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From the Editor

Alison McChrystal Barnes

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Forgive me if I reminisce for a paragraph or so. Elder lawyers are used to that, aren't you? About this time last year, it seemed as though we at *Elder's Advisor* were—like Alice's Red Queen—running very hard to stay in one place. Four of us at Marquette Law School and two at the Aspen Publishing offices in New York had been working for more than eight months to launch this journal. The batch of articles and columns for the first issue had been vetted, formatted, cite-checked, spell-checked, and dispatched to the printer so eventually someone besides us would be able to read them. The race was on to fill the second issue. But, there was no journal to show prospective authors or subscribers, no reassuring blue volume in hand, to show what *Elder's Advisor* could be.

That was then, so now is a moment to savor. We have published more than fifty authors from all parts of the country who work with older people, including lawyers, doctors, nurses, pharmacists, social workers, and financial planners. The five issues weigh about as much as a healthy newborn, and we know from where the next two issues are coming. The range and depth of the subjects presented by incoming authors seems to grow with each publication. In addition, a growing number of last year's authors have new manuscripts for us on year 2000 issues.

This Volume 2, No. 2 illustrates some of the best of the year's progress. We are delighted to present our first guest-edited issue. Our editors: Julie Braun, attorney and elder law consultant who has published in *Elder's Advisor* on grandparents' rights; and Jane Rupprecht Mulcahy, our alumna and first executive editor, who now pursues a lively elder law practice herself. They appeared together on a panel on hot topics in elder law at the ABA Annual Meeting, last August in Atlanta. They have chosen a theme for their issue—long-term care litigation—and assembled an impressive range of interdisciplinary expertise on the subject.

In past years, and for many elder counselors today, seeking compensation for harm to a nursing home resident was an exercise in bad economics. That is, the structure of damages in civil actions results in such low recovery that the expense of litigation is not justified. Problems with such cases generally can arise in three areas. First, plaintiff's economic losses are small, no matter what the injury. The plaintiff has no prospect of future wages, and even if the need for medical care is greatly increased, the client's life expectancy is short enough that the total spent for

care arising from the negligence is likely to be small. Thus, future wages and medical expenses are limited. A related problem involves the already-compromised health and well-being of the client. In many instances, it is difficult to say whether the harm resulted from the caregiver's negligence or the probable deterioration of age and infirmity. And, third, if there is a tale to tell, the client/victim often cannot tell it, either because of faulty memory or extreme physical frailty. Thus, the case has problems with damages, causation, and evidence.

Nevertheless, nursing home torts and related civil litigation for elderly clients has taken a step forward in the past two years. The *National Law Journal* reports that in 1997, the largest personal injury verdicts, $92.37 million and $83 million, were in nursing home cases.[1] In *Holder v. Beverly Enterprises Inc.*,[2] for example, the jury awarded $83 million. In the California case, *Delaney v. Baker*,[3] the plaintiff won a $150,000 jury verdict plus $218,000 in attorneys fees and costs.

Cases like *Delaney*, using the California elder abuse statute, have defied constraints on damages asserted to apply under the state's professional negligence statutes.[4] The elder abuse statute includes enhanced penalties while the medical malpractice act caps awards for pain and suffering and attorneys fees. In California, the abuse statute trumps the malpractice law.

Both verdicts were reduced on appeal. Holder's award, for example, was reduced by about $30 million to $54.63 million. Nevertheless, the awards indicate that juries are unwilling to accept deterioration from bad care for frail older people who rely on their caregivers.

The issue is sharpened as nursing homes experience a new prospective payment squeeze. Beginning in July 1998, Medicare pays a nursing home at a predetermined rate for the care of a resident admitted for post–acute care. The intention of the legislation is to contain growth in the cost of post–acute care just as prospective payment has limited acute care costs.[5]

Nursing homes are pressed to issue prospective denials of Medicare coverage early in the rehabilitative process, to assure that the average post-acute stay is covered by Medicare. Many residents will be unaware that they must appeal that facility decision by requiring the nursing home to submit the bill to Medicare in order to preserve their right to administrative appeals. Rehabilitation services coverage will end, and possibly, the hope of recovery will end with it. Some residents will be unable to return to their homes, and their nursing home residency will begin prematurely.

When the nursing home stay is long, the resident's funds are depleted and Medicaid steps in. Most nursing homes accept the lower Medicaid payment when the resident entered at private pay rates. The facility must operate under tighter financial constraints and may adopt less intensive staffing levels that Medicaid payment can support. The possibility rises of substandard care from overworked, inadequately supervised aides, who cannot often enough change the sheets, reposition the bedridden resident, or supervise resident interactions.

Lawyers and other elder advocates often speak of the need to assure that nursing home care is, at the least, good enough. In the United States, the minimum standard of care is finally set by the right to sue in negligence and recover for the damage negligently caused. Punitive damages are the mark of society's censure, recognizing a type of harm that damages society, in addition to the harm to the individual plaintiff. Ironically, nursing home negligent care and abuse is one type of harm that society should control with substantial punitive damages. This issue provides a look at the technical and policy issues of redressing and punishing these wrongs.

Alison McChrystal Barnes
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Endnotes

1. *Verdicts and Settlements: Nursing Home Loses $83 M for Wrongful Death, Fraud*, NAT'L L. J., Dec. 15, 1997 at A9.
2. No. 95-437 (Dist. Ct. Rusk Co., Tex. 1997).
3. 99 Cal. Daily Op. Serv., 1637 (1997), *rev'd*, 69 Cal. Rptr. 2d 645 (1998).
4. *See Verdicts and Settlements, supra* note 1, at A9.

5. The rate is determined by the system of Resource Utilization Groups (RUG-IIIs). HCFA has stated that residents categorized in the first twenty-six of the RUG-III groups have a presumption of eligibility. Those in the other, less skilled RUG-III groups must be individually evaluated to determine eligibility for Part A coverage. *See* Toby Edelman, *Prospective Payment Rule for Skilled Nursing Facilities Transforms Medicare Eligibility for SNF Care*, 24 NAT'L SENIOR CITIZENS LAW CENTER WASH. WKLY., July 10, 1998, at 111.