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GRANDPARENT MOLESTING: SEXUAL ABUSE OF ELDERLY NURSING HOME RESIDENTS AND ITS PREVENTION

Robert A. Hawks*

INTRODUCTION

Nursing homes have become the only practical option for many aging Americans. As this nation's population ages, and the elderly live longer, more and more people will become nursing home residents. In 1998, approximately 1.6 million people lived in nursing homes.¹ This figure will grow as the baby boomer generation ages, with estimates of as many as 6.6 million residents by 2050.²

Nursing homes should be safe havens for the elderly. Many residents lack physical and cognitive abilities, and this makes them vulnerable to abuse and neglect.³ Unfortunately, nursing homes do not always live up to the ideal of safe, happy places for the elderly to live out their golden years. Abuse and neglect are very real problems throughout America's nursing homes. Between one and two million cases of elder mistreatment, of all

* Robert A. Hawks graduates from Marquette University Law School in May 2007. The author dedicates this article to the memory of John Mickal.

1. Kevin B. Dreher, Note, *Enforcement of Standards of Care in the Long-Term Care Industry: How Far Have We Come and Where Do We Go from Here?*, 10 ELDER L.J. 119, 122 (2002).

2. National Center on Elder Abuse (NCEA), U.S. House of Representatives, Committee on Government Reform-Minority Office, *Nursing Home Abuse*, <http://www.elderabusecenter.org/default.cfm?p=nursinghomeabuse.cfm>. (last visited Oct. 4, 2006).

3. See *infra* notes 63-68 and accompanying text.

types, occur each year.⁴

Sexual abuse is among the most heinous abuses committed against nursing home residents. It also is the least detected, least reported, and least acknowledged type of abuse. However, thousands of elder Americans suffer from sexual abuse every year.⁵

This article evaluates the problem of elder sexual abuse in nursing homes and discusses various methods that have been employed to prevent it. The first section describes the problem including legal definitions, examples, the extent of sexual abuse in nursing homes, and the effects of this abuse. The second section discusses responses to elder sexual abuse, including investigating reports of abuse, providing aid and protection to victims, and prosecuting perpetrators. The third section describes various legal theories that victims use to recover damages through the civil court system. The fourth section discusses the state and federal regulatory attempts to prevent elder sexual abuse and explains deficiencies of this regulation. The final section proposes a comprehensive strategy for preventing elder sexual abuse, which accounts for the best interests of residents, families, facilities, and caregivers.

IDENTIFYING THE PROBLEM OF ELDER SEXUAL ABUSE

Before taking action to prevent elder sexual abuse, it is necessary to understand the problem. This is especially important with elder sexual abuse because it often is undetected and unreported. Because elder sexual abuse is a hidden problem, this section also discusses various risk factors for the occurrence of abuse.

DEFINING ELDER SEXUAL ABUSE

As stated above, sexual abuse is the least detected, least

4. Dreher, *supra* note 1, at 119.

5. See *infra* notes 14-36 and accompanying text.

reported, and least acknowledged form of elder abuse. It has not been consistently defined, which results in skewed data making it difficult to understand the extent of the problem. Because elder sexual abuse definitions vary by jurisdiction, it is likely that incidents of sexual abuse are grossly underreported. Without understanding the extent of the problem, policymakers face a difficult task in determining how many resources should be devoted to its prevention.

The National Center on Elder Abuse (NCEA) defines elderly sexual abuse as “non-consensual sexual contact of any kind with an elderly person” or “[s]exual contact with any person incapable of giving consent.”⁶ This definition includes “unwanted touching, all types of sexual assault or battery, such as rape, sodomy, coerced nudity, and sexually explicit photographing.”⁷ While the NCEA limits its definition to unwanted contact, its examples of abuse include conduct that does not involve touching of the elderly person.

Other definitions of elderly sexual abuse are used in social science literature and various state laws. Some commentators have presented a broader definition including “any form of sexual conduct or exposure without consent and when the victim is incapable of giving consent.”⁸ This definition includes such things as inappropriate sexual comments and sexualized interest in another person’s body, which may result in emotional harm but not physical harm.⁹

Although language varies among the states, the NCEA definition of sexual abuse seems to be the most common definition. Wisconsin, following the NCEA definition, defines sexual abuse as forcing, tricking, threatening, or coercing a

6. NCEA, *The Basics: Major Types of Elder Abuse*, <http://www.elderabusecenter.org/default.cfm?p=basics.cfm>. (last visited Oct. 4, 2006).

7. *Id.*

8. Jennifer Hagerty Lingler, *Ethical Issues in Distinguishing Sexual Activity from Sexual Maltreatment among Women with Dementia*, 15 J. ELDER ABUSE & NEGLECT 85, 92 (2003) (quoting Bonnie Brandl & Tess Meuer, *Domestic Abuse in Later Life*, 8 ELDER L.J. 297, 301 (2000)).

9. See Lingler, *supra* note 8, at 92-93.

person into sexual contact against that person's will.¹⁰ New York, Arizona, and California also define sexual abuse as non-consensual sexual contact.¹¹ Texas, on the other hand, defines sexual abuse more broadly to include indecent exposure as well as sexual assault.¹²

Additionally, many states include sexual abuse as a form of physical abuse.¹³ As discussed below, defining sexual abuse as a form of physical abuse skews the statistics on abuse and creates difficulty in assessing the extent of the problem.

EXAMPLES OF ELDER SEXUAL ABUSE

The following cases of elder sexual abuse demonstrate the wide range of offenses perpetrated on the elderly. These cases also identify the perpetrators of this abuse, such as nursing home staff, other nursing home residents, and guests.

Examples of abuse by staff include cases where "a male nurse aide molested two elderly female residents by putting his finger in their vaginas while bathing them," and where a male staff member was found "on top of [a] resident with his pants down and the resident's legs spread."¹⁴ Rape, as in the latter

10. State of Wisconsin, Department of Health and Family Services, Division of Disability and Elder Services, Bureau of Aging and Disability Resources, *Elder Abuse: Wisconsin Report 2004*, <http://www.dhfs.state.wi.us/aging/elderabuse/2004ElderAbuseBrochure.pdf> (last visited Oct. 4, 2006) [hereinafter *Wisconsin Elder Abuse*].

11. State of New York, Office of Children & Family Services, *Definitions of Adult Abuse*, <http://www.ocfs.state.ny.us/main/psa/adultabuse.asp> (last visited Oct. 4, 2006); Mesa Community College, *Law Enforcement Response to Violence Against Women*, <http://www.mc.maricopa.edu/dept/d52/ajs/vaw/elderabuse.htm> (last visited Oct. 4, 2006) [hereinafter *Arizona Facts About Abuse*]; State of California, Department of Aging, *Long-Term Care Ombudsman Program: Elder Abuse*, http://www.aging.ca.gov/html/programs/elder_abuse.html (last visited Oct. 4, 2006).

12. State of Texas Department of Family & Protective Services Adult Protective Services, *Everyone's Business: Vulnerable Adult Abuse Prevention Campaign*, <http://www.dfps.state.tx.us/everyonesbusiness/Facts.asp> (last visited Oct. 4, 2006) [hereinafter *Texas Facts About Abuse*].

13. See, e.g., CAL. WELF. & INST. CODE § 15610.63(e) (West Supp. 2006); WIS. STAT. ANN. § 46.90(1)(a) (West Supp. 2005).

14. MINORITY STAFF, SPECIAL INVESTIGATIONS DIVISION, COMM. ON GOV'T REFORM, U.S. H.R., ABUSE OF RESIDENTS IS A MAJOR PROBLEM IN U.S. NURSING

case, is one of the worst forms of sexual abuse. A case from Louisiana demonstrates a more violent assault:

[The victim] was allegedly attacked in her room in the nursing home at approximately 3:00 in the morning. Whether from a criminal assault or from other causes, [the victim] unquestionably sustained serious and painful injuries. Bruises and a few scratches were noted on her neck, face, throat, and mouth, with a blood-letting laceration on her face. Also noted were numerous bruises, scratches, and contusions near and in the entrance to the vagina. She also sustained a tear, or laceration, of the vaginal wall extending the entire length of the vagina and into the peritoneal cavity. External as well as internal bleeding resulted; a large hematoma or blood clot formed in the abdomen from internal bleeding. Surgery was necessary to remove the hematoma, which removal also required the removal of an ovary.¹⁵

This could be a case of rape, but the injuries suffered also may indicate sexual assault with an object.

Not all sexual abuse involves physical assault of the victim. In a case from California, a male employee approached a ninety-year-old, female resident, exposed his penis and asked the resident to put it in her mouth.¹⁶ Although the victim suffered no physical harm from this abuse, she likely suffered emotional harm from the unwanted and offensive proposition.

Often the abuse is ongoing, as in a case from New Jersey in which a female resident reported that a male aide "made vulgar, sexual remarks to her while assisting her in the shower."¹⁷ She also reported that he came into her room, kissed her cheek, fondled her breasts, and "on one occasion, he exposed his genitals to her."¹⁸

Nursing home residents also can perpetrate sexual abuse.

HOMES 12 (Jul. 30, 2001), <http://www.democrats.reform.house.gov/Documents/20040830113750-34049.pdf> (last visited Oct. 4, 2006) [hereinafter *Congressional Report on Abuse*].

15. *Collier v. AMI, Inc.*, 254 So. 2d 170, 171 (La. Ct. App. 1971).

16. *Congressional Report on Abuse*, *supra* note 14, at 12.

17. *Id.*

18. *Id.*

In one case:

[A] male resident was discovered by facility staff laying on top of a female resident with his pants and underwear off, attempting to pry her legs apart. The male resident had an extensive history of inappropriate sexual contact, fondling, and propositioning of female staff and residents. Facility staff [was] aware of this resident's sexually aggressive behavior, but failed to take protective measures to prevent abuse.¹⁹

This example also demonstrates a recurring problem of nursing home staff's failure to take protective measures against abuse through inadequate staffing and lack of training in abuse detection and prevention.²⁰

KNOWN EXTENT OF ELDER SEXUAL ABUSE

Assessing the extent of sexual abuse in nursing homes requires an understanding of nursing home abuse in general. Between 1999 and 2001, almost one in three nursing homes (5283 facilities) were cited for abuse violations, and over 2500 of the 9000 total violations caused actual harm to the residents or placed them in danger of death or serious injury.²¹ Actual harm to the residents resulted in ten percent of those nursing homes cited.²² The number of abuse violations has nearly tripled since 1996, and, unfortunately, it is expected to continue to grow.²³

A study of data maintained by the Health Care Finance Administration (HCFA), now Centers for Medicare and Medicaid Services (CMS), from 1999 to 2001 showed the most

19. *Id.* at 13. In another case, a male resident repeatedly harassed female residents by touching their breasts and genital areas. *Id.*

20. See Pamela B. Teaster & Karen A. Roberto, *Sexual Abuse of Older Adults: APS Cases and Outcomes*, 44 THE GERONTOLOGIST 788, 794 (2004) [hereinafter *Sexual Abuse of Older Adults*]. Adult Protective Services (APS) is the primary public agency for investigating potential abuse in nearly forty states. *Id.* at 788.

21. *Congressional Report on Abuse, supra* note 14, at i. Actual harm is defined as physical injury to the victim. *Id.*

22. *Id.*

23. *Id.* at 6. Some of the increase in violations likely is due to increased enforcement by inspectors and better reporting of violations. *Id.* However, it is possible that at least some of the increase results from an increase in abuse. *Id.* at 7.

frequent abuse violation by nursing homes (3797 facilities) was “the failure to properly investigate and report allegations of resident abuse, neglect, or mistreatment or to ensure that nursing home staff do not have a documented history” of abuse.²⁴ The second most frequent violation (2314 facilities) was the “failure to develop and implement written policies that prohibit abuse, mistreatment, and neglect of residents.”²⁵ The third most frequent violation (1009 facilities) was the “failure to protect residents from sexual, physical, or verbal abuse.”²⁶ Although twenty percent of the violations fall into the third category, the high numbers of violations in the first two categories increase the likelihood of sexual abuse occurring in the nursing home due to inadequate prevention.

For reasons discussed above,²⁷ it is difficult to determine exactly how much of all reported elder abuse is sexual abuse. One study showed that less than one percent of all substantiated reports of elder abuse involve sexual mistreatment.²⁸ Another study derived from *Medicaid Fraud Reports*, however, found that 8.8% of 488 abuse cases were sexual in nature.²⁹ A third study compiled from National Ombudsman Reporting System data from 1998 showed over 1700 complaints of sexual abuse over a two-year period.³⁰

The quality of data regarding abuse varies greatly state to state. In 2004, Wisconsin counties reported 3937 cases of suspected abuse and neglect, which showed an increase of 2.2% from the previous year.³¹ Seventeen of these cases proved fatal,

24. *Id.* at 5.

25. *Id.*

26. *Id.*

27. See *supra* notes 6-13 and accompanying text.

28. Pamela B. Teaster & Karen A. Roberto, *When Elders Are Molested: Sexual Abuse of Nursing Home Residents Too Often Goes Unreported*, LEGAL TIMES, June 27, 2005, at 20 [hereinafter *When Elders Are Molested*]. This article is based on a five-year study by the authors of APS cases in Virginia from 1996-2001. *Id.*

29. Brian K. Payne & Richard Cikovic, *An Empirical Examination of the Characteristic, Consequences, and Causes of Elder Abuse in Nursing Homes*, 7 J. ELDER ABUSE & NEGLECT 61, 65 (1995).

30. *Sexual Abuse of Older Adults*, *supra* note 20, at 789.

31. *Wisconsin Elder Abuse*, *supra* note 10.

and 320 additional cases were life threatening.³² Of the total cases of abuse and neglect, 291 of these cases (7%) involved physical abuse, which includes sexual abuse, and nearly one-half of these reported cases were substantiated.³³ In 2005, Texas Adult Protective Services investigated 8169 complaints of abuse and neglect in institutional settings.³⁴ In 1999 and 2000, Arizona Protective Services investigated and substantiated 5040 reports of abuse, neglect, and exploitation.³⁵ In 2004 and 2005, the California Elder Abuse Prevention Program received a total of 44,701 complaints from nursing home residents.³⁶ Although Wisconsin provided the most detailed information regarding abuse, similar percentages can be used to estimate the total extent of physical and sexual abuse in other states.

UNDERREPORTING OF ELDER SEXUAL ABUSE

Almost everyone, including researchers and practitioners, agrees that many sexual abuse incidents are unreported, resulting in inaccurate estimates.³⁷ Researchers believe that elder abuse is proportionately as prevalent as child abuse, but elder abuse is reported less frequently.³⁸ Estimates suggest that child abuse is reported in one in three cases.³⁹ The NCEA suggests that only one in five cases of elder mistreatment is reported.⁴⁰ A congressional study of elder abuse found that, on

32. *Id.*

33. *Id.*

34. *Texas Facts About Abuse*, *supra* note 12.

35. *Arizona Facts About Abuse*, *supra* note 11 (citing *Adult Protective Services Activity Summary, 1999-2000*). The reports include both community and institutional settings. Additionally, few perpetrators were arrested or prosecuted. *Id.*

36. State of California, Department of Aging, *2006/07 Aging Services Data Report*, http://www.aging.ca.gov/html/whatsnew/Aging_Services_Data_Report.pdf (last visited Oct. 4, 2006). This figure represents complaints of all types of abuse and neglect from a total of 283,890 facility beds throughout the state. *Id.*

37. *Sexual Abuse of Older Adults*, *supra* note 20, at 788.

38. Audrey S. Garfield, Note, *Elder Abuse and the States' Adult Protective Services Response: Time For Change in California*, 42 HASTINGS L.J. 859, 864-5 (1991).

39. *Id.*

40. *Sexual Abuse of Older Adults*, *supra* note 20, at 795.

average, only one in eight cases of elder abuse were reported.⁴¹ One commentator suggested that elder sexual abuse is reported even less frequently.⁴² Additionally, men, who suffer from the same types of abuse as women, are less likely to report abuse because of social expectations.⁴³ Likely reasons for this underreporting are the victim's fear of retribution, the victim's embarrassment, the caregiver's denial of abuse, and the legal consequences of reporting abuse. The net effect of this underreporting is that elder sexual abuse is more prevalent than statistics suggest.

Many nursing home residents who are victims of sexual abuse are unlikely to report the abuse. One study showed that older women were less likely to report sexual assault than were younger women, but older women were more likely to sustain genital injury from the assault.⁴⁴ Many victims of sexual abuse have diminished capability to report incidents of abuse. Older victims, those with poor physical status or those with diminished cognitive abilities, are less likely to report abuse.⁴⁵ Nursing home residents typically are older, have poor physical status, and have diminished cognitive abilities. Age can affect reporting because older people equate victimization with shamefulness. Socioeconomic status and race can affect reporting as well because victims believe they are powerless to prevent eviction from the nursing home for reporting abuse, and perpetrators frequently prey on the victims' fears and feelings of powerlessness.⁴⁶

Additionally, nursing home residents' family and caregivers frequently fail to report abuse. Family members do

41. *Elder Abuse: A Decade of Shame and Inaction, A Report by the Chairman of the Subcomm. on Health and Long-Term Care of the House Select Comm. on Aging*, 101st Cong., 2d Sess. 54 (1990).

42. *Sexual Abuse of Older Adults*, *supra* note 20, at 795.

43. JACKI PRITCHARD, MALE VICTIMS OF ELDER ABUSE: THEIR EXPERIENCES AND NEEDS 100 (2001).

44. *Sexual Abuse of Older Adults*, *supra* note 20, at 789.

45. Elizabeth A. Capezuti & Deborah J. Swedlow, *Sexual Abuse in Nursing Homes*, 2 *ELDER'S ADVISOR* 51, 54 (2000).

46. *See id.*

not report abuse because they fear that the resident will be forced to leave the facility.⁴⁷ Some residents and family members do not report abuse to local law enforcement agencies because they "do not always view the abuse as a criminal matter."⁴⁸ Nursing home employees do not report abuse because they fear retaliation from other employees and nursing home management.⁴⁹ Since signs of sexual abuse are more difficult to discover than signs of physical abuse, it is likely that many cases of sexual abuse are not reported by family and caregivers because the abuse is undetected. Nursing home management does not report abuse because it fears negative publicity and state sanctions.⁵⁰ An example of the combination of these failures to report is evident in the following case:

A resident reported to a licensed practical nurse that she had been raped in the nursing home. Although the nurse recorded this information in the resident's chart, she did not notify nursing home management. She also allegedly discouraged the resident from telling anyone else. Two months later the resident was admitted to a hospital for unrelated reasons and told hospital officials that she had been raped. It was not until hospital officials notified police of the resident's complaint that an investigation was conducted. Investigators then discovered that the resident had also informed her daughter of the incident, but the daughter, apparently not believing her mother, had dismissed it. The resident later told police that she did not report the incident to other staff at the nursing home because she did not want to cause trouble.⁵¹

Unfortunately, the investigation was fruitless because the resident was unable to identify the perpetrator, but the nurse was counseled on proper reporting procedures.⁵² Denial of

47. U.S. GEN. ACCT'G OFFICE, NURSING HOMES: MORE CAN BE DONE TO PROTECT RESIDENTS FROM ABUSE, GAO No. 02-312, at 11 (Mar. 2002) [hereinafter GAO REPORT].

48. *Id.* at 9.

49. *Id.* at 11-12.

50. *Id.* at 12.

51. *Id.*

52. *Id.*

residents' allegations of sexual abuse, unfortunately, is far too common in America's nursing homes.

Another misconception concerning elder abuse is that only women are the victims of sexual abuse. The study of sexual abuse among males is considered a taboo subject, and serious research of the problem has been conducted only recently.⁵³ One study found that more than twenty percent of victims of all forms of abuse were men.⁵⁴ That study, however, revealed only one victim of sexual abuse out of sixty-two total victims of abuse, even though nearly one-half of the victims suffered physical abuse.⁵⁵ Nearly one-half of those victims were age seventy-five or older, and more than one-quarter of them lived in residential care.⁵⁶ The study concluded that although a smaller proportion of men suffer abuse, the type and intensity of abuse suffered, as well as the range of perpetrators, is similar to that suffered by women.⁵⁷

RISK FACTORS FOR ELDER SEXUAL ABUSE

Even though the exact extent of elder sexual abuse is unknown, researchers have identified certain nursing home risk factors. One study found that an overwhelming majority of incidents of elder sexual abuse occurred in nursing facilities.⁵⁸ The NCEA found that the likelihood of abuse is greater in facilities with high percentages of residents suffering from dementia and those with low staff ratios.⁵⁹ Another risk factor is the lack of an abuse prevention policy.⁶⁰ Not surprisingly, facilities with a history of abuse and noncompliance are more

53. PRITCHARD, *supra* note 43, at 55.

54. *Id.* at 26 (providing data that twenty-nine of 126 elder abuse victims were men).

55. *Id.* at 37.

56. *Id.* at 30, 33.

57. *Id.* at 39.

58. *Sexual Abuse of Older Adults*, *supra* note 20, at 791.

59. NCEA, NURSING HOME ABUSE: RISK PREVENTION PROFILE AND CHECKLIST 1 (2005), <http://elderabusecenter.org/pdf/publication/NursingHomeRisk.pdf> (last visited Oct. 4, 2006) [hereinafter *Nursing Home Abuse Checklist*].

60. *Id.* at 7.

likely to have future incidents of abuse.⁶¹ This noncompliance includes failing "to inform residents of their rights and how to make complaints" of abuse, as well as poor enforcement of regulations regarding abuse.⁶²

In addition to facility risk factors, several resident risk factors have been identified. One study "revealed a relatively homogenous group of older adults, most of whom were women with cognitive and functional limitations residing in nursing homes," most likely to be the victims of sexual abuse.⁶³ The study showed that most victims had reduced orientation to place and time, required assistance with ambulation, and were unable to manage their own finances.⁶⁴ Younger victims, those between the age of sixty and seventy-nine, with low levels of orientation to time and place were most likely to be victims of sexualized touching, and older victims, those eighty and older, with medium orientation were most likely to be victims of sexualized interest.⁶⁵ The study found a correlation between decreased orientation and increased invasiveness of the abuse.⁶⁶ This study also showed that the overwhelming majority of sexual abuse victims are women, with only four male victims out of eighty-two total victims.⁶⁷ The relatively low incidence of sexual abuse of male residents may be due to a smaller population of male nursing home residents who do not suffer lifelong impairment. Because residents in nursing homes are more likely to suffer from dementia and have increased dependence on their caregivers, they are more vulnerable to abuse.⁶⁸ One study showed that unmarried residents without close family members within an hour from the facility are more likely to be victims of abuse.⁶⁹ The NCEA confirmed that

61. *Id.* at 13.

62. *Id.*

63. *Sexual Abuse of Older Adults*, *supra* note 20, at 793.

64. *Id.*

65. *Id.* at 793-94.

66. *Id.* at 794.

67. *Id.* at 791 tbl. 1.

68. *Id.* at 789.

69. *Elder Abuse in Residential Long-Term Care Facilities: What Is Known About*

finding by reporting that residents who receive infrequent visits are more likely to be abused than residents who are frequently visited by friends and family.⁷⁰ The reason for this is that friends and family are able to check on the resident's care and observe symptoms of abuse that facility employees may overlook.⁷¹

Very little research exists regarding perpetrator risk factors because commentators cannot agree on who are the most common perpetrators. One study found that the majority of perpetrators were nursing home employees, and that other residents abused only three in twenty victims.⁷² This finding reinforces the widely-held perception that most elder sexual abuse is committed by the people charged with the elder's care. In contrast, another study found that the most frequent perpetrators of sexual abuse in the institutional setting are other residents, rather than staff members.⁷³ Perpetrators frequently suffer from untreated psychiatric conditions or abuse drugs or alcohol.⁷⁴ Ten to fifteen percent of nursing home employees abuse drugs or alcohol, which increases the likelihood of sexual abuse in nursing homes.⁷⁵

Nurse aides, who comprise the largest proportion of nursing home employees, not surprisingly are the most frequent perpetrators of abuse.⁷⁶ However, these employees are not the only employees with access to residents. Laundry aides, security guards, and maintenance workers also have been

Prevalence, Causes, and Prevention: Testimony Before the U.S. S. Comm. on Finance, 107th Cong. 2 (2002) (testimony of Catherine Hawes, Ph.D., Professor, Dep't of Health Policy and Mgmt., Sch. Pub. Health, Texas A&M Univ. Sys. Health Sci. Center) [hereinafter *Elder Abuse in Long-Term Care Facilities*].

70. *Nursing Home Abuse Checklist*, *supra* note 59, at 2.

71. *Id.*

72. *Sexual Abuse of Older Adults*, *supra* note 20, at 789 (citing A.W. Burgess et al., *Sexual Abuse of Nursing Home Residents*, 36 J. PSYCHOSOCIAL NURSING & MENTAL HEALTH SERV. 10 (2000)).

73. *Id.* at 792.

74. *Id.*

75. Jennifer Marciano, *Mandatory Criminal Background Checks of Those Caring for Elders: Preventing and Eliminating Abuse in Nursing Homes*, 9 ELDER L.J. 203, 217 (2001).

76. GAO REPORT, *supra* note 47, at 22, 25.

accused of abuse.⁷⁷

A study of sexual abuse of persons aged sixty years and older in Virginia from 1996 through 2001 demonstrates the extent of sexual abuse and its risk factors.⁷⁸ This study of residential and institutional settings yielded a total of eighty-two cases of sexual abuse, which is approximately fifteen cases per year.⁷⁹ The results of the study showed that most victims were female; most perpetrators were male; roughly one-half of the victims were between the ages of sixty and seventy-nine; most perpetrators were age sixty or older; the majority of victims had at least some cognitive impairment; and more than one-half had impaired mobility.⁸⁰ The most common type of mistreatment was kissing and fondling, and the second most common was unwanted sexual interest in the victim's body.⁸¹ Other types of abuse were unwanted discussion of sexual conduct and sexual jokes.⁸² Oral-genital contact, penetration, and vaginal rape occurred in approximately five percent of the cases reported.⁸³ Nearly one-half of the cases involved multiple types of abuse.⁸⁴ Incidents of multiple types of abuse were more likely to occur with older victims and those requiring assistance with ambulation.⁸⁵ In the majority of cases, the abuse was an isolated incident; the abuse was ongoing in less than twenty percent of the cases.⁸⁶ Although most incidents occurred within the nursing home, some abuse occurred when the elder was taken outside of the facility, including at the perpetrator's home and

77. *Id.* at 25.

78. *When Elders Are Molested*, *supra* note 28, at 20. Virginia's definition of sexual abuse is similar to the NCEA definition including all forms of unwanted sexual contact. *Id.*

79. *Id.* Although the study included abuse in both institutional and residential settings, nearly three-quarters of sexual abuse occurred in nursing homes. *Id.*

80. *Id.*

81. *Sexual Abuse of Older Adults*, *supra* note 20, at 791.

82. *Id.* at 791-92.

83. *Id.* at 792.

84. *Id.*

85. *Id.* at 789.

86. *Id.* at 792.

the hospital.⁸⁷ Surprisingly, one-half of the incidents were witnessed by at least one other person, usually either another resident or a staff member.⁸⁸

ESTIMATING THE EXTENT OF ELDER SEXUAL ABUSE

Studies show that between five and ten percent of elderly people suffer from some type of abuse.⁸⁹ For reasons discussed below, the actual number of sexual abuse cases is difficult to assess. However, based on population estimates from 1998 of 1.6 million residents, between one and eight percent of all abuse cases involve sexual abuse meaning that somewhere between 1000 and 13,000 nursing home residents suffer from sexual abuse. This number could reach as high as 53,000 victims as nursing home populations continue to increase. This significant problem will influence long-term care policy well into the future.

EFFECTS OF ELDER SEXUAL ABUSE

Sexual abuse against the elderly includes physical and psychological effects, both of which can be devastating to the victim.

Between one-quarter and two-thirds of rape victims suffer physical injuries.⁹⁰ Studies show that elderly female victims are more likely than younger women to sustain injuries to the genitalia, including vaginal bleeding, swelling, bruising, abrasions, and lacerations.⁹¹ Sometimes vaginal lacerations and tears, which result from decreased strength of vaginal tissue in post-menopausal women, require surgical repair.⁹² Treatment for sexual assault includes pain medication and antibiotics to

87. *When Elders Are Molested*, *supra* note 28, at 20.

88. *Sexual Abuse of Older Adults*, *supra* note 20, at 792.

89. PRITCHARD, *supra* note 43, at 13.

90. Capezuti & Swedlow, *supra* note 45, at 52.

91. *Id.*

92. *Id.*

protect against sexually transmitted diseases.⁹³

Physical signs and symptoms of sexual assault include vaginal and rectal bleeding, vaginal and rectal discharge, genital and rectal scarring, sexually transmitted diseases, and urinary irritations.⁹⁴ Other signs of physical abuse, which may be related to the sexual assault, include bruises, abrasions, lacerations, fractures, general body soreness, fatigue, and rope burns, which could occur if the victim was restrained.⁹⁵

Emotional signs and symptoms include denial, humiliation, flashbacks, intense fear, guilt, anxiety, depression, feelings of hopelessness and helplessness, phobias, and rage.⁹⁶ These conditions are symptomatic of post-traumatic stress disorder or rape trauma syndrome.⁹⁷

Because victims of sexual abuse are likely to be cognitively impaired, practitioners must consider additional effects of abuse. Often cognitively impaired individuals are "unable to describe the assault event, the fears, or the feelings of helplessness."⁹⁸ This makes it more difficult to provide these victims with necessary services because they are unable to express their needs. In addition, victims suffering from dementia, including Alzheimer's disease, often display post-rape emotional distress, including "disorganized or agitated behaviors, sleep disturbance, and extreme avoidance of certain staff members."⁹⁹

Research shows that sexual abuse may increase the victim's mortality. Injuries, but more significantly stress, from the assault may exacerbate other health conditions of the victim, such as hypertension and diabetes.¹⁰⁰ One study demonstrated that over one-half of sexual abuse victims died within twelve months of the incident; however, one-half of those who died

93. *Id.*

94. *Id.* at 53 tbl. 1.

95. *Id.* at 53.

96. *Id.*

97. *Id.*

98. *Id.* at 52.

99. *Id.*

100. *Id.* at 53.

were between the ages of eighty and ninety-nine.¹⁰¹ Although the advanced age of the victim could have contributed to the natural death of the victim, it is likely that the trauma of sexual assault contributed to an untimely death.

CURRENT RESPONSES TO ELDER SEXUAL ABUSE

Nursing home management and the legal system currently respond to sexual abuse in three ways, but these efforts frequently are unsuccessful in preventing elder sexual abuse. First, they attempt to uncover incidents of abuse. Secondly, they treat the victim of abuse and attempt to protect the victim from future abuse. Finally, they respond to the perpetrator of abuse.

UNCOVERING INCIDENTS OF ELDER SEXUAL ABUSE

The first step in preventing abuse and treating victims is uncovering incidents of abuse. Several sources are available to elder residents of nursing homes who choose to report sexual abuse, including nurses and administrators, family members, ombudsmen, adult protective services, and the police.¹⁰² Knowledge of these sources is important, especially considering that family members and nursing home staff frequently fail to pursue investigation of abuse.

Unfortunately, reports to nursing home staff may be ineffective because nursing homes do not always respond adequately to reports or other evidence of sexual abuse. In one abuse violation case:

[S]tate inspectors found that a female resident with dementia had a "bruised area and a small abrasion inside the labia" that was indicative of abuse. Upon investigating her condition, the inspectors learned that the nursing home had conducted no inquiry into this apparent sexual abuse. The director of nursing explained to the inspectors that "maybe she fell on a

101. *Sexual Abuse of Older Adults*, *supra* note 20, at 789.

102. Stacey Wood & Mary Stephens, *Vulnerability to Elder Abuse and Neglect in Assisted Living Facilities*, 43 *THE GERONTOLOGIST* 753, 755 (2003).

broomstick."¹⁰³

In another case, an investigation of the personnel records of an aide, who had hit a resident in the eye, revealed that the aide had several complaints against him, including an allegation of molesting a female resident, which had not been investigated by the facility or reported to the state.¹⁰⁴ In another case, a facility failed to respond when "a resident with dementia abused 13 other residents over a ten month period, including sexually assaulting a female resident, punching and slapping numerous residents in the face, and striking another resident in the head with a coffee mug."¹⁰⁵ These unreported incidents allow harm to victims that nursing homes are charged to protect.

State inspections, which are conducted regularly of all licensed nursing homes, are not the most effective way to uncover incidents of abuse. Although state inspectors can discover evidence of abuse during annual inspections, a government report found that more than forty percent of abuse violations are discovered after someone files a formal complaint of abuse.¹⁰⁶ Complaint investigations generally uncovered more serious violations, some of which resulted in actual physical harm to the residents.¹⁰⁷ A complaint to the ombudsman, adult protective services, or the police is more effective in uncovering abuse because these complaints typically trigger formal, independent investigations.

A study of physical and sexual abuse in Georgia, Illinois, and Pennsylvania in 1999 and 2000 demonstrates the common responses to abuse allegations. Allegations of abuse frequently are not reported promptly, and law enforcement officials state that they seldom are called immediately to investigate allegations of abuse.¹⁰⁸ About one-half of the notifications to state agencies were made two or more days after the nursing

103. *Congressional Report on Abuse*, *supra* note 14, at 13.

104. *Id.* at 10.

105. *Id.* at 13.

106. *Id.* at 6.

107. *Id.*

108. GAO REPORT, *supra* note 47, at 4.

home learned of the alleged abuse, and this delay compromised the quality of evidence and hindered investigations.¹⁰⁹ The study also found that not all reporting agencies refer the allegations to law enforcement agencies for investigation.¹¹⁰

Another study examined the residents' awareness of resources to assist with suspected abuse.¹¹¹ The results of the study showed that the majority of residents had a poor awareness of available services, but that most residents were aware of assistance from nurses and administrators.¹¹² The study showed residents were least likely to be aware of external services.¹¹³ These findings are problematic because external services are more likely to prevent abuse than nursing home administrators. However, the study showed that residents were fairly able to identify physical abuse in comparison to other types of abuse.¹¹⁴ Most concerning, when residents were asked to whom they would report abuse or quality of care concerns, over one-quarter of the respondents gave no response or a vague answer.¹¹⁵ The results of this study demonstrate that nursing home residents are under-informed about what constitutes abuse and the resources available to assist them if they are abused.

TREATING THE VICTIM OF ELDER SEXUAL ABUSE

Once incidents of sexual abuse are discovered, the most immediate need is treatment for the abused victim. This treatment is needed not only for the physical injuries caused by the abuse but also for the victim's emotional needs.

Because sexual assault victims often suffer from rape trauma syndrome, it is important to provide victims with crisis

109. *Id.*

110. *Id.* at 5.

111. Wood & Stephens, *supra* note 102, at 755.

112. *Id.*

113. *Id.*

114. *Id.* at 756.

115. *Id.*

counseling.¹¹⁶ Psychological counseling and psychopharmacological therapy, including antidepressants and anti-anxiety drugs, have the goal of restoring the victim to pre-assault psychological functioning.¹¹⁷ One commentator recommends that this therapy, as well as therapy for the victim's family, be conducted outside of the facility.¹¹⁸ Outside therapy may be more effective because the victim may not be comfortable discussing the assault with staff members of the facility in which the abuse occurred.¹¹⁹

The social service response to male victims of abuse is inconsistent. One commentator argued that "male victims of abuse are often not offered the time, and resources and sensitivity which they require."¹²⁰ Initially, social services responded quickly to investigate whether abuse had occurred, but often the victim was "dumped" in a safe place without adequate ongoing support.¹²¹ Social services frequently did not pursue the victim's needs, which resulted from the abuse, or perform adequate assessments of the victim.¹²² The research found that social workers frequently failed to:

- conduct a formal interview with the victim
- ask the victim if he wanted the police involved
- liaise with other professionals who could have information (e.g. probation officers)
- convene a case conference
- develop a formal protection plan
- reconvene the case conference to review the protection plan.¹²³

The study showed that social services followed through less

116. Capezuti & Swedlow, *supra* note 45, at 53.

117. *Id.*

118. *Id.*

119. *Id.*

120. PRITCHARD, *supra* note 43, at 95.

121. *Id.* at 95-96.

122. *Id.* at 97.

123. *Id.* at 96.

frequently when the victim's mental state was uncertain.¹²⁴ Additionally, the police "regularly refused to come out to interview victims, who were deemed not to be good witnesses."¹²⁵ The abused elder was victimized further because of these failures by social services.

One commentator suggested the following as needs of male abuse victims:

- to talk about abuse (past and recent), life experiences, dilemmas and fears for the future, the resolution of loyalties which have been abused
- to be given practical information and advice about sources of help
- to be offered options about possible actions and outcomes
- to go at the victim's pace, respecting the stresses involved in disclosing one's failure to cope effectively with those who have been abused, and with one's fears of future suffering and disappointment.¹²⁶

This holistic approach to the needs of abuse victims would be effective treatment for all sexual abuse victims, male and female, because it treats the victim as a whole person and aids in the psychological healing of the victim following abuse.

RESPONDING TO THE PERPETRATORS OF ELDER SEXUAL ABUSE

A study derived from *Medicaid Fraud Reports* showed that over one-half of sexual abuse cases resulted in a criminal conviction, but only one-quarter of those offenders were sentenced to prison.¹²⁷ This rate of prison sentences was high in comparison to a three percent rate of incarceration following

124. *Id.*

125. *Id.*

126. *Id.* at 102.

127. Brian K. Payne & Richard Cikovic, *An Empirical Examination of the Characteristics, Consequences, and Causes of Elder Abuse in Nursing Homes*, 7 J. ELDER ABUSE & NEGLECT 61, 66 (1995).

conviction of other types of abuse.¹²⁸ Another study showed that only four in eighty-two sexual abuse cases over a five-year period were prosecuted criminally.¹²⁹ However, three of these resulted in a conviction.¹³⁰

States rarely criminally prosecute perpetrators because nursing homes frequently find other ways to prevent ongoing abuse.¹³¹ Nursing homes respond by relocating the abused person to another facility or within the facility, providing physical or psychological treatment to the abused person, relocating the abuser, or providing psychological treatment for the abuser.¹³² The study showed that these responses generally are effective because Adult Protective Services reported that the victim was at risk of further abuse, by the alleged perpetrator, in only twelve percent of the cases.¹³³ If the majority of perpetrators are other residents of the nursing home, as some studies suggest, there may be more effective ways to deter further abuse than prosecution and incarceration of elderly perpetrators. If the abuse is committed by caregivers, then prosecution of the perpetrators may be more effective to prevent abuse of other elderly persons.

The most common reasons for not prosecuting cases are insufficient evidence and the victim's inability to participate in the prosecution.¹³⁴ The likelihood for prosecuting the perpetrator decreased when the victim had cognitive deficiencies or was of advanced age.¹³⁵

Because the best evidence to prosecute sexual abuse is the testimony of the victim, especially without other witnesses, the

128. *Id.*

129. *Sexual Abuse of Older Adults*, *supra* note 20, at 792.

130. *Id.*

131. *When Elders Are Molested*, *supra* note 28, at 20.

132. *Id.* Nursing homes seem to be more effective at these responses than at detecting and reporting abuse to outside authorities.

133. *Sexual Abuse of Older Adults*, *supra* note 20, at 793. This study did not differentiate whether domestic or institutional victims were more likely to be at continued risk.

134. *Id.* at 792.

135. *Id.* at 792-93.

quality of that testimony is crucial. Victims with dementia may not be able to describe the entire incident in detail, but this is a function of the mental disease rather than the veracity of the report.¹³⁶ Crisis resulting from the assault may lead to confusion about the details, and it may take several weeks before the victim can provide an adequate account of the assault, which is contrary to the presumption that a victim's recall of the event is best when closest to the event.¹³⁷ Additionally, an elderly witness's memory of an event typically is lower than average, including complete memory loss, if significant time passes between the incident and the prosecution of the perpetrator.¹³⁸ For example, in one case, a victim successfully identified the perpetrator during the investigation but was unable to identify him at trial five months later, resulting in a dismissal of the case.¹³⁹ Another study showed that more than one-half of sexually abused nursing home victims die within one year of the abuse, which frequently prevents the victim from participating in the trial.¹⁴⁰

The collection of specimen evidence following a sexual assault makes the possibility of prosecuting the perpetrator much more likely; therefore, this evidence must be collected in a way that will ensure its preservation. Because of the importance of this evidence, only "clinicians with rape assault assessment training, expertise in the collection of specimen evidence, and compassionate communication techniques" should collect it.¹⁴¹ Evidence should be collected as soon as possible following the assault because the quality of the evidence degrades rapidly.¹⁴² Other evidence, such as clothing and bed linens, also must be collected and preserved.¹⁴³ This physical evidence is critical to

136. Capezuti & Swedlow, *supra* note 45, at 54.

137. *Id.*

138. GAO REPORT, *supra* note 47, at 16.

139. *Id.* at 17.

140. *Id.*

141. Capezuti & Swedlow, *supra* note 45, at 54.

142. *See id.*

143. *Id.*

the prosecution, and nursing homes have a duty to preserve this evidence and may face civil and criminal liability for failing to preserve it.¹⁴⁴

CIVIL ACTIONS BY VICTIMS

Although a sexual abuse victim always can bring a tort action against the perpetrator, the victim likely would prefer to recover from the nursing home because of its deeper pockets. Victims and their families can use various traditional tort remedies to recover damages from nursing homes, including malpractice, negligence, vicarious liability, and negligent hiring and supervision of employees.

A sexual abuse victim can bring suit against a nursing home for malpractice because nursing homes are obligated to protect their residents from harm as part of the nursing services they provide.¹⁴⁵ This theory is based on a breach of "the ordinary care of trained and experienced medical professionals to the treatment of patients entrusted to them."¹⁴⁶ The plaintiff must use expert testimony to establish the professional's standard of care because "[i]t is not within the common knowledge of the general public to determine the ability of patients in weakened conditions to protect themselves, nor whether a potential target of an attack in a healthcare facility should be better protected and by what means."¹⁴⁷ An abuse victim also can sue a medical professional who failed to diagnose, treat, and report reasonably identifiable elder abuse incidents if that failure led to injury.¹⁴⁸ For example, a victim sued for malpractice when the nursing home did not provide medical care for seven hours following a sexual assault.¹⁴⁹ However, the expense of expert testimony may make suits under this theory unlikely. Additionally, the high

144. *Id.* at 54-55.

145. *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 850 (Tex. 2005).

146. *Id.*

147. *Id.* at 851.

148. Dreher, *supra* note 1, at 134-36.

149. *Collier v. AMI, Inc.*, 254 So. 2d 170, 170-71 (La. Ct. App. 1971).

burden of proof for this theory likely would cause an abuse victim to seek another theory of liability.

Negligence requires that the plaintiff establish four elements for liability including a duty owed to the plaintiff, a breach of that duty, proximate causation, and damages.¹⁵⁰ Because generally there is no duty to prevent a third party from harming a person, the plaintiff must succeed in establishing that the nursing home owes a duty to the plaintiff because of the special relationship as caregiver.¹⁵¹ Nursing homes owe their residents a duty of protection and “must exercise such reasonable care toward a patient as his known condition” requires.¹⁵² This includes “safeguarding the patient from dangers due to mental incapacity,” such as sexual abuse on a resident with diminished cognitive abilities.¹⁵³ However, nursing homes are not insurers of their residents’ safety.¹⁵⁴ Nursing homes must “take reasonable precautions to protect [residents] from the foreseeable consequences of [their] impairments, including possible sexual assaults by staff.”¹⁵⁵ Intentional or criminal conduct, such as sexual abuse, should be foreseeable unless it is “wholly beyond the range of expectability.”¹⁵⁶ Prior sexual assaults, policies against unsupervised conduct, expert opinions, and legislative recognition of the problem of sexual abuse demonstrate that it is a foreseeable harm.¹⁵⁷ Whether the nursing home breaches this duty is a question of fact.¹⁵⁸

If a nursing home staff member commits the sexual abuse, the injured person may recover under the doctrine of vicarious liability provided the employee’s wrongful acts are committed

150. Capezuti & Swedlow, *supra* note 45, at 56.

151. *Niece v. Elmview Group Home*, 929 P.2d 420, 423 (Wash. 1997).

152. *Collier*, 254 So. 2d at 173; *see also* *Regions Bank & Trust v. Stone County Skilled Nursing Facility, Inc.*, 49 S.W.3d 107, 112 (Ark. 2001).

153. *Collier*, 254 So. 2d at 174 (quoting 41 C.J.S. *Hospitals* § 8, at 349-350).

154. *Collier*, 254 So. 2d at 173.

155. *Niece*, 929 P.2d at 424.

156. *Id.* at 427.

157. *Id.*

158. *Regions Bank*, 49 S.W.3d at 113.

within the scope of employment.¹⁵⁹ The majority of courts hold that sexual abuse by an employee is not within the scope of employment because it is for the personal gratification of the employee.¹⁶⁰ This rule tends to preclude a victim from recovering under vicarious liability. A minority rule, however, imposes liability on the employer for actions outside the scope of employment under a non-delegable duty exception.¹⁶¹ This exception is premised on the theory that given some nursing home residents' lack of autonomy and dependence on care, the residents deserve absolute protection.¹⁶²

Even if traditional negligence or vicarious liability theories are ineffective in establishing nursing home liability for sexual abuse, theories premised on negligent hiring and supervision of employees may be effective. Negligent supervision "creates a limited duty to control an employee for the protection of third parties even where the employee is acting outside the scope of employment."¹⁶³ However, the employer is liable only if it knew or reasonably should have known the employee posed a threat to the resident's safety.¹⁶⁴ An employee's prior criminal record or previous patient abuse may provide evidence of foreseeability.¹⁶⁵ Additionally, federal regulations mandate that facilities must reject applicants listed on state abuse registries.¹⁶⁶ Because of these regulations, courts have imposed liability on facilities for creating an unreasonable risk of harm when the facility hires employees and should have known the employees were unfit.¹⁶⁷

159. *Id.* at 114-15.

160. *Id.* at 114; *see also* *Niece v. Elmview Group Home*, 929 P.2d 420, 425-26 (Wash. 1997); *Maguire v. State*, 835 P.2d 755, 758-59, (Mont. 1992); *G.L. v. Kaiser Found. Hosp., Inc.*, 757 P.2d 1347, 1350 (Or. 1988).

161. *Stropes v. Heritage House Children's Ctr. Of Shelbyville, Inc.*, 547 N.E.2d 244, 251 (Ind. 1990).

162. *Id.* at 254.

163. *Regions Bank & Trust v. Stone County Skilled Nursing Facility, Inc.*, 49 S.W.3d 107, 113 (Ark. 2001).

164. *Id.*

165. *Id.* at 116.

166. 42 C.F.R. § 483.13(c)(1)(ii)(B) (2005).

167. *See, e.g., Deerings West Nursing Ctr. v. Scott*, 787 S.W.2d 494, 498-500 (Tex.

A few sexual abuse victims have attempted to recover under a theory of negligent supervision of other residents when those residents perpetrate the abuse. Many courts refuse to adopt this theory because sexual assault victims can recover under general negligence theory or under a statutory cause of action against the nursing home.¹⁶⁸ If a court were to recognize negligent supervision of a resident as an independent theory, the victim would have to establish that the nursing home management knew that the perpetrator posed a threat under a theory similar to that of negligent supervision of an employee. Although this theory has not been argued successfully, it likely will be raised in future abuse cases.

In addition to traditional tort doctrines, many states have created a private cause of action against nursing homes for elder mistreatment, abuse, and neglect.¹⁶⁹ These states place a high value on the safety and well-being of their elderly residents by making it easier for them to recover following incidents of abuse.

Elder abuse victims encounter several practical problems when pursuing a private cause of action against their abusers or the nursing homes in which they were abused. Elder abuse victims are unlikely to file suit because of their physical and emotional isolation, dependency on caregivers, and general lack of financial resources.¹⁷⁰ Additionally, the slow pace of litigation discourages victims from filing. This slow pace, coupled with the high mortality of sexual abuse victims, means that many

App. 1990).

168. See, e.g., *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 850 (Tex. 2005).

169. See, e.g., CAL. WELF. & INST. CODE § 15600 (West 2001); CONN. GEN. STAT. ANN. § 19a-550(e) (West Supp. 2006); D.C. CODE § 44-1004.03 (2005); FLA. STAT. ANN. § 400.023 (West Supp. 2006); GA. CODE ANN. § 31-8-126(a) (2006); 210 ILL. COMP. STAT. ANN. 45/3-601 (West 2000); LA. REV. STAT. ANN. § 40:2010.9(A) (Supp. 2006); MASS. GEN. LAWS ANN. ch. 111 § 70E (West Supp. 2006); N.J. STAT. ANN. § 30:13-4.2 (West 1997); N.Y. PUB. HEALTH LAW § 2801-d (Consol. 1997); OHIO REV. CODE ANN. § 3721.17 (LexisNexis 2005); OKLA. STAT. ANN. tit. 63, § 1-1939 (West 2004); WASH. REV. CODE ANN. § 70.129.170 (West 2002); W. VA. CODE ANN. § 16-5C-15 (LexisNexis 2001); WIS. STAT. ANN. § 50.10 (West 2003).

170. Dreher, *supra* note 1, at 141.

cases will not be decided prior to the death of the victim.¹⁷¹

In addition to the practical problems with filing suit following elder abuse, there are legal problems. Because elderly victims frequently have diminished mental capacity and physical frailty, which makes them poor witnesses, they often encounter difficulty establishing breach and causation.¹⁷² Additionally, traditional tort theory measures damages based on lost earnings, medical expenses, emotional distress, and loss of physical well-being.¹⁷³ These measurements coupled with an elder's limited earning capacity and limited life expectancy translates into abysmally low damage awards for victims who overcome the other obstacles.¹⁷⁴ Recipients of Medicaid can lose their benefits if they receive a substantial damage award that makes them ineligible for Medicaid; the award likely will be paid to the defendant nursing home until it is depleted, and the victim is again eligible for Medicaid.¹⁷⁵

Many of these challenges can be overcome by improving the statutes that allow these private actions, as well as by improving federal legislation. One commentator suggests placing civil suits for elder abuse on a fast track to decrease the amount of time needed to resolve the suit.¹⁷⁶ Florida implemented this approach with a statute allowing judges to advance on the docket civil actions involving parties aged sixty-five or older.¹⁷⁷ Congress also should develop a meaningful national standard of care for nursing homes and exempt damage awards resulting from abuse suits from Medicaid eligibility requirements.¹⁷⁸

Although civil litigation may allow an individual victim of elder abuse to recover for his or her injuries, this approach is

171. *See id.*

172. *Id.* at 143.

173. *Id.*

174. *Id.* at 143-44.

175. *Id.* at 144.

176. *Id.* at 145.

177. FLA. STAT. ANN. § 415.1115 (West 2005).

178. Dreher, *supra* note 1, at 146-47.

unlikely to ensure the overall safety of nursing home residents from sexual abuse. Because large jury verdicts likely will place greater financial strains on nursing homes, it is likely that staffing conditions will worsen rather than improve. The ideal answer to this problem must be found outside of civil litigation, especially considering that very few victims of sexual abuse will even attempt a civil suit against the nursing home.

PREVENTION OF ELDER SEXUAL ABUSE THROUGH REGULATION

The federal government and nearly all states have enacted legislation in an effort to prevent sexual abuse of the elderly. Current federal legislation is the least effective in prevention of this type of abuse, but Congress currently is investigating ways to combat elder abuse. Traditionally, states have been the principal regulators in the area of elder abuse, but the states vary greatly in their efforts to prevent abuse.

CURRENT FEDERAL REGULATION

Although federal legislation assists victims of child abuse and domestic abuse, there is no comparable law to deal with the problem of elder abuse.¹⁷⁹ Because no federal standard governs nursing homes, "there are no national databases containing information on deficiencies, no uniform mechanism for reporting allegations of abuse or neglect, and no uniform role for ombudsmen in residential care and assisted living."¹⁸⁰ However, there is some federal legislation stating the rights of nursing home residents, which has been used by the states to protect vulnerable elders.

The Older Americans Act (OAA) defines elder abuse and authorizes the use of federal funds for elder abuse awareness programs, but it does not provide funding for adult protective

179. *Elder Abuse Law Background Information*, <http://www.elderabusecenter.org/default.cfm?p=backgrounder.cfm> (last visited Oct. 4, 2006) [hereinafter *Elder Abuse Law*].

180. *Elder Abuse in Residential Long-Term Care Facilities*, *supra* note 69, at 6.

services. The OAA does little to protect elder Americans from sexual abuse, but amendments to the OAA strengthened the long-term care ombudsmen program.¹⁸¹ All states have established ombudsmen programs that advocate for the right of nursing home residents.¹⁸² Many investigations of abuse are triggered by complaints to ombudsmen.¹⁸³

In 1987, Congress passed the Omnibus Budget Reconciliation Act (OBRA 87), which established a Nursing Home Bill of Rights for residents of Medicare and Medicaid certified facilities.¹⁸⁴ This bill of rights states that nursing home residents have the right to be free from physical and mental abuse.¹⁸⁵ Because of this right, nursing homes are required to report all incidents of abuse, as well as unexplained injuries, to facility administrators and state authorities.¹⁸⁶ Additionally, nursing homes must thoroughly investigate all allegations of abuse and develop plans to prevent further abuse.¹⁸⁷ The results of these investigations must be reported to state authorities within five working days of the incident.¹⁸⁸ OBRA 87 also requires the states to establish registries of nursing aides, which contain findings of resident abuse and neglect, but it does not require criminal background checks.¹⁸⁹ Despite its extensive regulation of nursing home conduct, OBRA 87 does not create a private cause of action against nursing homes for standard of care violations. However, OBRA 87 does provide a broader range of enforcement sanctions than what existed previously, including temporary management or receivership, civil fines and penalties, injunctions, suspension of admissions, and consideration of past performance when issuing licenses and

181. 42 U.S.C.A. §§ 3001-3003; §§ 3027(a)(9), 3058g (Westlaw current through Aug. 17, 2006).

182. *Elder Abuse Law*, *supra* note 179.

183. *Id.*

184. *See* 42 U.S.C.A. §§ 1395i-3(c), 1396r (Westlaw current through May 12, 2006).

185. 42 U.S.C.A. § 1396r(c)(1)(A)(ii).

186. 42 C.F.R. § 483.13(c)(2) (2005).

187. *Id.* at § 483.13(c)(3).

188. *Id.* at § 483.13(c)(4).

189. 42 U.S.C. § 1395i-3(e); 42 C.F.R. § 483.13(c)(1)(ii).

certificates of need.¹⁹⁰

Despite federal regulations purporting to ensure the safety of nursing home residents, studies show that the HCFA, now CMS, rarely imposes sanctions on non-complying facilities.¹⁹¹ Additionally, CMS rarely exercises its authority to terminate facilities' participation in Medicare and Medicaid for repeated and serious violations.¹⁹²

The Medicare-Medicaid Anti-Fraud and Abuse Amendments to the Social Security Act of 1977 established Medicaid Fraud Control Units (MFCUs), which have the authority to investigate allegations of abuse and criminally prosecute perpetrators.¹⁹³

PROPOSED ELDER JUSTICE ACT

The United States Senate recently considered Senate Bill 2010 (Elder Justice Act), which intends to increase protection for the elderly from abuse. The bill proposes to increase the effectiveness of state adult protective services by providing \$300 million per year for seven years.¹⁹⁴ The bill also creates an advisory board to create long-term plans for dealing with elder abuse.¹⁹⁵ Most importantly, the bill establishes a centralized national repository of data related to elder abuse, neglect, and exploitation.¹⁹⁶ This provision will allow elder abuse to be addressed at the national level, which will lead to better care for elders. The bill dedicates funds to investigate the development of a national nurse aide registry.¹⁹⁷ The bill also requires nursing homes to conduct a national criminal background check on

190. 42 U.S.C. § 1396r(g).

191. Dreher, *supra* note 1, at 129.

192. *Id.*

193. GAO REPORT, *supra* note 47, at 8.

194. The Elder Justice Coalition, *S. 2010 - Elder Justice Act*, available at <http://www.elderjusticecoalition.com/docs/EJAtwopager1105.doc>. (last visited Oct. 4, 2006).

195. *Id.*

196. *Id.*

197. *Id.*

prospective employees.¹⁹⁸ A national registry and national criminal background check will help prevent abusive nursing home employees from moving to another state and avoiding existing background checks. Additionally, a national registry will facilitate the background checks already conducted by nursing homes. The bill also provides funding for ombudsman training and dementia training, which will allow elders to receive better care in nursing homes.¹⁹⁹

STATE REGULATION

Each state regulates nursing homes more extensively than the federal government, and state law offers the most protection to the elderly population.

The overwhelming majority of states have statutes mandating reporting of actual and suspected abuse within nursing homes to the state reporting agency.²⁰⁰ In addition to reporting abuse to the state reporting agency, some states require the nursing home to report any allegations of abuse to a local law enforcement agency.²⁰¹ These states often have reciprocal statutes that law enforcement agencies must report suspected abuse to the state reporting agency.²⁰² Other states provide for the coordination of efforts between the state reporting agency and local law enforcement.²⁰³ Following

198. *Id.*

199. *Id.*

200. *See, e.g.*, CAL. WELF. & INST. CODE § 15630 (West Supp. 2006); CONN. GEN. STAT. ANN. § 17b-451(a) (West Supp. 2006); D.C. CODE § 44-105.09(b) (2005); FLA. STAT. ANN. § 415.1034(1)(a)(4) (West 2005); 210 ILL. COMP. STAT. ANN. 45/3-610(a) (West Supp. 2006); IND. CODE ANN. § 12-10-3-9 (LexisNexis 2001); MONT. CODE ANN. § 52-3-811 (2005); N.Y. PUB. HEALTH LAW § 2803-d(1) (Consol. 2001); 35 PA. STAT. ANN. § 10225.701(a) (West 2003); WASH. REV. CODE ANN. § 70.124.030 (West 2002); WIS. STAT. ANN. § 46.90(5)(a) (West Supp. 2005).

201. *See, e.g.*, CAL. WELF. & INST. CODE § 15630(b)(1)(A); CONN. GEN. STAT. ANN. § 19a-553(a) (West 2003); 35 PA. STAT. ANN. § 10225.701(b); TEX. HEALTH & SAFETY CODE ANN. § 242.122 (Vernon 2001); WASH. REV. CODE ANN. § 70.124.040(1) (West 2002).

202. *See, e.g.*, 35 PA. STAT. ANN. § 10225.703(b) (West 2003).

203. *See, e.g.*, CAL. WELF. & INST. CODE § 15640(a)(1) (West 2001); FLA. STAT. ANN. § 415.104(1) (West 2005); IND. CODE ANN. § 12-10-3-18 (LexisNexis 2001); N.Y. PUB. HEALTH LAW § 2803-d(6); TEX. HEALTH & SAFETY CODE ANN. § 242.126(k)-(l)

notification by the nursing home, some states mandate law enforcement agencies to then conduct an investigation.²⁰⁴

Early reporting of abuse allegations to local law enforcement seems to result in better investigations and more convictions. In Illinois, the state agency refers allegations of abuse to the MFCU within three days of receiving the report, while Georgia has no referral policy and typically refers cases more than fifteen days after the allegation.²⁰⁵ The Illinois program allows law enforcement to investigate allegations sooner and investigate them more effectively, and this results in nearly six times the number of convictions than in Georgia.²⁰⁶

Many states impose fines or jail confinement for a violation of the reporting schemes.²⁰⁷ These penalties encourage nursing homes to quickly report incidents of abuse. However, one commentator points out that reporting abuse may actually expose the nursing home to more liability, rather than less, because of the increased awareness of incidents of abuse.²⁰⁸

Several states have established centralized registries of all abuse reports and the results of investigations.²⁰⁹ Some of these states also have established registries of abusive nursing home employees to aid in the prevention of future abuse.²¹⁰

Although there is no federal statute requiring criminal background checks of nursing home employees, nor does CMS

(Vernon Supp. 2006); WIS. STAT. ANN. § 46.90(3)(a).

204. See, e.g., 35 PA. STAT. ANN. § 10225.703(a); TEX. HEALTH & SAFETY CODE ANN. § 242.135(b) (Vernon Supp. 2006).

205. GAO REPORT, *supra* note 47, at 15.

206. *Id.* at 15-16. The effectiveness of this program must be adjusted slightly because Illinois' nursing home population is nearly twice that of Georgia, but accounting for this difference still results in three times the number of convictions. *Id.*

207. See, e.g., CAL. WELF. & INST. CODE § 15630(h) (West Supp. 2006); CONN. GEN. STAT. ANN. § 17b-451(a) (West Supp. 2006); FLA. STAT. ANN. § 415.111(1) (West 2005); 35 PA. STAT. ANN. § 10225.706(c) (West 2003); TEX. HEALTH & SAFETY CODE ANN. § 242.131 (Vernon 2001); WASH. REV. CODE ANN. § 70.124.070 (West 2002).

208. See Capezuti & Swedlow, *supra* note 45, at 55-56.

209. See, e.g., TEX. HEALTH & SAFETY CODE ANN. § 242.130 (Vernon 2001).

210. See, e.g., 210 ILL. COMP. STAT. ANN. 45/3-206.01(a) (West Supp. 2006); N.Y. PUB. HEALTH LAW § 2803-j(3)(d) (Consol. 1997); OKLA. STAT. ANN. tit. 63, § 1-1950.7(A) (West 2004).

require these checks, many states require nursing homes to perform background checks.²¹¹ However, the quality of these background checks varies from state to state. Only a handful of states require background checks for every employee²¹² or require the background checks to be completed prior to the employee beginning work.²¹³ Additionally, most state statutes require only a check of any criminal record within the state of employment, which allows abusers to move from state to state to avoid detection.²¹⁴ Alternatively, some states require nursing homes to request nationwide criminal background checks by the Federal Bureau of Investigation (FBI) for some healthcare employees.²¹⁵

Extensive use of background checks of prospective employees may be one of the best solutions to the problem of elder sexual abuse. Studies show that twenty-five percent of nursing home employees prosecuted for abuse have prior criminal records of drug abuse, sexual assault, and assault.²¹⁶

Considering that other residents perpetrate sexual abuse of nursing home residents, some states are considering background

211. See, e.g., CAL. WELF. & INST. CODE § 15671(a) (West 2001); FLA. STAT. ANN. § 400.215(1) (West 2006); N.Y. PUB. HEALTH LAW § 2899-a(1) (Consol. Supp. 2006); OKLA. STAT. ANN. tit. 63, § 1-1947(A) (West Supp. 2006); 35 PA. STAT. ANN. § 10225.502(a) (West 2003); TEX. HEALTH & SAFETY CODE ANN. § 250.003(a) (Vernon Supp. 2006); WASH. REV. CODE ANN. § 43.43.842(1)(a) (West 2006); WIS. STAT. ANN. § 50.065(2)(am) (West Supp. 2005).

212. See, e.g., FLA. STAT. ANN. § 400.215(1); OKLA. STAT. ANN. tit. 63, § 1-1950(B) (West 2004); 35 PA. STAT. ANN. § 10225.502(a); WASH. REV. CODE ANN. § 43.43.842(1)(a).

213. See, e.g., FLA. STAT. ANN. § 400.215(2)(a); N.Y. PUB. HEALTH LAW § 2899-a(10) (provisional employment with supervision); OKLA. STAT. ANN. tit. 63, § 1-1950.8(C) (West 2004) (provisional employment); 35 PA. STAT. ANN. § 10225.506 (West 2003) (provisional employment for thirty days); TEX. HEALTH & SAFETY CODE ANN. § 250.003(b) (provisional employment in emergency situations); WIS. STAT. ANN. § 50.065(2)(am) (provisional employment with supervision).

214. GAO REPORT, *supra* note 47, at 5.

215. See, e.g., CAL. HEALTH & SAFETY CODE § 1338.5(a)(2) (West 2000) (at discretion of state Department of Justice); FLA. STAT. ANN. § 400.215(2)(b) (required if applicant not a resident of state for prior five years); 35 PA. STAT. ANN. § 10225.502(a)(2) (required if applicant not a resident of state for prior two years); WIS. STAT. ANN. § 50.065(2)(am) (required if applicant not a resident of state for prior three years).

216. Marciano, *supra* note 75, at 204.

checks of residents. Illinois is leading this movement by requiring a criminal background check of all nursing home residents within twenty-four hours of admission.²¹⁷ Similarly, Oklahoma requires notification to the nursing home of any admissions of registered sex offenders.²¹⁸ Although this requirement is not as extensive as the Illinois requirement, it still should help prevent sexual abuse in nursing homes.

STRATEGIES TO PREVENT ELDER SEXUAL ABUSE

Although various regulatory options have been implemented and others could be implemented at the federal or state level, that regulation is only as effective as its enforcement. Enforcement of existing regulation is inconsistent at best. For this reason, the following section focuses on ways that nursing homes voluntarily can prevent elder sexual abuse.

Education is the most effective way to deter future cases of abuse. Nursing home staff should be trained to detect sexual abuse and to assist victims and perpetrators.²¹⁹ This training should include prevention and intervention strategies, reporting guidelines, and preservation of evidence.²²⁰ Nursing homes should improve education programs for residents, which include training on detecting and reporting incidents of abuse.²²¹ To overcome the residents' tendency to hide incidents of abuse, training should emphasize that being a victim of abuse is not something shameful.

Nursing homes should implement hiring practices that avoid employing people that are at risk for becoming perpetrators. Nursing homes should not hire the following people to care for elderly persons: "people who lack empathy, who have no real interest in the welfare of the residents for whom they care, who are disrespectful or controlling, and who

217. 210 ILL. COMP. STAT. ANN. 45/2-201.5(b) (West Supp. 2006).

218. OKLA. STAT. ANN. tit. 63, § 1-1946(A) (West Supp. 2006).

219. *Sexual Abuse of Older Adults*, *supra* note 20, at 794.

220. *Id.*

221. *Id.*

have known substance abuse, domestic violence, or criminal histories."²²² Nursing homes should establish rigorous policies governing hiring and supervision that include comprehensive background checks; these background checks should exceed federal and state regulations.²²³ This includes conducting nationwide background checks and registry searches for all employees who have direct contact with residents. It is also important that nursing homes restrict access of employees, such as maintenance and cleaning staff who are not licensed or listed on state registries, to elderly residents without supervision.

Nursing homes should create an environment that focuses on the protection of residents in their care. Nursing homes should implement policies that encourage employees to report suspected abuse without fear of negative consequences.²²⁴ Nursing homes should increase staffing to provide better opportunities to uncover and prevent abuse, and they should place vulnerable elders near nursing desks because this increased visibility likely deters sexual abuse.²²⁵ Nursing homes and family members can enhance observation of nursing home residents through the implementation of video surveillance, which provides continuous monitoring of residents.²²⁶ With increased attention on the protection of residents from sexual abuse, it is likely that many perpetrators will be discouraged from assaulting residents.

In addition, nursing homes should take steps to reduce incidents of sexual abuse by other residents. Nursing homes should perform background checks on residents to ensure identification of those at risk to become perpetrators. These residents should be segregated from their potential victims, and their behavior should be monitored more closely.

Nursing homes where abuse occurs should expect that

222. *Nursing Home Abuse Checklist*, *supra* note 59, at 9.

223. Capezuti & Swedlow, *supra* note 45, at 57.

224. *Nursing Home Abuse Checklist*, *supra* note 59, at 7.

225. *Sexual Abuse of Older Adults*, *supra* note 20, at 794.

226. Selket Nicole Cottle, Note, "Big Brother" and Grandma: An Argument for Video Surveillance in Nursing Homes, 12 ELDER L.J. 119 (2004).

victims and their families may want to relocate the victim outside of the facility, and they should assist the victim with that relocation.²²⁷ This assistance should be part of the facility's response plan when dealing with reports of abuse. Creating this supportive environment will prevent further harm to the victim. In some communities, however, relocation may not be practical; therefore, nursing homes should explore and present all available options to the resident and resident's family. These homes may consider same-sex wings where all employees are of the same gender because this environment may create a sense of safety in the victimized resident.

A single investigator with professional experience in abuse of vulnerable adults should investigate reports of abuse to ensure that the most information is obtained with the least amount of distress to the victim. State or local protective services, rather than facilities, should investigate reports of abuse.²²⁸ An independent investigation of abuse likely will be more thorough, and the knowledge gained from these investigations can be used to implement prevention programs. A disorganized interrogation or multiple rounds of questioning is likely to make the victim endure the trauma of the incident many times over.²²⁹ A systematic, professional investigation of the incident should minimize additional trauma to the victim reliving the incident, while still obtaining the facts needed to uncover the perpetrator and identify potential treatment options for the victim.²³⁰ One commentator suggests the best interviewer is a member of law enforcement of the same gender as the victim to increase the comfort level of the victim.²³¹ It is likely that a victim will cooperate with the investigation if a family member or trusted caregiver introduces the victim to the police investigator.²³² Conducting the investigation away from the

227. Capezuti & Swedlow, *supra* note 45, at 53.

228. *Id.* at 54.

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

nursing home may also improve the investigation because the victim will be more willing to talk away from the scene of the abuse.²³³ Improved investigation techniques are likely to provide necessary aid to the victims of abuse as well as more quickly uncover the perpetrators in an effort to prevent further abuse of residents.

The NCEA suggests that the most effective way to reduce elder abuse is through increased collaboration between the various groups that monitor and prevent the abuse, including nursing home administrators and staff, state licensing and certification staff, adult protective services staff, state long-term care ombudsmen, and Medicaid fraud control unit staff.²³⁴ The NCEA recommends a seven-step approach to collaboration:

- 1) The first step is to assemble a team of advocates who will work together on risk prevention
- 2) Negotiate an agreement with team members, which clearly defines roles and responsibilities and explicitly states goals.
- 3) Gain input through open communication and brainstorming with team members.
- 4) Discuss and seek out a fuller understanding of abuse risks in the nursing home.
- 5) Generate creative ideas for prevention of abuse.
- 6) Build consensus and agree on action steps and a plan for follow-up.
- 7) Combine knowledge, perspectives and skills to reduce risks.²³⁵

This collaboration is to address long-term prevention of abuse, but many individual instances of abuse must continue to receive individual attention.²³⁶ Increased cooperation between the various players likely will uncover abuse quickly and reduce

233. *Id.*

234. *Nursing Home Abuse Checklist*, *supra* note 59, at 3.

235. *Id.*

236. *Id.*

the incidence of abuse by creating a coordinated effort with a common goal. Nursing home residents will be the primary beneficiaries of this cooperation.

Many of these suggestions can be implemented with little cost to the states. The costs to the nursing homes are greatly outweighed by the benefits of protecting residents from sexual and other forms of abuse. When nursing homes focus primarily on the safety and well-being of residents, the policies and procedures adopted by the nursing home likely will reduce incidences of abuse.

CONCLUSION

As America's population ages, the number of vulnerable adults continues to rise. The problem of elder sexual abuse is not likely to disappear but rather grow as nursing home populations increase. Increased awareness of the problem is likely to reduce the incidents of abuse. Nursing homes must improve their detection and prevention programs. State and federal governments must create effective regulation to prevent sexual abuse and enforce that regulation. Residents and their families must arm themselves with knowledge to protect themselves from abuse. With a concerted effort from all parties, America's future elderly population will be able to enjoy their twilight years without the threat of sexual abuse.
