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New Remedies for Elder Abuse and Neglect

By Seymour Moskowitz

Abuse and neglect of the elderly present a profound paradox. Most people envision their later years filled with caring and supportive family, financial security and useful, fulfilling activity. They tend to remember a past when mistreatment of the aged was not a national issue. Yet a vast body of evidence indicates that a shocking percentage of society's senior citizens are mistreated—abused by family or institutional caregivers or neglected in their basic needs. Although precise statistics are impossible to obtain, generally accepted estimates place the number of abused or neglected elderly in the United States at 2 million per year.

The mistreatment may take many forms:

- Physical abuse: violent conduct resulting in pain or bodily injury (e.g., battery, improper use of restraints and molesting).

- Psychological abuse: behavior that induces significant mental anguish (e.g., threats, harassment), causing depression, nervous system disorders, physical illness and, in extreme cases, suicide.

- Financial abuse or exploitation: theft or conversion of property by the elder's relatives, caregivers or others.

- Neglect: failure to fulfill a caretaking obligation necessary to maintain the elder's physical and mental well-being. Neglect may be intentional or negligent, resulting from the caretaker's own infirmity or ignorance.

This article presents background information on elder abuse and neglect, outlines its legal context and discusses the critical role lawyers can play in dealing with this important issue. Although criminal law has been the traditional legal tool to combat elder abuse, this article suggests using civil damages as an alternate means of

ameliorating elder mistreatment. Common law and statutory remedies, used by lawyers in civil practice, can become significant new weapons in responding to this ubiquitous problem.

The 'Discovery' of Elder Mistreatment

In the past 30 years, the popular image of an idealized and peaceful American family has been shattered. In 1962, in a pioneering article, C. Henry Kempe and his colleagues called the medical community's attention to the problem of physical child abuse, coining the term "battered child syndrome." 181 J. Am. Med. Ass'n 17-24 (1962). Within a few years, volumes of research on child abuse surfaced. All 50 states enacted legislation requiring professionals—including doctors, nurses and social workers—to report suspected child

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abuse and providing protective services for children. In the 1970s a broad-based movement against spousal abuse and violence against women arose as a result of both public and professional attention.

Elder abuse, by contrast, received attention much later. Some early studies in the 1970s in Great Britain highlighted "granny bashing." By the early 1980s several American studies demonstrated that elder abuse was a serious problem in the United States as well. Although several congressional committees have focused attention on the issue, Congress has failed to respond.

As a result, leadership and responsibility fell to the states. Before 1981 only 16 states had statutes addressing adult abuse, and these laws were not age specific. By 1986, however, all states had enacted some type of legislation that typically included elder abuse within the jurisdiction of "Adult Protective Services," a system of preventive and supportive services for the elderly living in the community. The laws of most states also require reports of suspected elder abuse and make failure to report a criminal offense.

Older Population Growth

Persons over age 65 are the fastest growing segment of America's population. Older Americans constituted 4% of the total population in 1900; in 1994 they were nearly 12.5% of the total population at 35.2 million. This number will increase to more than 40.1 million, or almost 13.3% of America's total population, by 2010. By the year 2050, almost 25% of all Americans will be over age 65.

The nation's nursing home population has also dramatically increased, expanding 24.2% from 1980 to 1990. Of the 1.9 million Americans living in nursing homes in 1990, 1.6 million were over age 65. The majority of nursing home residents were women

(1.3 million), and 66.7% of these women were over age 80.

Prevalence of Elder Abuse

Although precise statistics are not available, elder abuse affects a very large number of older persons. In 1981 Congress estimated that 4% of the American elderly population, approximately 1 million people, may have been victims of moderate to severe abuse. A decade later, a follow-up congressional report, aptly titled *Elder Abuse: A Decade of Shame and Inaction*, determined that the situation had worsened. House Select Comm. on Aging, 101st Cong., 2nd Sess. (1990).

The report noted that elder abuse was increasing and 5% of the elderly, or more than 1.5 million elderly persons, suffered abuse yearly. The 1990 report also concluded that elder abuse is far less likely to be reported than child abuse, estimating that only 1 of 8 cases of elder abuse, as compared with 1 of 3 cases of child abuse, is reported to the authorities. The National Center on Elder Abuse (NCEA) estimated almost 2 million reportable cases of mistreatment occurred in 1994 in domestic settings alone. Academic researchers have made similar estimates. Moreover, some evidence indicates that mistreatment in institutions, such as nursing homes, is a serious problem. One recent study found that 40% of nursing home staff admitted committing at least one psychologically abusive act toward a resident in the preceding year and 10% admitted physically abusing residents. Karl Pillemer and David W. Moore, *Abuse of Patients in Nursing Homes*, 29 *Gerontologist* 314 (1989).

Victim Characteristics, Risk Factors and Perpetrators

The abused elder often suffers from a range of physical and mental impairments. The victim, who often lives with the abuser, typically is

socially isolated and without any support network, causing the abuse to be hidden from scrutiny. NCEA statistics indicate adult children most frequently abuse the elderly (36.7% of cases in 1994). Other family members (15% of cases in 1994) and spouses (14% of cases in 1994) also make up large segments of the total cases. The NCEA reported specific types of domestic elder maltreatment in 1994 as follows: physical abuse, 15.7%; sexual abuse, 0.5%; emotional abuse/neglect, 7.3%; neglect, 58.5%; financial/material exploitation, 12.3%; all other types, 5.1%; unknown, 0.6%. In 1994, 65.4% of the victims of domestic elder abuse were white, 21.4% were black and 9.6% were Hispanic.

Reporting Suspected Mistreatment

Mandatory reporting of suspected abuse and neglect has been a significant legislative response to the problem of mistreatment of the elderly. Presently, 42 states and the District of Columbia have statutes requiring reporting. These laws require various groups (typically professionals such as doctors, nurses, psychologists and social workers) to report known and suspected incidents to prescribed public officials. Eight states—Colorado, Illinois, New Jersey, New York, North Dakota, Pennsylvania, South Dakota and Wisconsin—make reporting voluntary.

Most statutes require a state agency to conduct an investigation, including a visit to the allegedly abused elder, after it receives a report of abuse. State laws typically grant immunity from liability for making a report to persons obliged to report, and almost all states guarantee the reporter anonymity. The required content of the report typically includes names and addresses of the abused elderly citizen, the reporter, the alleged abuser, information relating to the nature and extent of the harm, the basis of the reporter's knowledge and similar information.

Health and social workers are often the first professionals who confront cases of suspected elder mistreatment, yet many studies indicate that they rarely report it. Many physicians report that the fear of court appearances, possible anger of the abuser and potential loss of confidentiality deter them from reporting. It is unlikely that social workers, nurses, psychologists or others with a duty to report comply at a rate higher than physicians.

Identification of Elder Mistreatment

The shocking statistics of elder mistreatment should alert professionals to the need to assess clients for possible abuse and neglect. This requires sensitivity to the sometimes subtle indications of abuse as well as general knowledge and orientation to the problem. Professionals in family service agencies, hospital emergency departments, primary care clinics and other institutions that serve the elderly must be able to recognize the signs and symptoms of various forms of elder mistreatment. If these professionals do not make adequate assessments, ask proper questions or investigate, cases will be undetected. This will often result in additional injury to the elderly patient or client because elder abuse, like spouse and child abuse, follows cyclical patterns and the victim is likely to experience repeated abuse.

Hospitals and medical professionals clearly have a role in identifying and preventing elder abuse, but lawyers also have an important role. Some states include lawyers within the class of mandated reporters. Lawyers should inform older clients that they have fundamental rights to privacy, autonomy, asset control and freedom from abuse. Recent statutes and decisions have stressed the client's right to control medical and personal decision making. In addition, lawyers working with or on behalf of elderly clients should be cautious not to unwittingly facilitate

financial abuse by drafting instruments for execution by incompetent individuals or by failing to advise older people of the consequences of legal action. Certain situations will require independent counsel for the elderly client.

Potential Legal Consequences

State laws typically make the failure to report suspected elder mistreatment to public authorities a criminal offense. Most states make these omissions a misdemeanor, but sanctions are often minor or unspecified. Statutes often require a mental state of willfulness to prove a violation. Criminal enforcement of these reporting laws is almost nonexistent for a wide variety of reasons. Few actual cases of prosecution against doctors, nurses or other professionals exist. A computer search of published decisions in all states between 1994 and 1997 yielded only one prosecution based on these statutes, and even that case did not directly involve a failure to report.

Civil Liability for Failure to Assess, Treat and Report

In addition to criminal enforcement, lawyers can use mandatory reporting laws in civil actions. Tort suits for damages against professionals who fail to diagnose and report elder mistreatment can help compensate victims and change behavior of professionals. Elder abuse statutes typically require only "reasonable suspicion" or "reasonable belief" that abuse has occurred, not definitive proof. A few states explicitly provide civil liability for failure to report. When statutes are silent on civil liability, a malpractice claim may allow recovery. A professional's failure to diagnose obvious mistreatment or failure to report suspected physical abuse or neglect could constitute professional negligence, especially if the mistreatment is repeated with resulting injury. The standard of care in such suits may be based on protocols and assessment instruments. Expert testimony may

also guide the judge or jury on the appropriate standard of care.

Abused or neglected individuals are often physically and emotionally powerless to defend themselves. The at-risk elder is in the class of persons legislatures intended to protect with reporting statutes. These statutes should become the standard for determining legal duty in tort actions. The defendant professional may defend on grounds that he or she did not actually cause the injury. The response, in cases of reasonable suspicions of abuse or indications that abuse may be present, is that the actions of the abuser were reasonably foreseeable and thus do not break the causal chain. Elder abuse is usually not an isolated, atypical event but often part of a pattern of repeated mistreatment that will continue and become more severe unless there is appropriate medical, social or legal intervention.

The landmark case imposing civil liability for later injuries suffered as a result of a professional's failure to report abuse is *Landeros v. Flood*, 551 P.2d 389 (Cal. 1976). In *Landeros*, a child's parents had beaten her repeatedly and took her to a hospital for treatment. The defendant physician examined the child and discovered several fractures. The court noted that the nature of these injuries should have aroused the physician's suspicions, and the mother was unable to explain the injuries. The physician had not ordered additional tests, had not diagnosed "battered child syndrome" and had not reported possible abuse to state authorities. After the hospital released the child to her parents, they beat her again, causing traumatic injuries. The child's guardian ad litem brought a medical malpractice action against the physician and the hospital. The court held that the physician could be liable for the child's later injuries because he should reasonably have known that the parents would continue to abuse her. It found that the physician's inaction proximately caused the child's subsequent beating and injury, even though her parents physically caused the injury.

A few other courts have followed in *Landeros* and allowed civil causes of action for failure to report suspected child abuse. Other courts have declined to recognize such an action. Those refusing to provide relief have used reasoning similar to *Fischer v. Metcalf*, 543 So. 2d 785 (Fla. Ct. App. 1989), in which the court held that because the common law recognized no cause of action for failing to report child abuse and because the Florida legislature did not specifically provide for a cause of action, none existed under Florida law.

In those jurisdictions that allow civil suits in the child abuse context, the reasoning in *Landeros* can be applied to cases of unreported elder abuse or neglect. Much elder abuse is cyclical, making repeated mistreatment and increased injuries reasonably foreseeable. The potential defendants in cases of failure to diagnose, treat or report include licensed professionals such as physicians, nurses and social workers, who may be statutorily required to report elder abuse. Their employers—hospitals, nursing homes and community agencies—may also be liable under vicarious liability theories.

License Sanctions

All members of licensed professions are subject to some form of disciplinary control. Administrative actions against individuals who fail to diagnose and treat elder abuse can rapidly change behavior in the profession. Some jurisdictions make the failure to file any report required by law grounds for revocation of professional licenses. This provision would apply to mandated reports of elder abuse or neglect. The vast majority of states allow an agency to revoke a medical license if a physician violates a law related to the practice of medicine or engages in unprofessional conduct. Although professionals may purchase malpractice insurance, suspension or revocation of a license threatens their livelihood and standing in the profession. Public licensing boards should be

more aggressive in ensuring that professionals are complying with the law, and lawyers can be the advocates in that process.

Statutorily Imposed Liability

A few states (Michigan, Minnesota, Iowa and Arkansas) have explicitly created a civil cause of action for damages against persons who intentionally or negligently fail to report elder abuse or neglect. These statutes express a public policy that professionals who violate reporting requirements should be monetarily liable for the resulting damages. Successful lawsuits based on these statutes would encourage the reporting of elder abuse.

Legal Actions Against Perpetrators

After mistreatment has occurred, lawyers may employ a variety of legal

tools, both traditional and novel, to deal with the perpetrators of elder mistreatment.

Tort Law

In appropriate cases, civil damage suits may effectively punish and even deter elder abuse. Each of the various forms of mistreatment corresponds to traditional legal actions: physical abuse is battery; financial exploitation may be conversion or fraud. Injury, financial loss or death while the victim is in an institution such as a nursing home could result in a lawsuit based on federal statutes, malpractice and other legal theories.

Nevertheless, litigation has been infrequent for a variety of understandable reasons.

- Older persons simply do not file many lawsuits.
- Mistreated elders may fear retaliation by caregivers or facilities.

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- Memory or communication problems sometimes make the elderly poor witnesses or advocates for themselves.

- The litigation process, involving interviews in unfamiliar surroundings and testimony in court, is often uncomfortable or even traumatic.

- The mistreated elderly often fear that loss of the caregiver will worsen the situation and lead to their institutionalization.

Lawyers are wary of cases without fee potential. Acknowledging the foregoing limitations, the civil

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legal process may be important in deterring and remedying elder mistreatment. Tort remedies can be significant. New statutes offer enhanced damage possibilities, attorney's fees and other special incentives for law suits based on elder mistreatment.

Criminal Prosecution

The criminal justice system provides numerous possibilities for dealing with elder abuse. The state can prosecute physical abuse as assault or battery. Financial exploitation is typically theft, extortion or some other crime. Many states provide that crimes against the elderly carry enhanced penalties. The prevalence of elder mistreatment clearly warrants more vigorous police and prosecutorial activity.

New Statutory Remedies

The law in many states does not adequately address mistreatment suffered by the elderly. Many victims are unable to obtain a lawyer, even when the abuse is obvious and shocking. Because of the slow pace of litigation, many of the frail elderly do not survive long enough for a lawsuit to come to judgment. In some states the death of the abused elder person cuts off recovery for pain, suffering or disfigurement. Problems of proof are another disincentive. In many instances of financial abuse, the misappropriated property may represent the elder's life savings but still amount to a relatively small sum in comparison to attorney's fees and other litigation costs.

Recognizing the need for new statutory remedies, several states have become "laboratories" to test new remedies. In 1992 California enacted the Elder Abuse Civil Protection Act to help victims engage lawyers to take their cases. Cal. Welf. & Inst. Code §§ 15657-15657.3. The statute creates new remedies when a plaintiff proves by clear and convincing evidence that the defendant is culpable of

recklessness, oppression, fraud or malice in the commission of abuse of the elderly. These remedies include postmortem recovery for pain and suffering and mandatory attorney's fees and costs. The act allows fees for the services of a conservator litigating an elder's claim and continuation of a pending action by the elder's personal representative or successor.

Another innovative statute is Illinois' recent Financial Exploitation of the Elderly and Disabled Act, which provides for criminal penalties as well as treble damages and attorney's fees for a civil judgment for conversion of a senior citizen's property by threat or deception. Ill. Ann. Stat. ch. 320, para. 720 5/16-13. These enhanced remedies are available regardless of the outcome of a criminal case. Statutes such as this make civil suits against the financial exploiter more feasible, and even attractive, for lawyers.

All states now have domestic violence laws designed to protect victims of abuse. Typically used in spousal abuse cases, these statutes may provide a judicial "protection order" for elders threatened with harm. Although the details of these statutes vary, the use of a protection order will often spark police involvement and bring the case to the attention of social service agencies.

Conclusion

Elder mistreatment affects millions of persons and families but lurks in the shadows of society. Prior legal responses to this problem have been ineffective. The legal system, both common law and statutory, should play an important role in meeting this pervasive yet hidden problem.

Seymour Moskowitz is a professor of law at Valparaiso University in Valparaiso, Indiana. A list of laws protecting elders and mandating reporting of elder mistreatment may be obtained from the author at (219) 465-7858.