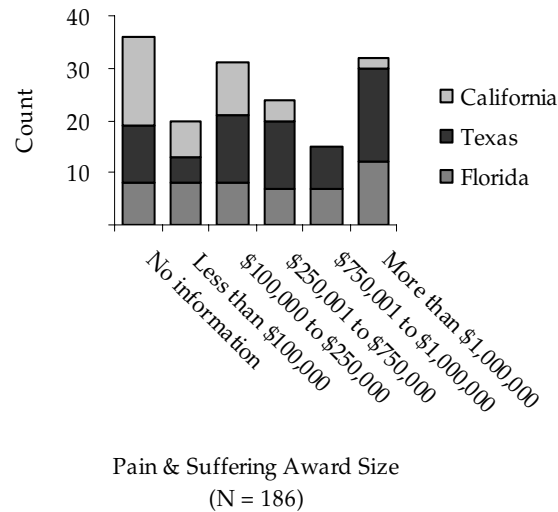
Table Five¹⁹¹**Size of Pain and Suffering Award by State:
California, Florida, and Texas****3. CAPS ON NONECONOMIC DAMAGES RESULT IN GENDER INJUSTICE**

Table Six shows that, overall, only one in three awards in nursing home cases would not be diminished by a cap of \$250,000 on noneconomic damages. In 13% of the cases, the claimant's total recovery would be downsized by 90% or more. The cap would also reduce awards by up to 90% in one out of three cases. Because of the gender-specific nature of injuries, the longer average life span of women, and the empirical finding that two out of three nursing home claimants are women, gender injustice results when legislatures cap noneconomic damages.

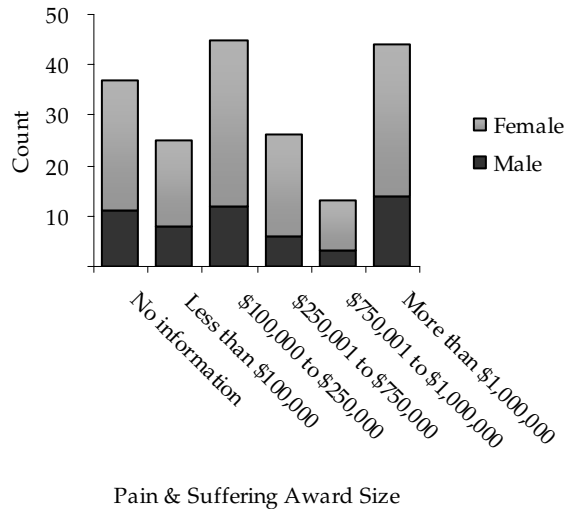
The gender ratio tilts even more in favor of women among residents ages seventy-five and older. One observer noted that because "[w]omen live longer than men, their relative risk of lifetime use of a nursing home is higher (52% versus 33%)."¹⁹² In one Illinois nursing

191. Rustad Database, *supra* note 64.

192. Hawes, *supra* note 40, at 447.

home, there are ten women for every male resident.¹⁹³ This dataset confirms that the pain experienced in nursing homes disproportionately affects women. In Table Six, most of the larger noneconomic awards subject to a \$250,000 cap were awarded to women.

Table Six¹⁹⁴
The Role of Gender and General Damages Awards



Caps on noneconomic damages negatively affect women more than men because of demographic variations rather than differential jury awards based upon gender injustice. Sixty-eight percent of the 186 nursing home verdicts in the three jurisdictions were awarded in favor of women.¹⁹⁵ This gender effect is even greater than in the verdict reporter study summarized in Table One. Caps not only reduce the size of awards; for many elderly victims of nursing home neglect, caps preclude the possibility that the lawsuit will be brought at all.¹⁹⁶ Absolute caps on noneconomic damages reduce the prospective re-

193. See Ill. Council on Long-Term Care, *The Aging Process: Unique Challenges for Men*, http://www.nursinghome.org/fam/fam_007.html (last visited Sept. 25, 2006).

194. Rustad Database, *supra* note 64.

195. *Id.*

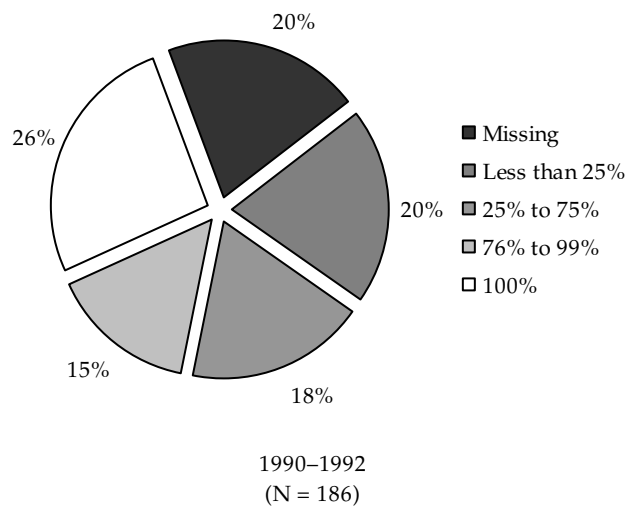
196. Interview data with Florida nursing home specialists confirm that noneconomic damages are the most significant damages component and the key to bringing any lawsuit against a corporate nursing home.

covery to such an extent that elderly claimants will likely be unable to obtain legal representation.

General or noneconomic damages constitute the lion's share of most nursing home awards. The mean compensatory damages award for all cases was \$2,029,124, and the median award was \$398,500. One-quarter of nursing home compensatory damages awards exceeded \$1,500,000. Most compensatory damages awards are based upon general damages. Table Seven illustrates the overwhelming significance of general damages in nursing home recoveries.

Table Seven

**Pain and Suffering as Percentage of Compensatory Damages
Nursing Home Cases: California, Florida, and Texas**



4. CAPS ARE ALREADY TAKING A TOLL

Table Seven demonstrates that nursing home neglect and abuse cases are largely about pain and suffering. Nonpecuniary damages account for the entire award in more than a quarter of nursing home lawsuits. Noneconomic damages or general damages are less than a quarter of the compensatory damages in only 20% of the cases. Taking the missing cases out of the formula makes the role of non-economic damages in nursing home cases even more overwhelming.

These data suggest that caps are already taking a toll in nursing home cases in each of the three hot-spot jurisdictions.

a. *California's Hard Cap of \$250,000 on Pain and Suffering* California's Medical Injury Compensation Reform Act of 1975 (MICRA) caps noneconomic damages in medical malpractice cases at \$250,000.¹⁹⁷ This cap applies to nursing homes as well as professional liability awards against physicians, nursing homes, hospitals, or other licensed health facilities.¹⁹⁸ The California Supreme Court upheld the constitutionality of MICRA in 1985.¹⁹⁹ Because MICRA was enacted to limit noneconomic damages based on negligence, it does not apply to extreme nursing home neglect and abuse cases where the standard of professional medical care is not at issue.²⁰⁰ No data exists on California verdicts prior to MICRA, so it is unclear how the statute has affected the types of cases filed. An interview with a prominent California trial lawyer specializing in nursing home cases provided anecdotal evidence that the cap markedly depresses the number of claims.²⁰¹

Another California attorney specializing in nursing home litigation was of the opinion that the MICRA cap makes most nursing home cases "zero damages" cases because the cost of litigation exceeds the potential value of the award.²⁰² The presence of uncapped punitive damages, by contrast, serves as an incentive to litigate in cases with extreme neglect or other aggravated misconduct amount-

197. See CAL. CIV. CODE § 3333.2(b) (West 1997).

198. *Id.* § 3333.2(c)(1).

199. *Fein v. Permanente Med. Group*, 695 P.2d 665, 669 (Cal. 1985) (finding no equal protection violation in California's MICRA statute that limits claimant's noneconomic damages to \$250,000 because the tort reform statute was rationally related to California's legitimate state interest in reducing the cost of medical malpractice insurance).

200. In *Andrea N. v. Laurelwood Convalescent Hospital*, 16 Cal. Rptr. 2d 894, 908 (Cal. Ct. App. 1993), the California Appeals Court reinstated a \$7.5 million award upon ruling that the MICRA cap was inapplicable in a case where a disabled woman was raped and impregnated while under the care of the convalescent hospital. Similarly, a content analysis reveals that most nursing home lawsuits are not fundamentally about medical liability and therefore should be excluded from noneconomic damages capping and other reforms targeted at medical malpractice. However, recent tort reform proposals, including Senate Bill 354, which define nursing homes broadly as health care providers, do not exclude nursing home abuse or neglect cases from the cap. S. 354, 109th Cong. (2005).

201. Interviews with Trial Attorneys, *supra* note 160.

202. *Id.*

ing to voluntary manslaughter.²⁰³ Attorneys in California also report that the MICRA cap decreases the amount of proposed settlements because insurers know their total exposure in advance.²⁰⁴ If an insurer or nursing home defendant knows that \$250,000 is the maximum amount at stake, a final settlement offer of \$50,000 or less is typical.²⁰⁵ An attorney's share of the award is typically 33.3% after expenses. In such cases, the expert testimony necessary to prove that the facility's standard of care was substandard often exceeds the attorney's share, assuming a plaintiff's verdict or settlement.²⁰⁶

A study of postverdict adjustments demonstrates that California's MICRA cap downsized a number of nursing home verdicts.²⁰⁷ In one wrongful death case, a minister in his sixties suffered decubitus ulcers due to neglect in a California long-term care facility.²⁰⁸ The trial court applied MICRA's noneconomic damages cap, thus reducing a \$1 million gross award to \$250,000.²⁰⁹ An additional \$1 million awarded for elder abuse was similarly downsized by three-quarters.²¹⁰ In another egregious case of neglect, a diabetic nursing home resident suffered bilateral amputations due to substandard care in a California convalescent home.²¹¹ After the jury awarded \$3 million in noneconomic damages, the nursing home filed a motion to reduce the award to conform to the MICRA cap.²¹²

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. California's MICRA cap of \$250,000 is found in section 3333.2 of the California Civil Code, "Negligence of Health Care Provider; Noneconomic Losses; Limitation":

(a) In any action for injury against a health care provider based on professional negligence, the injured plaintiff shall be entitled to recover noneconomic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement and other nonpecuniary damage.

(b) In no action shall the amount of damages for noneconomic losses exceed two hundred fifty thousand dollars (\$250,000).

CAL. CIV. CODE § 3333.2 (West 1997).

208. VerdictSearch, Summary, *Camacho v. Meridian Neurocare*, No. CIV 214086, 2004 WL 2715126 (Cal. Super. Ct. Mar. 12, 2004).

209. *Id.*

210. *Id.*

211. VerdictSearch, Summary, *Ollison v. Eskaton*, No. 00AS05801 (Cal. Super. Ct. 2002).

212. *Id.*

In *Perry v. Sun Healthcare Group Inc.*,²¹³ a nursing home was charged with violation of California's Elder Abuse Statute, breach of the insurance contract, and tortious breach of the implied covenant of good faith and fair dealing.²¹⁴ The jury returned an award of \$500,000 in noneconomic damages to the estate of an elderly man who, after developing "ulcerative sores, severe infections, [and] a foul-smelling discharge from his tracheostomy," died of a severe maggot infestation that blocked his breathing.²¹⁵ The jury found that an entomologist's testimony concerning the age and genesis of the maggots was the decisive factor in awarding punitive damages. During the postverdict period, the defendant successfully filed a motion to reduce the noneconomic damages to \$250,000 to comply with the MICRA cap.²¹⁶ Noneconomic damages were reduced to \$250,000 in a number of other California nursing home cases involving extreme neglect.²¹⁷

b. Florida's Cap on Nursing Home Damages In November 2004, Florida voters "approved a referendum to limit attorneys' fees in medical malpractice cases to 30% of the first \$250,000 and 10% of any

213. VerdictSearch, Summary, *Perry v. Sun Healthcare Group, Inc.*, No. KC 037 190 (Cal. Super. Ct. Nov. 5, 2002).

214. *Id.*

215. *Id.*

216. "MICRA was passed by the California Legislature in response to the medical malpractice insurance crisis of the mid-1970s." Note, *Putting the Cart Before the Horse: The Need to Re-Examine Damage Caps in California's Elder Abuse Act*, 39 SAN DIEGO L. REV. 599, 600 n.1 (2002).

217. VerdictSearch, Summary, *Muccianti v. Fountain View, Inc.*, No. 62501227 (Cal. Super. Ct. 2001). In this case, a nursing home resident's verdict was disproportionately based upon noneconomic damages. The jury awarded \$94,927 in economic damages and \$623,000 in noneconomic damages, which was then reduced to \$250,000 to comply with California's tort reform. *Id.* The nursing home discharged the resident after her Medicare ran out even though she was suffering from severe medical conditions including an ischemic bowel, which caused her death. *Id.* Noneconomic damages often make up the overwhelming majority of the monetary amount collected by the plaintiff. In VerdictSearch, Summary, *Doe v. Roe Skilled Care Facility*, No. Confidential (Cal. Super. Ct. 2002), only \$10,000 of the \$475,000 settlement in a fatal fall case was allocated to economic damages, while the remainder was compensation for pain and suffering. *Id.* In that case, the plaintiff's counsel believed that "the value of the case was driven by the enhanced remedies" and attorneys' fees available under California's Elder and Dependent Adult Civil Protection Act. *Id.* In *Darblay v. Western Med. Enters., Inc.*, 1984 WL 588652 (Cal. Super. Ct. Oct. 22, 1984), a nursing home neglect case against a California convalescent hospital, \$750,000 out of the \$796,750 total verdict was for noneconomic damages. *Id.*

amount thereafter.”²¹⁸ Additionally, the Florida legislature placed an absolute cap of \$500,000 per claimant on noneconomic damages in medical liability cases.²¹⁹ Florida’s \$500,000 noneconomic damages cap applies to both “personal injury and wrongful death [actions] arising from medical negligence of practitioners, regardless of the number of such practitioner defendants.”²²⁰ Florida permits the cap to be lifted, but there is an absolute upper limit of \$1 million in catastrophic injury cases.²²¹ The Florida legislature did not specifically include nursing homes as health care providers, but the cap applies to all facilities rendering medical care in any setting.

c. Texas’s 2003 Cap Is the Death Penalty for Nursing Home Cases In Texas, voters enacted Proposition 12, which amended the Texas state constitution to place an overall cap of \$750,000 on noneconomic damages and an absolute limit of \$250,000 on verdicts against individual

218. Evan L. Goldman, Commentary, *The Real Victims of Tort Reform*, 178 N.J. L.J. 1195 (2004) (discussing the Florida ballot initiative passed in November 2004). “Patients will get 70% of the first \$250,000 awarded and 90% of the remainder of the award. Attorneys would still get payment for court and witness expenses.” Tanya Albert, *State Tort Reform Ballot Wins Set Stage for Further Ballots* (Nov. 22–29, 2004), <http://www.ama-assn.org/amednews/2004/11/22/gvl11122.htm>.

219. As one commentator reported:

Gov. Jeb Bush signed the Florida cap, which limits noneconomic damages in medical malpractice cases to \$500,000, in August. While state legislators debated the cap, its supporters argued that limiting malpractice damages would reduce costs to insurance companies that paid those damages and that the insurers could pass the savings on to doctors by lowering premiums.

Jean Hellwege, *Med-Mal Caps in Two States Don’t Reduce Insurance Rates*, TRIAL, Feb. 2004, at 14.

220. FLA. STAT. § 766.118(2)(a) (2005).

221. *Id.* § 766.118(2)(b–c). Florida’s cap on noneconomic damages provides for exceptions in § 766.118(2)(b):

[I]f the negligence resulted in a permanent vegetative state or death, the total noneconomic damages recoverable from all practitioners, regardless of the number of claimants, under this paragraph shall not exceed \$1 million. In cases that do not involve death or permanent vegetative state, the patient injured by medical negligence may recover noneconomic damages not to exceed \$1 million if:

(1) The trial court determines that a manifest injustice would occur unless increased noneconomic damages are awarded, based on a finding that because of the special circumstances of the case, the noneconomic harm sustained by the injured patient was particularly severe; and

(2) The trier of fact determines that the defendant’s negligence caused a catastrophic injury to the patient.

Id. § 766.118(2)(b).

defendants.²²² The 2003 tort reform is the functional equivalent of the death penalty for many meritorious claims because it has created perverse incentives for insurers to offer settlements below the costs of litigation.²²³ In cases filed against Texas nursing homes after September 1, 2003, the final judgment against any one nursing home cannot exceed \$250,000 in pain-and-suffering or noneconomic damages for each claimant.²²⁴ Under the former cap, total compensatory damages could not exceed \$500,000.²²⁵ Texas's cap limits the total noneconomic damages "for each claimant, regardless of the number of defendant physicians or health care providers" against whom nursing home claims are asserted.²²⁶

Texas's hard cap limits the liability for noneconomic damages for each nursing home "inclusive of all persons and entities for which vicarious liability theories may apply."²²⁷ In actions against physicians or health care providers other than health care institutions (which includes nursing homes), the total recovery may not exceed \$250,000 for each claimant.²²⁸ For vicarious liability claims "against a single health care institution, the limit of civil liability for non-

222. Hellwege, *supra* note 219, at 15.

223. This pessimistic assessment was made by a leading Texas trial lawyer who won a number of million-dollar nursing home cases in recent years. His law firm used to handle hundreds of nursing home cases, but he told me that he has not filed a single nursing home case since the Texas tort reform took effect on September 1, 2003, and no other attorneys are filing nursing home lawsuits. This conclusion was confirmed by my interviews with several other Texas trial lawyers. Interviews with Trial Attorneys, *supra* note 160.

224. "The 1977 cap on pain and suffering originally climbed to over \$1.7 million due to inflation and became limited to only wrongful death cases due to Texas Supreme Court decisions on constitutionality." *Current Issues Related to Medical Liability Reform: Hearing Before the Subcomm. on Health of the H. Comm. on Energy and Commerce*, 109th Cong. 59 (2005) (testimony of Jose Montemeyer, Comm'r, Texas Department of Insurance). Texas law limits liability for all "health care institution[s]" to \$250,000. TEX. CIV. PROC. & REM. CODE ANN. § 74.301 (Vernon 2005). Health care institutions include nursing homes, hospices, and intermediate care facilities. *Id.* § 74.001(11).

225. TEX. REV. CIV. STAT. ANN. art. 4590i (Vernon 1977), *repealed by* Acts 2003, ch. 204, § 10.09.

226. *See* TEX. CIV. PROC. & REM. CODE ANN. § 74.301(a).

227. *Id.* § 74.301(c). The statute also provides:

In an action on a health care liability claim where final judgment is rendered against a single health care institution, the limit of civil liability for noneconomic damages inclusive of all persons and entities for which vicarious liability theories may apply shall be limited to an amount not to exceed \$250,000 for each claimant.

Id. § 74.301(b).

228. *Id.* § 74.302(a)(1).

economic damages” is also \$250,000 for each claimant.²²⁹ In a regulatory filing, even the largest medical liability insurer in Texas acknowledged that capping noneconomic damages will not significantly reduce insurance premiums.²³⁰

Although Texas was the hottest hot-spot throughout the period of this study, nursing home practice is now a moribund specialty. As the 2003 tort reforms capping noneconomic damages at \$250,000 and limiting attorneys fees prevent nursing home cases from being filed, Texas will probably be dethroned as a hot spot. The October 2006 issue of the *ABA Journal* reports that many Texas nursing home lawyers “have moved on to other work” because these cases are no longer financially feasible for firms to pursue.²³¹

4. PUNITIVE DAMAGES PLAY A KEY ROLE IN NURSING HOME LITIGATION

The most dramatic finding in this study was the extraordinarily high rate of punitive damages. Nursing home claimants received punitive damages awards in 30% of the 186 cases in the sample. Punitive

229. *Id.* § 74.301(b).

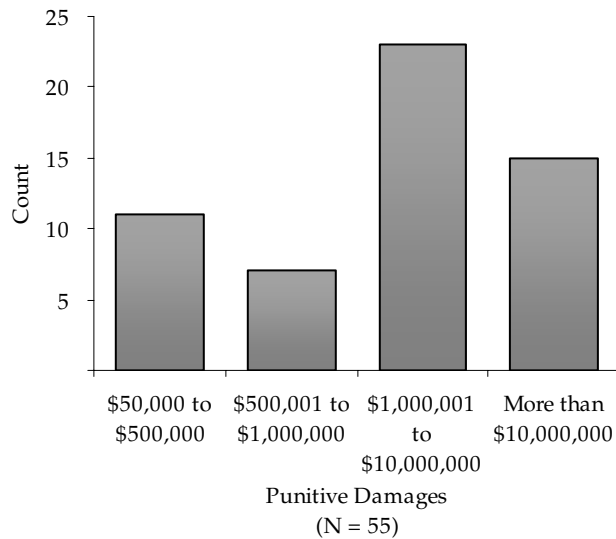
230. Texas’s 2003 tort reform that imposed a hard \$250,000 cap was enacted to reduce insurance premiums. The Foundation for Taxpayer and Consumer Rights uncovered a Texas regulatory filing by GE Medical Protective (the nation’s leading medical liability insurer) that acknowledged that capping of noneconomic damages would not reduce insurance rates. See Press Release, Found. for Taxpayer & Consumer Rights, Nation’s Largest Medical Malpractice Insurer Declares Caps on Damages Don’t Work (Oct. 27, 2004), available at <http://www.consumerwatchdog.org/pr/?postId=2037&pageTitle=Nation%27+Largest+Medical+Malpractice+Insurer+Declares+Caps+On+Damages+Don%27t+Work%2C+Raises+Docs%27+Premium%3B> (reporting that “[t]he nation’s largest medical malpractice insurer” sought a 19% increase in malpractice premiums in a regulatory filing with the Texas Department of Insurance (TDI)). In addition, GE Medical Protective’s filing acknowledged that “[n]on-economic damages are a small percentage of total losses paid. Capping noneconomic damages will show loss savings of 1.0%.” *Id.* The U.S. General Accounting Office (GAO) concluded that there is no compelling evidence that caps will significantly reduce premiums. See U.S. GEN. ACCOUNTING OFFICE, MEDICAL MALPRACTICE: IMPLICATIONS OF RISING PREMIUMS ON ACCESS TO HEALTH CARE 37 (2003), available at <http://www.gao.gov/new.items/d03836.pdf> (concluding that caps may slow premium growth but that the report “could not determine the extent to which differences in premiums and claims payments across states were attributable to states’ tort reform laws” or to factors such as laws regulating rate setting, other tort reform measures beside caps, the level of competition among insurers in particular markets, and interest rates); see also Jerome M. Staller, *Simplicity Can Be Devastating*, 22 MED. MALPRACTICE L. & STRATEGY 1 (Jan. 2, 2005) (discussing the GAO report on the relationship between noneconomic damages caps and insurance premiums).

231. Carter, *supra* note 10.

damages in nursing home cases averaged \$22,625,432, with a median award of \$4 million. In cases where punitive damages were awarded, the mean compensatory award was \$2,551,174, with a median of \$721,109.

Table Eight²³²

Punitive Damages in Nursing Home Cases



Punitive damages varied significantly by jurisdiction. Texas juries handed down thirty-four of the study's fifty-five punitive damages awards. Twenty-four of the thirty-four punitive damages awards in Texas nursing home cases were \$1 million or greater, and nine of the thirty-four awards were \$10 million or greater. In Florida, ten of the fifteen punitive damages awards were \$1 million dollars or greater, while three of the six punitive damage awards in California exceeded \$1 million. These high rates of punitive damages can be explained by the extreme circumstances in many of the nursing home neglect and abuse cases. The punitive damages in these nursing home cases express community disapproval of shoddy care and abuse against a vulnerable segment of society. The purpose of punitive damages awards against long-term care facilities is to send a signal

232. Rustad Database, *supra* note 64.

that the community will not tolerate such flagrant malfeasance as providing inadequate staffing,²³³ failing to prevent or treat pressure ulcers,²³⁴ and permitting residents to literally rot away from untreated pressure sores.²³⁵

Table Nine
Punitive Damages by State of Trial

	PUNITIVE				Total
	\$50,000 to \$500,000	\$500,001 to \$1,000,000	\$1,000,001 to \$10,000,000	More than \$10,000,000	
Cal.	2	1	1	2	6
Fla.	2	3	6	4	15
Tex.	7	3	15	9	34
Total	11	7	22	15	55

Examples of factual bases for punitive damages in nursing home cases include a facility's failure to summon timely medical assistance,²³⁶ failure to monitor and treat patients correctly,²³⁷ allowing residents to wander away and drown,²³⁸ and failure to care for pa-

233. In a Texas case, the elderly female resident died after she arrived at an emergency room "in a state of malnutrition, with 16 bedsores and her joints were contracted from lack of care received at a nursing home." *Fuqua v. Horizon/CMS Healthcare Corp.*, No. 98-00-CV-1087-4, 2001 WL 267650, at *1 (N.D. Tex. Feb. 14, 2001). On February 14, 2001, a Fort Worth, Texas jury awarded the plaintiff \$55,777 in medical expenses, \$2,710,000 in actual damages, and \$310,000,000 in punitive damages for a total award of \$312,765,777. *Id.*; see also *VerdictSearch*, Summary, *Ernst v. Horizon/CMS Healthcare Corp.*, No. 99-CI-08116 (Tex. Dist. Ct. Feb. 23, 2001) (awarding \$82 million, which included \$75 million in punitive damages in a case of extreme neglect where the resident developed bone-deep bed sores, suffered contractures of all limbs, and was severely dehydrated).

234. See, e.g., *Fuqua*, 2006 WL 267650, at *1.

235. *VerdictSearch*, Summary, *Holder v. Beverly Enters. Tex. Inc.*, No. 95-437 (Tex. Dist. Ct. Dec. 1997).

236. *VerdictSearch*, Summary, *Copeland v. Dallas Home for Jewish Aged, Inc.*, No. 98-04690 (Tex. Jud. Cir. Ct. May 21, 2001) (awarding more than \$50 million, including \$34 million in punitive damages, and finding that the nursing staff acted maliciously in failing to summon medical assistance for an elderly male patient suffering from the obvious symptoms of an untreated gastric ulcer).

237. *VerdictSearch*, Summary, *Lavalis v. Coperas Cove L.L.C.*, No. 183,293-B (Tex. Dist. Ct. Dec. 11, 2001) (awarding \$17,250,000 in punitive damages where an unmonitored female resident died from asphyxiation from having a suction tube forced down her throat in order to attempt to remedy a prior error).

238. *First Healthcare Corp. v. Hamilton*, 740 So. 2d 1189, 1197 (Fla. Dist. Ct. App. 1999) (finding punitive damages applicable where a nursing home was grossly negligent in supervising a resident with dementia who subsequently wandered unaccompanied from the facility and drowned).

tients who later died from such maladies as necrosis, sepsis, starvation, and contracture of limbs.²³⁹ The aim of punitive damages in these cases is to permit the jury to vent the community's sense of outrage over intolerable corporate practices in nursing homes. Punitive damages are an effective and indispensable means for exposing and correcting extreme neglect and abuse in long-term care facilities.

5. NURSING HOME NEGLIGENCE AND ABUSE CASES ARE NOT FRIVOLOUS

Tort reformers frequently depict nursing home lawsuits as frivolous. The Coalition for Affordable and Reliable Healthcare (CARH), for example, cheered on President Bush's call to reform medical liability in his 2005 State of the Union Address.²⁴⁰ The Chair of CARH described how President Bush "made it clear that he and the new Congress have a clear directive from Americans: put an end to runaway jury awards and frivolous lawsuits which force hospitals, doctors, and nursing homes to abandon their practices and patients."²⁴¹ Likewise, the President of the American Health Care Association said that "a significant number of [nursing home] lawsuits are frivolous."²⁴² The characterization of nursing home neglect cases as frivolous is rarely if ever supported by actual cases.

Scholars in favor of tort reform postulate an ethereal world of zero transaction costs in which consumers would not choose to insure against accidents that cause only mental pain.²⁴³ The tacit assumption

239. See VerdictSearch, Summary, *Ernst v. Horizon/CMS Healthcare Corp.*, No. 99-CI-08116 (Tex. Dist. Ct. 2001) (awarding \$82 million, including punitive damages, in a case where a fifty-four-year-old man became dehydrated, malnourished, and severely contracted, as well as developing numerous pressure sores while under the care of the defendant nursing home).

240. President George W. Bush, State of the Union Address (Feb. 2, 2005), available at <http://www.whitehouse.gov/news/releases/2005/02/20050202-11.html>. In every State of the Union Address except 2002, President Bush has called for tort reforms, such as the capping of noneconomic damages in medical liability cases.

241. Press Release, PR Newswire, President George W. Bush Lauded for Strong and Continued Support of Medical Liability Reform (Feb. 2, 2005), available at <http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=104&STORY=/www/story/02-02-2005/0002945497&EDATE=> (quoting John Thomas, Chairman of the Coal. for Affordable & Reliable Health Care (CARH) and Vice President & Gen. Counsel of Baylor Health Care).

242. Julia Malone, *Nursing Homes Bow to Power of Lawsuits*, ATLANTA J. CONST., Sept. 26, 2000, at 15A (quoting Charles Roadman, III, President, Am. Health Care Ass'n).

243. Alan Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 YALE L.J. 353, 364 (1988).

is that pain and suffering damages are frivolous and too often granted for phantom or imaginary pain.²⁴⁴ Professor Neil Komesar critiques those who view noneconomic damages as a plaintiff's windfall by positing the following hypothetical:

The importance of these non-pecuniary 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.²⁴⁵ Similarly, ask yourself whether you or your parents would be indifferent to decubitus ulcers, septic shock, severe dehydration, rape, sexual assault and physical abuse occurring in a long-term care facility.

Most nursing home patients do not suffer the loss of their professional lives and have no lost wages or self-financed medical bills. When a swarm of fire ants covered an elderly nursing home patient's bed and body, for example, she did not suffer *phantom* pain.²⁴⁶ Did the elderly female resident not experience real pain from being bitten by hundreds of ants that flowed from her mouth, nose, ears, hair, and body cavities?²⁴⁷ This elderly resident's sole basis for a compensatory award was pain and suffering.²⁴⁸

It is safe to say that the vast majority of nursing home residents who filed lawsuits in the three hot-spot jurisdictions of California, Florida, and Texas experienced excruciating pain and suffering. Eighty-nine percent of the nursing home plaintiffs in the sample suffered catastrophic injury or death from nursing home neglect,²⁴⁹ and 58% of the lawsuits were tried as wrongful death or survival actions. The primary injuries included amputation of legs or feet, decubitus ulcers, hip fractures, paralysis, and severe emotional injuries in the wake of sexual assaults, physical beatings, or patterns of abuse. In a

244. See Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 555, 586 (1985) (arguing that many plaintiffs exaggerate pain and suffering).

245. Neil K. Komesar, *Injuries and Institutions: Tort Reform, Tort Theory, and Beyond*, 65 N.Y.U. L. REV. 23, 58 (1990).

246. See VerdictSearch, Summary, *Devers v. Greystone Ret. Cmty.*, No. 99-2477 (Ala. Cir. Ct. May 28, 2002) (awarding \$1.8 million in compensatory damages and \$3.5 million in punitive damages in a case where an elderly nursing home patient suffered hundreds of fire ant bites that turned into staph infections while in the care of the nursing home).

247. *Id.*

248. *Id.*

249. Each nursing home neglect case was classified by the type of injury: (1) temporary partial (4%), (2) temporary total (4%), (3) permanent partial (4%), (4) permanent total (33%), and (5) death (56%).

third of the nursing home cases, there was a claim of elder abuse.²⁵⁰ Nearly a third of the residents suffered from decubitus ulcers or pressure sores caused by substandard care.²⁵¹ Thirty-one percent of claimants suffered falls from a lack of supervision or from medication errors. More than one in five claimants suffered from dehydration or malnutrition. Seventy-nine percent of the residents suffered from multiple injuries including burns, falls, starvation, sexual abuse, and the failure of pain management.

Many of the horrific nursing home conditions that led to non-economic awards evoke surrealistic portrayals of abuse and mistreatment.²⁵² A content analysis of the factual circumstances leading to nonpecuniary and punitive awards reveals a widespread pattern of extreme suffering. Elderly nursing home patients who were the subjects of lawsuits against long-term care facilities met fates such as drowning after wandering off unsupervised or unmonitored,²⁵³ being raped by nurses' aides,²⁵⁴ being savagely beaten,²⁵⁵ being eaten by fire ants,²⁵⁶ and dying from sepsis from untreated pressure sores after being left to lie in their own waste.²⁵⁷ Both men and women become vic-

250. Tort-law remedies were the primary means of redress, though elder abuse claims were filed in sixty-two out of 186 cases (33%). Rustad Database, *supra* note 64.

251. Thirty-two of the nursing home residents filing lawsuits suffered from pressure sores or decubitus ulcers. *Id.*

252. *E.g.*, VerdictSearch, Summary, Estate of McCorkle v. Extendicare Health Facilities, Inc., No. 99-000815 (Fla. Pinellas County Ct. Oct. 5, 2000) (reporting case of corporate nursing home short-staffing in which a sixty-five year-old resident developed gangrenous decubitus ulcers after being left neglected in his own urine).

253. First Healthcare Corp. v. Hamilton, 1998 WL 355241 (Fla. Cir. Ct. Feb. 10, 1998) (awarding wrongful death damages to the estate of a dementia patient who drowned after wandering from the premises unaccompanied).

254. VerdictSearch, Summary, Fough v. Tex. Health Enters., Inc., 1998 WL 2023198 (Tex. Dist. Ct. Mar. 30, 1998) (describing how an elderly female resident was brutally raped twice with a shower head, then returned to her bed by an aide who proceeded to relieve "himself sexually, spilling his fluids across her body").

255. VerdictSearch, Summary, Eaves v. Living Ctrs. of Am., Inc., 1997 WL 683538 (Tex. Dist. Ct. 1997) (reporting a case in which an elderly female patient suffered a broken jaw and was sexually assaulted in a nursing home).

256. VerdictSearch, Summary, Devers v. Huntsville Health Servs., No. CV99-2477 (Ala. Cir. Ct. June 28, 2002) (awarding \$35 million in punitive damages to an elderly female patient who suffered from being bitten by hundreds of fire ants and the infections resulting from having ants crawling in her body cavities); *see also* \$1.8-million Settlement Reached in Ant Bite Death, ST. PETERSBURG TIMES, Mar. 12, 2005, at 9B.

257. VerdictSearch, Summary, Fohr v. G.J.S. Holdings, Inc., No. 02-1913-03 (Fla. Cir. Ct. July 28, 2003) (awarding \$15 million in punitive damages as well as noneconomic damages to a seventy-eight-year-old female resident who developed

tims of rape and sexual abuse in nursing homes and long-term facilities.²⁵⁸ An elder and disability rights group searched sex offender registries in thirty-seven states and documented approximately 380 registered sex offenders residing in nursing homes.²⁵⁹ The risk of housing elderly sex offenders alongside a vulnerable population increases the need for supervision and heightened security.

Table Ten depicts the gravamen of each nursing home neglect or abuse case in the three jurisdictional study: (1) sexual or physical abuse (10%), (2) medical malpractice (20%), (3) inadequate supervision (42%), and (4) extreme neglect (27%). The overwhelming conclusion is that nursing home litigation is anything but frivolous and is attributable to substandard conditions. A cap on noneconomic awards for this vulnerable elderly population is inconsistent with the common law, which recognizes the full compensability of mental or emotional distress.²⁶⁰

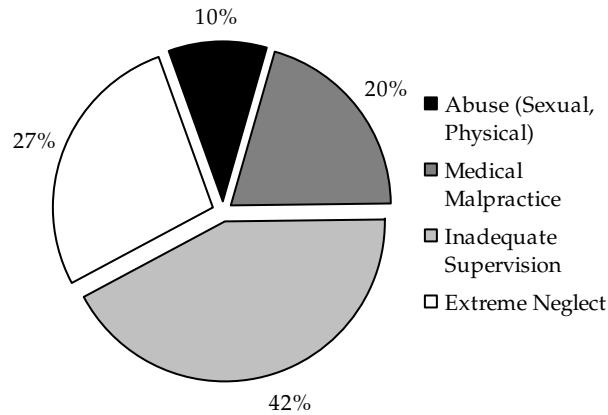
The underlying injuries in the cases reported in Table Ten indicate that these nursing home claimants did not file frivolous lawsuits. Most disquieting of all is the movement to limit noneconomic and punitive damages in nursing home cases, especially given the seriousness of the neglect or abuse that leads to awards on behalf of elderly residents. The next subsection takes a closer look at the narratives in the case reports that reveal real pain and suffering in America's long-term care facilities. The conclusion is that nursing home neglect and abuse warrants civil punishment as well as significant noneconomic damages.

sepsis and gangrene in a facility where she was never turned, repositioned, cleaned, showered, or fed, let alone treated for pressure sores that progressed to stage IV decubitus ulcers).

258. See generally Anne Hart Morris, *Sex Offenders Found in Nursing Homes*, AUGUSTA CHRON., Nov. 19, 2004, at B06.

259. *Id.*

260. See generally Michael L. Rustad, *Nationalizing Tort Law: The Republican Attack on Women, Blue Collar Workers and Consumers*, 48 RUTGERS L. REV. 673, 676 n.9 (1996).

Table Ten**Gravaman of Nursing Home Cases**

California, Florida, and Texas
(N = 186)

B. Profiles of Nursing Home Negligence, Neglect, and Abuse**1. MEDICAL MALPRACTICE IN RESIDENTIAL CARE FACILITIES**

About one in five nursing home claims involved medical malpractice. Nursing home cases are not traditional medical malpractice cases. Most of the medical liability cases involved neglect or abandonment by the facility rather than the failure of medical professionals. The claims were nearly always based on the failure to heed obvious warning signs of an impending medical crisis, the failure to manage pain, or extreme carelessness in rendering medical care. Nursing home negligence cases are largely about failing to monitor deteriorating medical conditions and failing to transfer patients to primary-care units or emergency rooms.²⁶¹ In most of the medical cases reported in Table Ten, the underlying claim is based upon the failure to treat residents or to provide medical assistance for residents

261. See, e.g., VerdictSearch, Summary, *Lowe v. Summit Care-Tex., Inc.*, No. 2000-C1-18008 (Tex. Dist. Ct. 2004) (reporting a settlement of \$3.85 million in a negligent supervision case where the facility failed to follow medical orders to reposition an elderly female resident, leading to the patient suffering from severe bed sores, malnourishment, and dehydration).

who were malnourished, dehydrated, or developing sepsis while lying in feces and urine. In one typical case, an elderly terminal cancer patient was not bathed for nineteen consecutive days.²⁶² When she fell, injuring her shoulder, the facility ignored the symptoms and treated her only with pain killers.²⁶³

In a Texas case, a nursing home patient developed an infection in his penis from a faulty catheterization that caused the necrotizing of penile tissue and sepsis.²⁶⁴ The patient had been under the care of a physician at the nursing home, and the infection caused by negligent catheterization led to his death.²⁶⁵ The defendant disputed the causal connection between the medical malpractice and the resident's death.²⁶⁶

2. INTENTIONAL TORTS AGAINST ELDERLY RESIDENTS

As Table Ten reveals, one in ten residents were raped, beaten, or physically abused in their long-term care facilities. Many of the victims of extreme abuse were female, though there were also examples of male patients being sodomized or otherwise sexually abused by nursing home personnel or coresidents. Nursing homes are a perfect venue for committing aggravated assault and other crimes against residents because these facilities are total institutions where residents are cut off from the larger society. In addition, many residents suffer from cognitive impairments or are otherwise unable to speak out against mistreatment.

In a Texas case, at least one witness testified that she saw a nurses' aide physically and mentally abuse a blind Hispanic woman in a San Antonio nursing home.²⁶⁷ The woman suffered a hip fracture when she fell after being left alone on a toilet.²⁶⁸ The assault claim against the nurse and the facility was based on evidence that the nursing home employee handled her roughly, taunted her verbally, and

262. VerdictSearch, Summary, *Barger v. Sensitive Care Briarwood*, No. 95-14545 (Tex. Dist. Ct. 1999) (reporting a jury verdict of \$201,897 that was reduced by a mediator after the judgment to an undisclosed amount).

263. *Id.*

264. VerdictSearch, Summary, *Lipp v. Living Ctrs. of Am., Inc.*, Case information unknown (Tex. Prob. Ct. June 26, 1995) (reporting a wrongful death survival action after a resident suffered an infection that led to his death).

265. *Id.*

266. *Id.*

267. *Cortez v. HCCI-San Antonio, Inc.*, 131 S.W.3d 113, 121 (Tex. App. 2004).

268. *Id.*

maliciously placed her call light out of reach.²⁶⁹ Many such cases of physical abuse in small residential facilities go unreported because the victims are often isolated and unable or reluctant to complain.²⁷⁰

Two other cases from Texas provide examples of victimization at the hands of nursing home employees. In *Gibson v. Appleton City Manor, LLC*,²⁷¹ a ninety-four-year-old bedridden patient was pushed off her bed by another resident, broke her leg, and subsequently developed gangrene that required an above-the-knee amputation.²⁷² The basis of the claim was that the facility was negligent in its duty to protect the plaintiff.²⁷³ In *Alexander v. La Vernia Nursing Facility*,²⁷⁴ an unlicensed and unsupervised sixteen-year-old intern employed as a nurses' aide at a nursing facility was charged with sexually assaulting an eighty-two-year-old female Alzheimer's patient who was unable to communicate and was physically incapacitated.²⁷⁵ A number of other sexual abuse cases reveal a pattern of inadequate screening and supervision of nursing home employees.²⁷⁶

3. NEGLIGENT NURSING HOME SUPERVISION

Table Ten reveals that 42% of the nursing home cases arose out of negligent supervision, which is often a by-product of understaffed facilities. A Beverly Enterprises facility, for example, left a seventy-nine-year-old woman outside in 100-degree sunlight for several hours, resulting in such severe burns that doctors amputated her left foot, and she ultimately died of complications resulting from the injuries.²⁷⁷ Another example comes from Arizona, where a jury awarded \$45.5 million to the estate of a severely disabled nursing home resident who

269. *Id.*

270. Nancy Weaver Teichert, *Care Home Deaths Raise Alarm in California*, SACRAMENTO BEE, Dec. 6, 2004.

271. VerdictSearch, Summary, *Gibson v. Appleton City Manor, LLC*, No. CV398-217CC (Tex. Dist. Ct. Feb. 15, 1999).

272. *Id.*

273. *Id.*

274. VerdictSearch, Summary, *Alexander v. LaVernia Nursing Facility*, No. GN002471 (Tex. Dist. Ct. Sept. 28, 2000).

275. *Id.*

276. *See, e.g.*, VerdictSearch, Summary, *Fough v. Texas Health Enters., Inc.*, 1998 WL 2023198 (Tex. Dist. Ct. 1998 Mar. 30, 1998).

277. Press Release, Business Wire, Reinecke & Daily to Pursue Punitive Damages Against Beverly Enterprises, Inc., June 13, 2003 (describing a lawsuit arising out of a "Laguna Hills rehabilitation facility's treatment of a 79-year-old woman who was left outside in 100-degree sun for several hours" and suffered severe burns resulting in an amputation injury and complications leading to her death).

drowned in a bathtub after being left unattended by a negligent caretaker.²⁷⁸

Elderly nursing home residents are at great risk of falling or being dropped, with 1.6 million seniors being treated for falls in U.S. emergency rooms in a single year.²⁷⁹ Injuries from falls are a particular concern for elderly nursing home patients because of their frail conditions.²⁸⁰ Research confirms that “[f]alls increase exponentially with age. More than one-third of adults sixty-five years and older will fall this year.”²⁸¹ Falls cause 95% of hip fractures among older Americans, and 20% of these injuries lead to death.²⁸² Thirty-one percent of the nursing home residents in the sample were injured by falls while in nursing home facilities.

Frail nursing home patients have frequently died after falling or being dropped. A female resident died when a nurses’ aide dropped her while she was being transferred from her wheelchair to a bed.²⁸³ Understaffing at the nursing home was a causal factor in the accident.²⁸⁴ The jury awarded \$500,000 in punitive damages, but the award was reduced to comply with Texas’s tort reform cap of \$250,000.²⁸⁵ The appeals court held the trial court in error for admitting into evidence 800 prior incidents of falls in the nursing home absent proof that these incidents were substantially similar to the plaintiff’s fall.²⁸⁶

Nursing homes were also frequently sued for failing to prevent dementia patients from wandering off the premises and then drowning, freezing to death, or being killed by cars while crossing busy highways. A Texas nursing home, for example, was found liable for negligence after a patient escaped and was struck by a vehicle on a

278. VerdictSearch, Summary, *Solomon v. Dev. Sys., Inc.*, No. PB2002-000496, 2004 WL 3094060 (Ariz. Super. Dec. 1, 2004) (awarding \$45.5 million to the estate of a drowning victim).

279. JAMES T. O’REILLY, *THE LAWYER’S GUIDE TO ELDER INJURY AND ACCIDENT COMPENSATION* 9 (2d ed. 2004). Elders are also statistically more likely to be involved in vision-related and attention-related accidents. *See id.* at 3.

280. *See generally* Julie A. Braun & Elizabeth A. Capezuti, *The Legal and Medical Aspects of Physical Restraints and Bed Siderails and Their Relationship to Falls and Fall-Related Injuries in Nursing Homes*, 4 DEPAUL J. HEALTH CARE L. 1 (2000).

281. O’REILLY, *supra* note 279, at 113.

282. *Id.* at 114.

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.*

roadway.²⁸⁷ The nursing home failed to obey a doctor's order to keep the plaintiff restrained in order to prevent the resident from wandering off, which is exactly what occurred in this case.²⁸⁸

4. EXTREME NEGLECT OR ABANDONMENT OF RESIDENTS

Federal regulations require that nursing homes "provide the necessary care and services to attain the highest practicable physical, mental, and psychosocial well-being."²⁸⁹ Too many long-term care facilities missed this standard by a wide margin. Table Ten reveals that more than a quarter of nursing home cases in the three jurisdictional study arose out of extreme neglect of the statutorily mandated standard of care. Nursing home neglect may be broadly defined as the failure of the facility to fulfill its obligation to provide adequate food, clothing, medicine, or medical care. In many of the nursing home cases, the primary injury is a decubitus ulcer, an amputation injury, or a fall caused by a lack of supervision. In a California case, for example, an elderly nursing home resident was completely dependent on his caretakers and used a tracheostomy tube to breathe and a nasogastric feeding tube to eat.²⁹⁰ The lawsuit arose out of the nursing home's neglect, which resulted in the resident developing pressure sores, a severe infection, and maggot infestations.²⁹¹

In another nursing home case, the facility's neglect led to an elderly resident developing four stage IV decubitus ulcers and one stage III decubitus ulcer.²⁹² The plaintiff had a preexisting wound on her chest that was not properly treated and thus became infested with maggots.²⁹³ "When questioned about this occurrence, the nursing home said that the maggots were prescribed by a physician even though there is no medical document indicating that maggots were a prescribed part of this resident's treatment."²⁹⁴ It was private attorney

287. VerdictSearch, Summary, *Estate of Porter v. CF & H Corp.*, No. 98-0474-H (Tex. Dist. Ct. 2000).

288. *Id.*

289. 42 C.F.R. § 483.25 (2005).

290. VerdictSearch, Summary, *Perry v. Sun Healthcare Group, Inc.*, No. KC037190, 2002 WL 32122460 (Cal. Super. Ct. 2002 Nov. 4, 2002) (reporting that the plaintiffs' expert "testified regarding the age and genesis of the maggots" infesting the elderly nursing home resident's wounds).

291. *Id.*

292. BeasleyAllen.com, Nursing Home Litigation Cases, http://www.beasleyallen.com/casednursing_home_cases.htm.

293. *Id.*

294. *Id.*

generals,²⁹⁵ not government regulators, who uncovered neglect and abuse in these nursing home cases.²⁹⁶

Understaffing and neglect are widespread and may be facilitated by Medicaid reimbursement formulas that do not reimburse providers for treating stage I decubitus ulcers but permit recoupment for severe pressure sores. In a Texas case, the trial attorneys discovered “excerpts from internal memos and the company manual pointing out that there would be no Medicaid reimbursement for stage I pressure sores, but that there would be reimbursement for sores at worse stages.”²⁹⁷ The attorneys also uncovered a Horizon-CMS Healthcare Corporation operations guide that advised its personnel, “[i]t is in our interest to have residents at the higher levels of care if appropriate payment levels are applicable.”²⁹⁸ In that case, the nursing home facility permitted the resident’s condition to worsen until she had stage III pressure sores, where the skin had rotted away to the fat and muscle.²⁹⁹ Five of the pressure sores progressed to “stage IV, where the skin has rotted away, exposing ligaments, joints and bone.”³⁰⁰

295. Judge Jerome Frank used the term “private attorney general” to refer to “any person, official or not,” who brought a proceeding “even if the sole purpose is to vindicate the public interest. Such persons, so authorized, are, so to speak, private attorney generals.” *Assoc. Indus. of N.Y. State, Inc. v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943).

296. See, e.g., VerdictSearch, Summary, *Darblay v. W. Med. Enters., Inc.*, No. 129413 (Cal. Super. Ct. Oct. 24, 1984) (awarding \$750,000 including punitive damages against a nursing home that violated many statutory standards and whose understaffing left patients alone “lying in their own feces and urine for up to eight hours”); VerdictSearch, Summary, *Fohr v. G.J.S. Holdings, Inc.*, No. 02-1912-03 (Fla. Cir. Ct. July 28, 2003) (reporting a case of extreme neglect resulting in sepsis from Type IV decubitus ulcers); VerdictSearch, Summary, *Rivera v. Brentwood Place Three*, No. 00-6777, 2002 WL 31023398 (Tex. Dist. Ct. Apr. 26, 2002) (awarding a \$2.3 million verdict including \$2 million in punitive damages in a Texas nursing home case litigated under an elder abuse statute); VerdictSearch, Summary, *Rhodes ex rel. Sellers v. Sensitive Care, Inc.*, No. F: 98:05120 (Tex. Dist. Ct. Oct. 5, 1998) (reporting extreme malnutrition and dehydration that made a nursing home resident look like a concentration camp victim); VerdictSearch, Summary, *Bruzga v. 3927 Found. Inc.*, No. B: 98:05707, 1998 WL 2022768 (Tex. Dist. Ct. Sept. 7, 1998) (reporting a settlement in a case where “a 69-year-old female diabetic suffered a left leg amputation[,] . . . a fracture of the left hip, and pressure ulcers”); see also Tamar Lewin, *Jury Finds Nursing Home Liable for Routine Neglect*, N.Y. TIMES, July 12, 1990, at A1 (reporting a \$250,000 punitive damage award for negligent supervision); Rustad, *supra* note 260, at 677–78.

297. *Mock Trials, Major Verdict: Attorneys Prep for Nursing Home Case with Warm-Up Trials, Win \$312 Million*, NAT’L L.J., Feb. 4, 2002, at C17.

298. *Id.*

299. *Id.*

300. *Id.*

The key to a \$312.71 million verdict against a corporate nursing home was that the facility was intentionally “understaffed, undersupervised and undersupplied,” which caused the resident’s death from pressure sores.³⁰¹ In that case, the elderly female resident “was malnourished and suffered from [sixteen] bed sores that rotted her skin away to the fat and muscle, in some cases exposing joints and bone.”³⁰²

Grossly inadequate staffing of a nursing home led to punitive damages in *Darblay v. Western Medical Enterprises, Inc.*³⁰³ In *Darblay*, an eighty-one-year-old woman fractured her hip and suffered other injuries caused by extreme neglect.³⁰⁴ Punitive damages were premised upon numerous health and safety violations in the nursing home:

Citations issued to Western as far back as 1977 include references to exactly the same type of conduct which caused plaintiff’s injuries in this case: inadequate nursing staff, failure to answer call buttons, failure to maintain an audible call button system at the nurses’ stations, failure to attend to patients in a timely manner, and failure to maintain safe premises.³⁰⁵

In *Jones v. Clearwater Convalescent Center, Inc.*,³⁰⁶ a nursing home failed to turn and reposition a sixty-nine-year-old woman in a diabetic coma who had sustained a fractured hip, causing her to develop infected bed sores that required amputation of her leg.³⁰⁷ In *Hamilton v. First Healthcare Corp.*,³⁰⁸ a nursing home was assessed approximately

301. Elizabeth Amon, *Your Honor, About Those Missing Boxes of Records*, NAT’L L.J., Mar. 19, 2001, at A6.

302. *Id.*

303. *Darblay v. W. Med. Enters., Inc.*, No. 129413 (Cal. Super. Ct. Oct. 22, 1984).

304. Thomas Koenig & Michael Rustad, *His and Her Tort Reform: Gender Injustice in Disguise*, 70 WASH. L. REV. 1, 76 (1995) (quoting *Darblay*, No. 129413).

305. *Id.*

306. *Jones v. Clearwater Convalescent Ctr., Inc.*, No. 91-7612-5 (Fla. Cir. Ct. Feb. 1993).

307. *Id.* (awarding \$300,000 in punitive damages in a case where the plaintiff suffered “physical and mental harm including the fracture of the left hip, and pressure ulcers including a sacral ulcer which was related to the loss of her left leg below the knee through amputation” during her stay at a nursing home).

308. *Hamilton v. First Healthcare Corp.*, No. CL97-1621 (Fla. Cir. Ct. Feb. 10, 1998); see also VerdictSearch, Summary, *Smith v. Health Facilities Mgmt. Corp.*, No. CV 02-1871 (Ark. Cir. Ct. Apr. 16, 2004) (failure to strap an incapacitated patient into her wheel chair while being transported in a van caused her to fall out of the chair, breaking her ankle and sustaining significant bruising to her face); *Beaulieu v. Coos Cty. Nursing Hosp.*, No. 90-C-92 (N.H. Dist. Ct. May 22, 1992) (failure to supervise an Alzheimer’s patient who ingested cleaning fluid that caused his death).

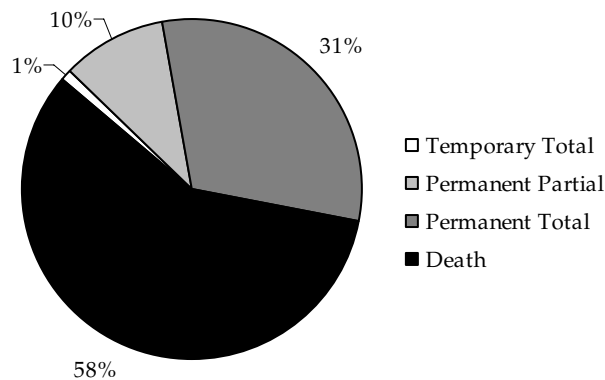
\$6 million in a wandering-off case where an elderly man known to be suffering from dementia left the facility and drowned.³⁰⁹

The aggravated misconduct in these cases led to the residents suffering severe injury or, in many cases, death. As Table Eleven demonstrates, 89% of the claimants suffered permanent disability leading to death or died directly from nursing home neglect, abuse, or mistreatment.

Table Eleven

Level of Injury

Nursing Home Litigants



California, Florida, and Texas
1990–2004
(N = 186)

Conclusion

Congress should consider the empirical reality of nursing home neglect cases before imposing arbitrary caps on noneconomic damages. In Texas, for example, a \$250,000 cap on noneconomic damages has all but eliminated nursing home lawsuits. Capping noneconomic damages means that the victims of nursing home negligence, abuse, or mistreatment cannot find attorneys willing to represent them. The real victims of caps on noneconomic damages are our most vulnerable citizens, our mothers and grandmothers who are victimized by profit-

309. *Id.*

driven corporate nursing home chains. Placing arbitrary limitations on noneconomic damages in the form of caps is a radical departure from the well-established principle that where there is a right, there must be a remedy.

An American Health Care Association Commission report described how nursing home litigation began in a handful of states and spread like a brushfire “to a multitude of regions throughout the country.”³¹⁰ But the real brushfire is the quiet revolution of caps on noneconomic and punitive damages that is altering the legal environment in favor of the nursing home industry. Arbitrary caps on noneconomic damages will mean that elderly nursing home victims of physical and sexual assault or extreme neglect will be deprived of the legal representation necessary to obtain redress for their injuries and violations of their rights.

310. ACTUARIAL ANALYSIS, *supra* note 59, at 18.