THE GRAYING OF AMERICA:

PROTECTING NURSING HOME RESIDENTS BY ALLOWING REGULATORY AND CRIMINAL STATUTES TO ESTABLISH STANDARDS OF CARE IN PRIVATE NEGLIGENCE ACTIONS

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INTRODUCTION

The following incidences illustrate that "we should never cease to be shocked by Man's inhumanity to Man, no matter the circumstances."1

On January 3, 1994, nurse's aide Loretta Gadley slapped an eighty-six year-old woman on her face and head; hit a seventy-six year-old wheelchair-bound man; and further physically abused an eighty-five year-old woman. All of these actions occurred between 6:30 p.m. and 7:25 p.m.2 All three victims suffered from Alzheimer's disease and were residents at the nursing home that employed Gadley from January 1989 until one month after the attacks.3 Gadley was convicted of the abuse, but the judge suspended all jail time

1 Beverly Enterprises-Florida, Inc. v. Spilman, 661 So.2d 867, 874 (Fla. Dist. Ct. App. 1995) (Sharp, J., concurring specially) (confirming a judgment of $720,000 in compensatory damages and $2 million in punitive damages against a nursing home which had so neglected a patient that the patient died from a bed-sores). The evidence supported that the acts and omissions by the nursing home warranted a punitive damage award in the amount of $2 million dollars.

2 Matt Greyla, Nurse's Aide Spared Jail Time in Attack on Three Elderly Patients, The Buffalo News, Nov. 29, 1994, at Local 5 (highlighting the fact that, despite years of ongoing lobbying, the state of New York has failed to enact felony charges to use against elder abusers for this type behavior).

3 Id.
and instead imposed a monetary fine and community service hours.\(^4\)

In Washington D.C., an elderly woman suffered from severe burns after a nurse’s aide placed her in scalding bath water and then deliberately attempted to conceal the fatal wounds by wrapping her in sheets.\(^5\) The resident died several days later.\(^6\)

In California, the plight of nine residents who were victims of bedsores, filth, dehydration, and malnutrition was revealed.\(^7\) One resident whose body had been overtaken by enormous bedsores was described as “stuporous, unresponsive, and semi-comatose.”\(^8\) Another patient suffered from such gross negligence that a licensed vocational nurse found maggots in the patient’s vagina and anus.\(^9\)

\(^4\) Id. (deciding her sentence should be a $500 fine and 250 hours of uncompensated community service because the judge said that “society would not be served” by jail time despite a potential six year sentence).

\(^5\) See H.R. Rep. No. 102-810, at 7 (highlighting one of many horror stories regarding cases of abuse and neglect in nursing homes). Another incident included a co-license holder of a boarding home in California who had intercourse with two women who were both retarded to such a degree that they could not give legal consent. In Michigan, a boarding house manager slapped a resident, pulled his hair, and knocked him from his wheelchair. In Tennessee, a woman who had lived in a boarding home for four years arrived at the hospital in such poor condition that her stockings had to be soaked to get them off and her toenails had to be surgically removed because they had grown into the soles of her feet. In Pittsburgh, while abusing residents of a nursing home, the owner was also stealing money from their bank accounts. Over $65,000 was taken from one couple who was in their eighties, while an attempt was made to take $60,000 from another resident’s bank account while the resident was at the hospital being treated for injuries sustained from an affiliated home’s abuse. Id. at 7-8.

\(^6\) Id.

\(^7\) People v. Casa Blanca Convalescent Homes, Inc., 236 Cal. Rptr. 164, 167-71 (Ct. App. 1984) (explaining the specific details of the nine residents’ deficiencies in care that led to severe physical, emotional, and psychological consequences for the patients).

\(^8\) Id. at 168 (detailing Leola Dobbs’ poor quality of care received during her stay at a nursing home). Dobbs was admitted to the nursing home upon discharge from the hospital in July 1976. She returned to the hospital less than two months later where it was noted that her condition had deteriorated. In those two months, Dobbs suffered from dehydration and constipation. The medical plan provided for a catheter to avoid dehydration, which by state law required that the nursing staff record input and output from catheters to prevent dehydration; this record keeping was woefully inadequate. Furthermore, Dobbs’ medical plan called for her to be turned frequently to prevent the bedsores. The records reflect that these turns were either not made or made on inappropriate intervals, and were inadequate in the prevention of the bedsores. Continued investigation indicated that the record keeping was not deficient; rather, the records were accurate in reflecting the lack of care and attention afforded this patient. Id.

\(^9\) Id. at 170. This information was presented to supervisors at the facility but no corrective action was taken for either this particular patient or to prevent recurrence. Several months

Lastly, in Texas, thirty-three year old nurse’s aide Johnny Gordon, a tall, 200 pound man with a criminal record, was allowed to care for nursing home resident Dorothy Cooper.\(^10\) Pursuant to Texas state law, Texas Health Enterprises, the health facilit network treating Cooper, was required to do a criminal background check before employing him as a nurse’s aide.\(^11\) Although the criminal history search was performed, evidence later revealed that several facilities within the Texas Health Enterprises chain negligently conducted these required criminal checks on Gordon not once, but three times.\(^12\) During a required training class in his third employment stint, he was recognized by the assistant director of nurses from a previous facility who remembered his abusive behavior.\(^13\) Although this assistant director reported Gordon’s previous history to both the training facility’s administrator and her supervisor, the facility deliberately ignored the warning.\(^14\) In the end, Dorothy Cooper paid dearly for the repeated negligence at the various homes.\(^15\)

On July 20, 1993, Gordon brutally raped sixty-four year old supervised female patient shower.\(^16\) Next, Gordon returned Cooper to her bed and proceeded to masturbate, discharging semen across

\(^10\) Id. at 81-82 (discussing how Gordon applied for positions with this chain of nursing homes in Odessa in 1991, Midland in October of 1992, and a third facility in Midland in May of 1993). In the first employment position, he was mistakenly classified as a female so his “Johnny Conness” in a handwritten criminal history report, instead of the correct “Johnny Conness,” Id. at 81-82. Finally, the third facility completely failed to run any criminal history request at

\(^11\) Id.

\(^12\) Id. at 81-82.

\(^13\) See Burgess & Marks, supra note 10, at 81-82.

\(^14\) See id. at 82. On the above date, Gordon was in violation of the facility’s requirement that a female must be present when a male employee bathes a female patient. Dorothy Cooper of physical and emotional pain as a result of the attacks.
her body. Two nurse's aides reported the suspected sexual assault to their supervisor after discovering a semen-like substance in Cooper's vaginal area. The supervisor ignored the discovery and left for lunch to shop for wallpaper. The nurse's aides then informed the charge nurse who discounted the semen-like substance as a vaginal infection. After Gordon brutally attacked Cooper, she became permanently withdrawn and refused care by staff. At night, the staff would find her terrified with her legs locked in the bed rails and often screaming.

These terrible stories are merely glimpses of daily horrors occurring in inadequate nursing home facilities. The graying of Americans and the increased number of individuals entering nursing homes heighten the nation's awareness of inadequate quality care. Loved ones are experiencing the unthinkable in standard nursing homes. Shocking incidences such as those described above illustrate deplorable conditions in long-term care facilities, incompe-

17 Id. at 81-82 (revealing that because Cooper required assistance in dressing, was suffering from diabetes, hypertension, glaucoma, and was confined to a wheelchair, she was completely helpless against Gordon's attack).

18 Id. (detailing that two nurse's aides found what "look[ed] and smell[ed] like semen" in and near Cooper's vaginal area).

19 Id. at 82.

20 Burgess & Marks, supra note 10, at 82. The charge nurse then called the physician to report the suspected infection and the physician ordered prescription medication without additional information or an exam. After much urging from the two nurse's aides, the director of nursing called the police and Cooper was admitted to the emergency room. Completion of a sexual assault examination uncovered bruises on Cooper's left thigh and vaginal area and brown anovular discharge. Id.

21 See id. at 82. Notes by staff indicate dramatic changes in Cooper's behavior as early as May, which coincided with Gordon's hire date. The assault described here occurred in July. Following the attack Cooper was transferred to a facility where her sister resided, but her personality remained permanently altered. Id.

22 See H.R. REP. NO. 102-810, at 7-10.

23 Id. at XI-XII. This report chronicles the focus of the House of Representatives Aging Committee. Between 1965 and 1975, Congress sought to eliminate hazards in institutions housing the elderly; however, their focus was on such hazards as firetraps, not abuse. In the early 1980s, the Committee was overwhelmed with reports of abuse in long-term care facilities. As the stories poured in detailing all types of abuse from all types of facilities, the Committee finally recognized and began to focus on the abuse that was occurring. The Committee was allowed to complete an independent study conducted by the National Academy of Sciences, and many of their recommendations have been incorporated into laws to protect the elderly. Some changes now require facilities to meet guidelines or risk losing reimbursement for patients through such programs as Medicare. Id. at XI-XII.

24 See id. (detailing numerous cases of nursing home abuse throughout the United States and exemplifying the pervasiveness of sexual and physical abuse by staff members).
eighty years old. The number of elderly individuals has steadily increased over the years. In 1994, the sixty-five and older population exceeded thirty-three million and represented 12.5 percent of the total population. Two years later, in 1996, the elder population’s growth continued to escalate, swelling to forty-four million people aged sixty or older. Time has proven that these numbers are on the rise, and by 2020, an estimated one in every six Americans will be sixty-five or older: an increase of about twenty million senior citizens as compared to 1996.

A. Types of Elder Abuse

The 1987 amendments to the Older Americans Act define elder abuse, neglect, and exploitation. These definitions set a framework for states to identify elder abuse and to enact their own statutory definitions. Three types of elder abuse exist: 1) self-neglect, also referred to as self-abuse; 2) domestic abuse; and 3) institutional abuse. Self-neglect occurs when an elderly person threatens or impairs his own health or safety. The second type of abuse, domestic elder abuse, focuses on mistreatment committed by someone who has a special relationship with the elder. The National Elder Abuse Incidence Study of 1998 concluded that at least 500,000 elders were victims of domestic abuse during 1996. The third category, institutional elder abuse, refers to mistreatment committed in residential facilities such as nursing homes. Individuals who commit institutional elder abuse often have a legal or contractual duty to the elder person, such as nursing home staff or professionals. Similar to domestic elder abuse, institutional abuse encompasses several different types of exploitation and mistreatment, including physical and psychological abuse. Of the three types of abuse (self neglect, domestic abuse, and institutional abuse), this comment primarily focuses on emotional abuse sustained in institutions, primarily nursing home facilities.

B. Emotional Attacks by Professional Caregivers

An invaluable study based on nursing home staff members’ accounts of elder abuse provides a rare glimpse of emotional elder abuse by professional caregivers. The study gathered data from nursing staffs of thirty-one skilled nursing and intermediate care facilities in New Hampshire. Researchers characterized emotional abuse as “an act carried out with the intention, or perceived inten-

32 See id. (asserting that most perpetrators of domestic elder abuse are the elder’s spouse, sibling, child, friend, or caregiver). This type of abuse encompasses physical abuse, sexual abuse, and psychological abuse. Id.
33 See Major Types of Abuse, supra note 35.
34 Id.
35 See id. (describing the similar nature of domestic and institutional abuse).
36 Karl Piikler & David W. Moore, Abuse of Patients in Nursing Homes: Findings from a Survey February 1987 to April 1987, 314, 315 (1989) (detailing that the data was gathered between the State of New Hampshire who had not been a part of a previous study and study, 357 of 691 staff members contacted agreed to participate in the with each interview having duration of about thirty minutes. During the interview, participants recounted actions they observed during the course of their week activities and accurate responses).
tion, of causing emotional pain to another person. A range of specific acts was assigned to indicate the amount of emotional elder abuse in participating nursing homes. These abusive acts included excessively isolating patients, insulting or screaming at patients, withholding nutrition or privileges from patients as punishment, and threatening the patients with physical abuse.

According to the study, a high incidence of emotional abuse plagued nursing homes. Most of the participating staff had witnessed at least one emotionally abusive act within the last year, while a smaller percentage had observed another staff member screaming at a patient. Researchers also found that half had witnessed another staff member insulting or swearing at a patient, while twenty-three percent were present when a patient was inappropriately isolated. Other acts witnessed by staff members included patients being threatened or having objects thrown at them, and denial of food or privileges as punishments.

C. Physical Attacks by Professional Caregivers

Incidents of physical abuse by professional caregivers are countless. In Texas, a blind American veteran entered a nursing home and died thirty-five days later as a result of gangrenous bedsores. In California, a home care operator punished an elderly resident for incontinence by smearing feces all over her. Officials in Florida also recounted incidents of institutional elder abuse. For instance, a seventy-six year-old retiree residing in a Florida nursing home sustained fatal head injuries reportedly induced by a staff member. The medical examiner discovered that the resident also had a broken arm and weighed a mere ninety-eight pounds. These illustrations are simply a sampling of elder abuse occurrences in the United States.

D. Prevalence of Elder Abuse

Reports created in the 1970s began to recognize elder abuse as a growing problem in the United States. The problem was internationally exposed in a letter published in a British medical journal in 1975. Appalled by the reports, the United States House of Representatives' Select Committee on Aging investigated the explosion of reports. Some revealed that elder abuse was a veiled problem that at that time affected approximately one million elderly individuals annually. In 1991, whistleblowers throughout the nation reported incidents of institutional elder abuse. The Committee's investigation of institutional abuse concluded that nursing facilities violated one or more basic elder rights nearly everyday. Every year, approximately 2.6 million nursing home residents may be denied the right to complain or seek relief for violations. Nursing facilities throughout the United States also deprive roughly 2.4 million institutionalized elders of simple personal choices including "what and when to eat, when to wake up and when to sleep, and what to wear." Nursing home employees annually deny approximately 1.5 million elders...
their right to privacy. The Committee also estimates that nursing homes refuse 1.5 million residents the right to keep personal possessions. Approximately 1.2 million nursing home residents are deprived of appropriate medical and nursing care. Finally, nursing facilities subject roughly 680,000 residents to unsafe and unsanitary living conditions. Thus, the amount of elder abuse taking place every day begins to become obvious.

E. Unreported Elder Abuse

Of those elders who are abused, only a fraction of abuse cases are actually reported to state authorities. The 1985 House of Representatives Elder Abuse Report revealed that elder abuse is much less likely to be reported than child abuse. Only one of every five cases of elder abuse is reported compared to one of every three cases of child abuse. Unreported elder abuse can be attributed to a number of factors. Abuse victims often experience emotional overload after being attacked. Sadly, elder abuse forces victims to face the reality that they are highly dependent on others and no longer have complete control over their lives. Instead, as society has changed its values and as elders’ bodies and minds fail, their independence has seemingly disappeared. Confronting this loss of control and independence coupled with physical abuse may greatly intensify the feeling of helplessness. Victims live in fear of retaliation by perpetrators, and may believe that their reports will further antagonize abusers and result in repeated abusive acts. In addition, a number of elder abuse victims blame themselves for triggering the abuse. Finally, some elder abuse victims are physically or mentally unable to report the abuse, including those in a vegetative state or those afflicted by memory-inhibiting conditions.

F. Possible Factors that Contribute to Elder Abuse

Increased reporting unveiling physical and emotional abuse by professional caregivers has motivated government officials to pinpoint possible factors fostering elder abuse in nursing homes. Government officials attribute the prevalence of elder abuse to several possible factors. The House Subcommittee on Health and Long-Term Care found that nursing homes are experiencing extreme nursing facilities to adequately supervise patients, assist them in their daily activities, feed residents, and maintain a safe, sanitary environment. The Committee also found that nursing home staff members are often ill-trained, grossly overworked, and very poorly paid. Nurse’s aide positions entail specific skills and a certain amount of patience and compassion, yet these workers are generally paid less than unskilled janitors. The prevalence of elder abuse may also result from the high nurse’s aide turnover, which may cultivate detachment between nurse’s aides and patients.
Nurse's aides are also entrusted with responsibilities that they have not been trained to manage and are often tasks that should be performed by physicians or nurses.\textsuperscript{44} Nurse's aides are specifically trained to feed, dress, and bathe patients.\textsuperscript{45} Government officials learned that nurse's aides were fulfilling their own duties as well as duties that are normally reserved for physicians.\textsuperscript{46}

A congressional study also concluded that caregivers often experience "symptoms of depression, anxiety, feelings of helplessness and lowered morale, and emotional exhaustion."\textsuperscript{47} The added pressure and stress of performing more duties than they are trained for likely plays a large role in the prevalence of elder abuse.

G. Legislative Action

Shocked by inadequate long-term nursing home care, Congress took legislative steps to combat elder abuse. For example, Title XX of the Social Security Act compels states to fund protective services for adults.\textsuperscript{48} Adult Protective Services ("APS"), a result of Title XX in many states, strives to prevent elder abuse and exploitation of the elderly living in the community.\textsuperscript{49} Congress directed all states to establish a Long-Term Care Ombudsman Program in 1978.\textsuperscript{50} The Long-Term Care Ombudsman Program provides individuals in long-term care facilities with protection against neglect and abuse.\textsuperscript{51}

\textsuperscript{44} See H.R. Rpt. No. 102-810, at 6-7 (providing examples of tasks that aides are not trained to perform such as medication preparation, catheter application, and other tasks).

\textsuperscript{45} Id. at 6.

\textsuperscript{46} Id.

\textsuperscript{47} H.R. Rpt. No. 100-665, at 30 (detailing that caregivers may suffer as many as three times the number of emotional stress symptoms as the general public).

\textsuperscript{48} 42 U.S.C. § 1397d(a) (1994).

\textsuperscript{49} See John Regan, Intervention through Adult Protective Services Programs, 18 GERONTOLOGY 230, 231 (1978) (defining protective services as a conglomerate of services that elderly individuals can use to continue independent living).

\textsuperscript{50} The State Long-Term Care Ombudsman program was established in 1978 and is now codified as 42 U.S.C. § 300gg-2 (2002). The program was established under 42 U.S.C. § 9001, popularly known as the Older Americans Act of 1965. Title 42 U.S.C. § 3007 (2002) now requires states to enact Ombudsman programs in order to maintain eligibility for federal grants under the Older Americans Act.

\textsuperscript{51} See Elder Abuse Prevention Background, at http://www.oaktrees.org/elder (last visited Oct. 27, 2000) (reporting improvements resulting from the program). These improvements include:

1. Receiving and resolving complaints by working with residents, their family members, their friends, the regulator authorities, as well as the institutions.

2. Providing public education on long-term care and alternatives.

In addition, Congress introduced the Elder Abuse Treatment & Prevention Act in 1980.\textsuperscript{52} However, the Act, which resembled the federal child abuse statute, was never successfully passed through the legislature.\textsuperscript{53}

Despite this setback, Congress did successfully ratify the Older Americans Act.\textsuperscript{44} The Older Americans Act "creates federal programs designed to identify, prevent, and address elder abuse, neglect, and exploitation."\textsuperscript{45} Furthermore the Older Americans Act Amendments of 1987 oblige local Area Agencies on Aging ("AAA") to evaluate the need for elder abuse prevention programs.\textsuperscript{56}

The legislature also recently passed the Nursing Home Reform Act.\textsuperscript{57} The Nursing Home Reform Act "sets rigorous standards for Medicare and Medicaid-funded long-term care facilities, establishing staffing and credential requirements, individualized plans of care, and a series of 'residents' rights'.\textsuperscript{58} It is hoped that these legislative actions will help stem some of the ongoing abuse in nursing homes and provide safer places for elderly residents.

\textsuperscript{52} See Seymour Moskowitz, Saving Grumpiness from the Wolf: Elderly Abuse and Neglect-The Framework, 31 CONN. L. REV. 77, 84 (1999) (revealing that non-institutionalized elders thus still had only haphazardly financial support and protection).

\textsuperscript{53} Older Americans Act, 42 U.S.C. § 300gg (2002).

\textsuperscript{54} Susan F. Buchanan, Legal Consequences of Elder Abuse Part II: Federal Abuse Legislation, CLINICAL GERONTOLOGY, at http://www.cger.org/CG/articles/CG9005/Buchanan.html (visited Oct. 27, 2000) (noting that the Administration on Aging supervises programs to help the elderly Americana Act). The Administration on Aging's responsibilities, include managing nutrition programs for the elderly in nursing facilities and community senior citizen centers. Id.


\textsuperscript{56} Nursing Home Reform Act, 42 U.S.C. §§ 1395d-3, 1396 (2002).

\textsuperscript{57} See Buchanan, supra note 95 (relating that the residents' rights include "privacy, confidentiality, notice of changes in rooms or roomsmates, petty grievances procedures, participation or federal certifying agencies".)
II. NEGLIGENCE ACTIONS AND ELDER ABUSE

A. Historical Background of Negligence Per Se and Ordinary Negligence

Negligence and negligence per se doctrines evolved from two different species of law.100 With each negligence judgment, the courts painstakingly mold negligence to establish its requirements and defenses.101 On the other hand, negligence per se is an action created by the legislature.102 The legislature carves out statutes intended to protect a particular class of individuals from a particular type of harm.103 To qualify for negligence per se, the plaintiff must belong to the class of individuals that the legislature intended to protect and the injury sustained must be the type of injury that legislature intended to prevent.104

Victims of criminal negligence perpetrated by nursing home staff may pursu the civil remedy of negligence per se against the staff member.105 The negligence per se claim has the additional advantage of allowing the victim to pursue action against the tortfeasor’s employer under the doctrine of respondeat superior.106 Because the plaintiff’s burden of proof for negligence per se is less

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100 See David P. Leonard, The Application of Criminal Legislation to Negligence Cases: A Reexamination, 23 Santa Clara L. Rev. 427, 428-29 (discussing the judicial tension between the two doctrines).
101 Id. at 431 (reveling that negligence is thus a product of the judicial system).
102 Id. at 430 (arguing that negligence per se, as determined by the legislature, creates statutes that are far too rigid to be of any use to the courts).
104 Id. at 225 (relating the English case of Gorris v. Scott in which the plaintiff sent his sheep in transit on an ocean voyage. In the Gorris case, the defendant failed to comply with the statutory requirement to secure the sheep in pens, and during the voyage, a storm erupted and washed the unsecured sheep overboard. The court held that the negligence per se was not applicable because the legislature enacted the statute with the intention of preventing the spread of disease among animals and not preventing them from being washed overboard).
105 See generally, KEETON ET AL., supra note 102, at 229-34 (describing negligence per se as generally based on statute violation); see also Julie Braun & Elizabeth Capersmith, The Legal and Medical Aspects of Respiratory and Bed Side Raills and Their Relationship to Falls and Fall Related Injuries in Nursing Homes, 4 DePaul J. Health Care L. 1, n.247 (2000) (listing different courts’ interpretations of the duty of care needed for negligence and negligence per se claims).
106 See id. at 499-501 (describing vicarious liability generally).
107 See id. at 229-34 (describing the burden of proof for the elements of negligence and negligence per se). But see Tom Mares, Florida’s Nursing Home Reform and its Anticipated Effect on Negligence Per Se Claims, 75 Fla. B.J. 18, 25 (2003) (describing a new statutory scheme that specifically limits negligence per se claims by requiring all elements of negligence for a successful
108 See also Moskowitz, supra note 93, at 165-69 (listing state by state criminal and civil statutes that protect elders from abuse).
109 KEETON ET AL., supra note 102, at 229-34 (describing negligence per se). The reduced recovery may increase the likelihood of winning the claim, resulting in higher probability of fines.
110 John Lipton, Nursing Home Litigation, ATLA Winter Convention Reference Materials using the Nursing Home Reform Amendments Act of 1987 as a basis for negligence per se
111 See Leonard, supra note 99, at 428.
112 Id. at 428-29.
113 Id. at 428 n.6 (quoting Justice Harlan Stone, The Common Law in the United States, 50 Harv. Ann. in the house of common law).
114 Courts have tried to minimize legislative A COMMON LAW FOR THE AGE OF STATUTES 21 (1982), stating that “[t]he traditional weapon in dealing with statutes has always been interpretation of what the written law means.”).
115 See id. at 432.
116 See id. at 429-30 (stating that criminal statutes strictly and narrowly define duty and the standard of care in such a way that most negligence cases are less likely to reach the court).
Despite the tension between the courts and the legislature, the courts have never operated completely independent from the legislature in negligence cases. In Osborne v. McMasters, the court recognized the legislatively enacted standard of care when a druggist violated a criminal law by selling an unlabeled poisonous drug. In Parker v. Barnard, a policeman brought a civil negligence action when he fell into an open elevator shaft while investigating an unguarded back door. The incident persuaded the court to recognize the statute criminalizing the non-attendance of an elevator shaft and allowed the statute to establish the standard of care for ordinary negligence.

B. Negligence Per Se Doctrine

State and federal legislatures recognized the need to protect the elderly against various types of abuse. In response to the increased number of nursing homes plagued with elder abuse, legislatures enacted statutes and regulations to deter abuse. Violations of criminal or regulatory statutes often provide injured parties remedies through negligence per se actions.

1. Negligence Per Se Elements

Negligence per se is the “unexcused violation of a legislative enactment or an administrative regulation, which is designed to

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114 See Leonard, supra note 99, at 433-34 (referring to legislatures as the “supreme lawmakers” and suggesting that this idea has brought about some deference by courts to many laws).

115 Id. at 434 (discussing Osborne v. McMasters, 41 N.W. 543 (Minn. 1889) and revealing that once legislatures make an activity negligence per se, the typical process in a negligence action is unnecessary).

116 Id. at 433-34 (citing Parker v. Barnard, 138 Mass. 116 (1883)).

117 See id. at 434; see also Clarence Moore, The Role of Criminal Statutes in Negligence Actions, 49 COLUM. L. REV. 21, 22 (1949). However, several years later, the Massachusetts court reached the opposite result in a similar case, holding that criminal statutes do not affect common law no-duty rules unless specifically provided for by the legislature. Id. at 22.

118 See David T. Marks et al., Old and New Issues in Litigating Nursing Home Cases, ADVANCED MEDICAL MALPRACTICE COURSE 16 (Mar. 13-14, 1997).

119 See Niece v. Elmview Group Home, 131 Wn.2d 39, 43 (1997) (explaining how special relationships, such as the relationship between a patient and a nursing home, give rise to the caregivers duty to protect an individual from foreseeable harms caused by the intentional or criminal conduct of third parties, even if the respondent superior doctrine is not applicable because a nursing home employee is not acting within the scope of their duties); see also Maureen Armour, A Nursing Home’s Good Faith Duty “To” Care: Redefining a Fragile Relationship Using the Law of Contract, 39 S. U. LAW. J. 217, 226-27 (1994).

120 See id.

2. Regulatory and Administrative Sanctions

The purpose behind nursing home regulations is "to promote public health, safety, and welfare and provide for the development and enforcement of standards of care" for individual facilities. To discourage inadequate patient care and elder abuse, the legislature imposes sanctions on facilities and individuals who defy statutory standards of care. Sanctions include: 1) stripping the facility of its license to operate; 2) loss of federal and state Medicaid revenues; 3) preventing a health care provider from participating in the Medicaid program; and 4) fines for regulation violations.

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121 Id. (defining the standard of care in these actions through statutes, ordinances, or regulations).

122 Id.

123 See Marks et al., supra note 118, at 16.

124 See Georgetown College v. Hughes, 130 F.2d 810, 814 (D.C. Cir. 1942) (noting that respondent superior only holds principals liable for tortious conduct of representatives acting within their scope of employment).


126 See Marks et al., supra note 118, at 16.

127 Id.

128 Id.


130 Marks et al., supra note 118, at 16.
C. Negligence

Negligence serves as the primary cause of action for injured residents against nursing homes. 131 To prove negligence, four elements must be established: 1) the nursing home has a duty to the resident patient; 2) the nursing home has breached its duty; 3) the breach has caused the patient’s injuries; and 4) the patient has suffered damages. 132

1. Duty Owed to Resident

First, the nursing home and its employees must be legally bound to the resident. 133 Nursing homes and their staffs are usually contractually bound to residents, thus establishing this element of duty. 134 In addition, the nursing facility and its staff owe a legal duty to the patient under theories of direct corporate liability and vicarious liability. 135 Under the direct corporate liability theory, nursing home facilities owe their residents a direct non-delegable duty of care. 136 The theory imposes liability on long-term care facilities for proximately caused injuries whether caused by an employee or by the facility itself. 137 Success of the direct corporate liability theory relies on the type of duty outlined and promised by the nursing facility and the type of evidence that defines the contours of the duty. 138

The theory of vicarious liability holds a nursing facility liable for injuries caused by individuals who maintain a special relationship with the institution. 139 Specifically, the individual and the nursing facility must have maintained an employee-employer relationship at the time of injury. 130 In addition, the employee must have caused the injury while acting within the scope of their employment. 141

When a connection can be made between the resulting harm and mistakes made by administrative personnel and upper level management, any distinction between direct corporate liability and vicarious liability quickly fades. A direct correlation may be drawn between administrative business decisions that would fall within a direct corporate liability theory and negligent managerial conduct, which is better classified as vicarious liability. 142 Business decisions determined by the corporation substantially affect whether the managerial staff can adequately satisfy its supervisory duties. 143 For instance, corporate decisions that cut back on finances may cause staffing shortages, drastically reduce the number of caring and qualified applicants, increase the number of indifferent untrained applicants, escalate turnover rates, and physically and emotionally overload nursing home staff. 144 Such problems compromise the quality of patient care and foster an environment where elder abuse is more likely to occur.

2. Breach of Duty

The second element in a negligence action is a breach of the duty owed by the nursing facility to the patient. 145 A breach of duty occurs when the nursing facility and its staff’s conduct deviates from the standard of care. 146 The standard of care can be established

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130 See Marshall B. Kapp, Malpractice Liability in Long-Term Care: A Changing Environment, 24 CRESCENTON L. REV. 1235, 1241 (1991) (requiring an individual to be acting within his or her scope of employment or supervision to hold the nursing home vicariously liable); see also Marks et al., supra note 118, at 14 (noting that the facility will be liable for the acts of another individual if there is a certain relationship between the facility and the tortfeasor).

131 See Kapp, supra note 140, at 1241.

132 See generally President and Directors of Georgetown College v. Hughes, 130 F.2d 810, 812 (D.C. Cir. 1942) (distinguishing negligence in administration and vicarious liability).

133 See generally Pilliner & Moore, supra note 44, at 318-19 (discussing that staff members who are burned-out or demoralized with their jobs are at greater risk of engaging in abusive behavior towards elders under their care).

134 See id. at 319 (describing the high pressures, poor wages, and low prestige of nursing home work as a contributing factor to elderly abuse); see also Steven H. Lopez, Nursing Home Privatization: What is the Human Cost?, Keystone Research Center.

through statutory or regulatory law, case law, contract, or expert testimony. In addition, contracts that incorporate regulatory and criminal statutes may serve to establish the standard of care. However, whether unincorporated regulatory and criminal statutes alone may establish a standard of care remains unclear.

a. Standard of Care Established by Case Law

Golden Villa Nursing Home, Inc. v. Smith, the seminal Texas case on nursing home negligence, sheds light on the parameters of the standard of care. Sixty-eight-year-old Amelia Oliver resided in Golden Villa Nursing Home. The nursing home was aware of Oliver's tendency to wander and considerable evidence demonstrated that she required supervision. One day while unsupervised, Oliver wandered onto Highway 35 in the city of Brazos where a motorcyclist hit her. Both Oliver and the motorcyclist brought negligence actions against the nursing home. The court held that a Texas nursing home is "under a duty to exercise such reasonable care for a patient's safety as his known mental and physical condition may require." Thus, the standard of care for negligence requires reasonable care to be taken in light of a patient's known physical and mental conditions.

b. Standard of Care Established by Statutes Incorporated into Contracts

A number of states have incorporated statutory standards into patients' nursing home contracts to establish the standard of care. Contracts can expressly outline the type of special care that facilities pledge to provide residents. For example, in Stifflemann v. Abrams, the plaintiffs advanced the idea that the decedent patient's nursing home contract containing the resident's bill of rights expressly outlined the standard of care owed to the decedent, and the Missouri Supreme Court agreed. The contract between Stifflemann and the Nursing home provided that the nursing home would allow residents "the best possible nursing care . . . to be treated as an intelligent and sensitive human being . . . physical security . . . [and] to be free from physical restraint." The Missouri statute itself required that every facility must make sure that each resident is "free from mental and physical abuse, and free from chemical and physical recognition of his dignity and individuality . . . ." Thus, deviation from the contractual standard of care represented a breach of duty standard of care.

c. Standard of Care Established by Experts

In the absence of statutory or case law, expert testimony may be used to establish the standard of care. Expert testimony is unnecessary if the case's facts fall within a layperson's common knowl-
edge and experience. However, expert testimony is pertinent in cases involving complex, technical issues beyond a layperson’s common understanding.

In Jahnke v. Evangelical Lutheran Good Samaritan Society, the plaintiff, a patient who was at a nursing home facility, sustained severe injuries after being pushed to the floor by another resident. The Kansas Court of Appeals found that the simplicity of the facts did not require expert testimony to establish the standard of care. Because the patient’s care was so obviously lacking and had such serious consequences, the triers of fact were capable of determining whether the facility exercised reasonable care to prevent injury.

The court noted that expert testimony would be required only when the facts of the case are technologically complex or alien.

d. Additional Standards of Care

Standards of care may also be delineated in a number of other ways. National organizations publish literature that indicates the standard of care for nursing homes. Similarly, in Texas, the Board of Examiners circulates Texas’s regulations and licensure requirements germane to physicians, nurses, and other health care home professionals. Standards of care may also be established by the nursing home facility’s own rules and policies. Authoritative references and manuals utilized by the facility will also describe the

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163 See id. at 1137.
164 See id. at 1135 (noting that the nursing home facility had knowledge of the other resident’s propenalty to behave aggressively).
165 Id. at 1136-37 (arguing that the negligence in this situation was so obvious that expert testimony was not needed; the average individual would see that the care given was not reasonable).
166 Id.
167 See Jahnke, 634 P.2d at 1137 (adding that the main purpose of expert testimony is to clarify a standard of care in such difficult situations).
169 Id.
170 Id. (identifying that a nursing facility’s own regulations and policies create job descriptions, dietary policies and procedures, infection control policies and procedures, staff education and training programs, quality assurance programs, documentation policies and procedures, and manuals and handbooks used by the facility).
171 Id.
172 Marks, supra note 168.
173 See Golden Ville Nursing Home, Inc. v. Smith, 674 S.W.2d 343, 349-50 (Tex. App.—Houston [14th Dist.] 1984, writ ref’d n.r.e.) (noting that there is liability for any injury proximately resulting from the breach of duty owed to the injured party).
174 See Kramer v. Lewisville Mem’l Hosp., 858 S.W.2d 397 (Tex. 1993) (discussing a wrongful death statute and using the ordinary meaning of cause in construction of the statute).
175 Joseph H. King, Jr., Causation, Valuation, and Change in Personal Injury Torts Involving Preexisting Conditions and Future Consequences, 90 Yale L.J. 1335, 1335 (1981) (noting that the test is also called the “nine quas non” test).
176 Id. at 1335-56. In recent times, the “substantial factor” test has attempted to replace the “but for” test. The substantial factor test establishes causation when the defendant’s act or omission was a substantial factor in causing the plaintiff’s injury. Id.
177 Missouri Pac. R.R. Co. v. American Statesmen, 552 S.W.2d 90, 103 (Tex. 1977).
178 See KESTON ET AL., supra note 102, at 164-65 (requiring a connection between the behavior and the consequential injury).
179 See Marks et al., supra note 118, at 3; see also Valdez v. Lyman-Roberts Hosp., Inc., 638 S.W.2d 111, 114-15 (Tex. App.—Corpus Christi 1982, writ ref’d n.r.e.) (requiring that if tributes to the injury, plaintiff can still prove a causal relationship between the conduct and the injury). The event must still be a probable cause of the harm, and not just a posi-
the absence of the injury then causation may not exist.\textsuperscript{180} In a medical
malpractice action, causation is proven through the "reasonable probability" that defendant’s conduct produced the injury.\textsuperscript{181}

4. Damages

Finally, damages must exist for a finding of negligence.\textsuperscript{182} Jurors measure the extent of the patient’s injuries and compensate victims such as nursing home residents who are injured with remedies for their grievances.\textsuperscript{183} Injured residents may recover damages for health care expenses, pain, suffering, mental anguish, and diminished capacity to enjoy life.\textsuperscript{184}

D. Arguments Opposing the Use of Statutes in Ordinary Negligence

Critics argue that the distinction between negligence per se and ordinary negligence appears to blur when statutes are used to create the standard of care. Nevertheless, a closer examination reveals that the distinction between the two concepts remains. In negligence actions, statutes merely allow jurors to determine whether a reasonably prudent person would have complied with the statute.\textsuperscript{185} Statutes may be introduced to assist triers of fact, but

\textsuperscript{180} Marks et al., supra note 118, at 3, 4-5 (expressing that plaintiff’s injuries must not stem from a pre-existing condition afflicting the patient).

\textsuperscript{181} See Duff v. Yelin, 751 S.W.2d 175, 177 (Tex. 1988); see also Lenger v. Physician’s Gen. Hosp., Inc., 435 S.W.2d 703, 705-07 (Tex. 1970) (examining whether there was evidence showing reasonable probability in a case where a patient was mistakenly given solid food after a colon resection surgery and later suffered severe complications from the surgery); see also Darrell L. Keith, Law of Chance: A Modern Proportional Approach to Damages in Texas, 44 Baylor L. Rev. 759, 761-62 (1992) (indicating that "reasonable medical probability" can be shown when the event more likely than not caused the condition in absence of other possible causal relationships). Texas courts, for example, quantify this relationship by requiring "something more than a fifty percent chance" to establish probability. Id.; see also Lenger, 435 S.W.2d at 713.

\textsuperscript{182} See Kiefer et al., supra note 102, at 165 (relating that neither nominal damages nor future threat of injury are enough to satisfy the damage requirement; some proof of an actual loss is required).

\textsuperscript{183} See Jacob A. Stetson, Symposium on Personal Injury Damages § 228 (3d ed. 1997) (discussing the lack of jury standards which often require a jury to rely on fairness and reasonableness when determining what damages an injured party should receive).

\textsuperscript{184} See Horizon/CMS Healthcare Corp. v. Audid, 34 S.W.3d 887, 894 (Tex. 2000) (distinguishing non-economic losses, such as physical pain and mental suffering, from economic losses, such as medical expenses and loss of earnings.).

\textsuperscript{185} Leonard, supra note 99, at 432 n.24.

acceptance is not required by the court.\textsuperscript{186} The triers of fact typically remain autonomous in resolving each of the disputed elements of ordinary negligence.\textsuperscript{187} A statute simply acts as another fact that jurors may consider when determining the minimum standard of care.\textsuperscript{188} On the other hand, negligence per se removes all doubt as to the type of conduct a reasonably prudent person would have exercised.\textsuperscript{189} Unlike ordinary negligence actions, jurors in negligence per se cases do not have the freedom to determine whether someone meets a standard of care.\textsuperscript{186} Thus, ordinary negligence’s flexibility and negligence per se’s extreme rigidity continue to define the line between the two concepts when statutes establish standards of care.

Opponents argue that statutes intrude on courts’ broad discretion by establishing standards of care in negligence actions.\textsuperscript{190} However, many statutes do not stifle courts’ flexibility. Courts continue from directing a verdict to narrowly or broadly defining a statute’s standard of care.\textsuperscript{191} In fact, Texas courts ultimately determine the degree of influence that criminal statutes have on civil statutes’ standards of care. In Carver v. William Somerville & Son, Inc., the court announced, "It is well-established that the mere fact that the Legislature adopts a criminal statute does not mean this court must accept Court identified its position by stating that civil courts have the power to adopt or reject standards of care outlined in criminal statutes in negligence cases."\textsuperscript{192}
III. MECHANISMS THAT ARE SUPPOSED TO DEAL WITH ELDER ABUSE PROBLEMS AND WHY THEY DON’T WORK

A. State Criminalization of Elder Abuse

Recognizing the importance of protecting elders from abuse and neglect, some states have enacted statutes imposing criminal penalties on violators.195 Like regulatory statutes, many state criminal statutes attempt to deter nursing home neglect and abuse.196 Formation of elder abuse statutes substantially differs among states.197 A number of states have enacted general elder abuse laws that do not specifically focus on nursing home residents, while other states, such as Texas, impose criminal liability for violating mandatory elder abuse reporting statutes.198 Nevertheless, mandatory reporting statutes can be useless if the actual perpetrator or abusive nursing home is not criminally prosecuted.199 Many states, including Missouri and Illinois, criminally penalize individuals responsible for elder abuse.200 Differences among state laws, however, are readily apparent even between these two states. Missouri penalizes only those individuals who “knowingly” abuse or neglect a resident, while Illinois criminally sanctions any person, owner, or licensee of a nursing facility that intentionally or knowingly abuses a resident.

195 Angela Smellibenger Quinn, Improving Federal Criminal Liability on Nursing Homes: A Way of Determing Inadequate Health Care and Improving the Quality of Care Delivered, 43 St. Louis U. L.J. 653, 656, 683 (encouraging federal legislation to criminalize certain conduct that results in mistreatment of elderly).
196 See id. at 683-84 n.256.
197 Id. at 683.
198 Id. at 683 & n.252 (uncovering that ten of seventy-one state elderly abuse laws explicitly provide protection for individuals sixty years old or elder and two state laws require a minimum age of sixty-five years); see also Tex. HEALTH & SAFETY CODE ANN. § 242.122 (Vernon 1992) (requiring anyone with reason to believe a resident has been harmed by another individual to report the mistreatment). The statute requires institution employees to immediately report the abuse or neglect orally and also in a report that is written within five days. They are also required to sign statements indicating they are aware of the requirement and understand their criminal liability for failure to comply. Id.
199 See Quinn, supra note 195, at 685 (speculating that problems with proof and lack of resources are two factors explaining why nursing home reporting violations are so seldomly prosecuted).

and fines licensees or owners of nursing home facilities for gross negligence.201 A facility that neglects an elderly individual is guilty of a petty offense in Illinois.202

Although many states have enacted criminal elder abuse laws, prosecution occurs infrequently.203 In Missouri, 4,759 nursing home regulation violation reports and 832 resident abuse and neglect reports flooded the Department of Social Services.204 However, of these reports, officials conducted criminal investigations of patient abuse on only twenty-three of these cases.205 According to Quinn, rare prosecutions may be attributed to a number of reasons, including: 1) the prosecuting department’s lack of time or resources; 2) difficulty in successfully prosecuting the perpetrator due to a heightened standard of proof; 3) the hurdle of proving causation; 4) the nursing home resident’s inability to aid in prosecuting the perpetrator due to poor health, decreased mental capacity, or death; and 5) the belief that nursing home quandaries should be resolved through the regulatory system or in civil court rather than the criminal justice system.206 Thus, inadequate enforcement of criminal liability for elder abuse undercuts legislative intent to deter and reduce elderly abuse and neglect in nursing homes.

B. Mandatory Reporting

Generally, mandatory reporting laws are designed to create social and legal responsibilities to promote quality institutional care and to deter elder abuse in nursing homes.207 To create this social and legal responsibility, legislatures often require “any person” with a “reasonable belief” or “suspicion” to report abuse to the proper

201 (a) any person or any owner or licensee of a long-term care facility who abuses a long-term resident is guilty of a Class 3 felony. Any person or any owner or licensee of a long-term care facility who knowingly neglects a long-term care facility
203 See Quinn, supra note 195, at 684-85.
205 Id.
206 See Quinn, supra note 195, at 686.
207 See generally Munkowitz, supra note 93, at 89-97 (reviewing various state laws regarding elder abuse and mistreatment).
authorities. Properly reporting abuse in good faith can provide immunity to the individual or institution and can launch investigative and treatment services by organizations or groups such as Adult Protective Services.

Mandatory reporting statutes are particularly intriguing because they act as bridges to link criminal statutes to civil liability. Like regulatory and administrative statutes, criminal statutes mirror legislative intent and suggest a minimum case for the nursing home industry. Interestingly, mandatory reporting statutes possess a dual nature. The statutes are statoriously criminal, yet they have the power to confer civil liability by establishing a standard of care in negligence actions. A closer examination of the dual nature of mandatory reporting provides insight to the statutes’ fluidity and ability to change from one form to another.

1. Criminal Nature

Failure to report elder abuse can be a criminal offense. The individual or institution must deliberately or "knowingly" fail to report the abuse in order to constitute a crime. Despite these state legislative efforts to mandate reporting of elderly abuse, mandatory reporting laws are rarely enforced. This may be at least partially due to the difficulty prosecutors face in proving that a suspect’s alleged failure to report incidents of abuse are the result of a "willful" or "knowing" culpable mental state sufficient to impose criminal liability. In fact, in at least one recent case against an HMO that allegedly discouraged employees from filing reports, the District Attorney’s Office decided there was insufficient evidence of wrong-

208 Id.


210 Tex. Health & Safety Code Ann. § 242.131 (announcing that "[a] person commits an offense if the person has cause to believe that a resident’s physical or mental health or welfare has been or may be further adversely affected by abuse or neglect and knowingly fails to report in accordance to § 242.122."). A report of resident abuse or neglect is viewed as "nonaccusatory and reflects the reporter’s belief that a resident has been or will be abused or neglected or has died of abuse or neglect." Id. at § 242.123 (recognizing that a report must include: (1) the name and address of the resident; (2) the name and address of the individual responsible for the care of the resident, if available, and; (3) other relevant information.

211 See Moskowitz, supra note 93, at 117.

212 Id.


214 See Kesron et al., supra note 102, at 222 (stating that in many cases, the criminal statute terms are applied to civil actions).

215 See id.


217 Kesron et al., supra note 102, at 220.

218 Id.

219 Id. (noting that although legislation may be penal in character, civil liability can still be imposed).
turn their backs on residents suffering from abuse, neglect, and exploitation.232 Monetary punishment motivates individuals to take action to prevent further abusive conduct.233 Despite state efforts to mandate reporting of elderly abuse through mandatory reporting laws, studies show that these statutes are largely ignored by healthcare providers and are rarely enforced.234 The unwillingness of prosecutors to aggressively pursue convictions against those who knowingly fail to report the abuse is largely due to the difficulty prosecutors face in proving that a suspect’s alleged failure to report was accompanied with the requisite “willful” or “knowing” culpable mental state sufficient to impose criminal liability.

IV. CRIMINAL AND REGULATORY STATUTES SHOULD ESTABLISH THE STANDARD OF CARE IN ELDER ABUSE NEGLIGENCE ACTIONS

A. States Allowing Criminal and Regulatory Statutes to Confer Civil Liability

In the face of increasing elder abuse, financial exploitation, and neglect, states have accepted the challenge to stop what has become a national disgrace.235 States such as California, Florida, and Arizona aggressively fight elder abuse by allowing juries to consider regulatory and criminal statutes as standards of care in negligence actions.236

232 Fischer v. Metcalfe, 543 So.2d 785, 789-90 (Fla. Dist. Ct. App. 1989) (advancing that civil liability of criminal statute violations furthers legislative intent “to help those who are abused, neglected, or exploited; to preserve family life, where possible; to deal with the impact of such abuse on siblings, family structure, and the citizens of Florida; and to intervene, treat and rehabilitate to forestall further harm.”). The Texas legislature enacted elderly abuse statutes “to ensure that institutions in this state deliver the highest possible quality of care.” Tex. HEALTH & SAFETY CODE ANN. § 242.051 (Vernon 1998) (stating “the rules and standards adopted . . . establish minimum acceptable levels of care”).

233 Moskowitz, supra note 93, at 135.

234 See Seymour H. Moskowitz, Reflecting Reality: Adding Elder Abuse and Neglect to Legal Education, 47 Loy. L. Rev. 191, 211 (2001) (citing numerous studies indicating the lack of force these statutes have); see also Moskowitz, supra note 93, at 117. It has been suggested that the ignorance of mandatory abuse reporting laws stems from concerns over private, fears of making false reports, and a belief that reporting potential abuse is simply too time consuming. See Wolfson, supra note 214 (stating that employees of a California HMO accused the HMO of systematically discouraging employees from reporting abuse because it was viewed as too time consuming).


236 Like Texas, these states house a large population of individuals over sixty-five years of age and are currently dealing with the explosion of elder abuse.237 In fact, California ranks number one in the nation, housing the most individuals over sixty-five in the United States.238 Florida ranks second in the nation, and Texas ranks fourth.239

California, Florida, and Arizona case law illustrate criminal and regulatory statutes’ ability to establish standards of care in ordinary negligence actions. As the leading states to expand statutes to protect elder abuse, California, Florida, and Arizona may serve as guides to states such as Texas to combat escalating elder abuse.

1. California

California enacted criminal elder abuse and regulatory statutes specifically to encourage civil litigation and deter elder abuse.240 Such legislation explicitly motivates attorneys to accept elder abuse and neglect cases by allowing compensation for attorneys’ fees.241 Allowing criminal and regulatory statutes to establish standards of care also facilitates recovery, thereby indirectly discouraging elder abuse as illustrated in case law.242

California’s Conservatorship of Gregory revolutionized ordinary negligence’s establishment of standards of care.243 In this case, a sixty-nine-year-old woman broke her hip and shoulder from falling moments after a nurse propped her up on her bed and negligently left her unsupervised.244 The nursing facility reported the incident to California’s Department of Health Services and Survey Agency as


237 1999 Census Estimates of the Older Population for States, ADMINISTRATION ON AGING, at http://www.census.gov/popest/estimates/state/st-09-01.pdf [hereinafter 1999 Census Estimate Five years of age in California was 3,647,532, in Florida the population was 2,741,849, and in Texas, the population of persons over sixty-five was 2,016,497].

238 Id.

239 Id.

240 Id. (noting that the California elder abuse laws are aimed at encouraging litigation).

241 Id.


243 Id. at 523.

244 Id. at 317; see also Terri D. Keville et al., Recent Developments in Long-term Care Law and Litigation, 30 WM. & MARY L. REV. 325, 329 (1990) (discussing the facts of the Gregory case in further detail).
required.238 Both the Department of Health and Services and the Survey Agency reviewed the facility’s operations and staff and did not cite or penalize the facility for inadequacies.239 Nevertheless, the court quoted portions of a regulatory statute in its instructions to the jury to establish a standard of care.240

In Gregory, the nursing home resident brought an ordinary negligence and fraud action against the facility under the Elder Abuse and Dependent Adult Protection Act.241 The defendants challenged utilizing state and federal regulations to define the standard of care for nursing home care.242 The court recognized relevant case law and acknowledged that applicable statutes should be given to the jury for its review and consideration on the reasonableness of the conduct.243 Reasoning that the legislature specifically designed the regulations to define ordinary care, the Court of Appeals held that regulations appropriately assisted jurors in determining the standard of care.244

In addition, in Easton v. Sutter Home Hospital, plaintiffs brought a negligence action against a nursing home physician and nurse for failing to report elderly abuse sustained by a decedent.245 Although criminal in nature, California courts permitted mandatory reporting statutes to assist the trier of facts in establishing a civil action’s standard of care.246 Utilizing the criminal statute to help establish the standard of care, the jury found that the defendants were not negligent.247

238 Keville et al., supra note 234, at 330.
239 Id.
240 Id.
241 Conservatorship of Gregory, 80 Cal. App. 4th at 517.
242 Id. at 522 (recognizing the more important issue of whether “the duly authorized regulations can be used to describe the care required under an existing statutory right of action for elder abuse”).
243 Id. at 523 (citing Housley v. Godinez, 4 Cal. App. 4th 737 (Cal. Ct. App. 1992)).
244 Id. at 524 (adding that jury instructions based on state or federal regulations can avoid being vague and can be appropriately used to assist jurors in establishing a standard of care by offering regulations that refer specifically to the profession’s standard of practice.)
246 Id. at 488-93 (discussing the criminal statute’s requirements and definitions to aid the jury in deciding whether defendants acted negligently).
247 Id. at 493.

2. Florida

Like California, Florida’s criminal and regulatory statutes establish minimum standards of care and may confer civil liablity. Enactment of Florida’s civil enforcement statute and legislative transcripts express a clear intention to allow residents whose rights are infringed upon to seek actual and punitive damages.248 By extending the criminal statute to the civil realm, the statute assists jurors in resolving the reasonableness of the conduct.

In Dusine v. Golden Shore Convalescent Center, a Florida Court of Appeals held that the exclusion of the nursing homes rules and regulations to establish a standard of care constituted reversible error.249 The victim brought a negligence action against the nursing home after she was found lying on the floor unattended and injured due to an unattended restraint belt.250 Plaintiff also contended that on prior occasions, the facility had failed to secure her in a restraint belt as required.251 As a result of the fall, she sustained serious injuries.252 The case illustrates that a party may establish a standard of care by introducing regulations specifying a minimum standard of care owed to a patient.253

Similarly, in Beverly Enterprises v. McVey, the plaintiff sued a nursing home claiming that the decedent had developed a subdural hematoma due either to the facility’s negligence or an employee’s intentional act.254 The plaintiff, who was the victim’s son, launched the negligence action by establishing a minimum standard of care utilizing Florida Statute section 400.022.255 The Court of Appeals affirmed the nursing facility’s liability, illustrating that regulatory and administrative statutes may assist the jury in defining a minimum standard of care.256

248 FLA. STAT. ANN. § 400.022 (West 2000).
250 Id. at 41.
251 Id.
252 Id. (revealing the victim required a restraint belt at all times because she was known to be mentally confused, incoherent, and unaware of her surroundings).”
253 Id. at 42-43.
255 Id. per curiam, FLA. STAT. § 400.023 (1993) (governing nursing home residents’ rights and allowing civil enforcement for elder abuse).
256 Beverly Enterprises, 739 So.2d at 648-49 (relying on Florida Statute § 400.022 in its determination of negligence).
3. Arizona

Some characterize Arizona as having perhaps the toughest criminal and civil elder abuse laws in the nation. Arizona penalizes offenders of physical and emotional elder abuse with up to twelve and a half years in prison and up to $150,000. In addition, facilities or organizations that fall below an acceptable standard of care incur steep civil liability. Not only does Arizona allow civil recovery of criminal elder abuse, but the state also permits punitive damages for pain and suffering, recovery for the cost of investigation, and compensation for attorneys fees. Furthermore, the court reserves the right to dissolve the facility or organization as part of the penalty.

In Denton v. American Family Care Corp., seventy-four-year-old Frances Denton, unable to care for herself, entered Paradise Homes #4 nursing facility. After a mere six weeks of care, Ms. Denton developed ailments resulting from abuse and neglect. She collapsed four or five times, suffered from severe dehydration, malnutrition, and lidocon toxicity. In addition, she developed a bedsore that covered such a large portion of her body that she required a skin graft to cover her exposed coccyx bone. The court held that a representative of the victim of elder abuse may recover damages for the victim’s pain and suffering pursuant to Arizona’s elder abuse statute, regardless of the victim’s death. More importantly, the court revealed Arizona’s intention to permit civil compensation for violations of criminal statutes. Recognizing the seriousness of

24. See Elder Abuse and Dependent Abuse Civil Protection Act, CAL. WELF. & INST. CODE § 15657.2 (West 1991).
25. Id.
26. Id.
27. Id.
28. Id.

29. 945 P.2d 1283, 1284 (Ariz. 1997) (noting that the facility held itself out as “Arizona’s leader in Alzheimer’s care”).
30. Id.
31. Id.
32. Id. (describing the bedsore as so enormous that the surgeon was forced to apply a 20-by- 30 centimeter skin graft to cover the wound).
33. Id. at 1285, 1288.
34. Denton, 945 P.2d at 1287 (finding that the legislature intended to extend recovery to incapacitated and vulnerable adults for actions of abuse, neglect, and exploitation; thus, victims and their representatives have the ability to recover damages for pain and suffering even if the victims die prior to judgment).

elder abuse, Arizona criminally penalizes offenders and classifies the offense as a class five felony. In addition, Arizona expanded its elder abuse statute to impose civil liability on offenders. Civil liability based on criminal statutes illustrates Arizona’s acceptance of admitting legislative standards of care assist jurors.

B. Texas Should Expressly Allow Criminal and Regulatory Elder Abuse Statutes to Confer Civil Liability

Escalating accounts of elder abuse in Texas cause both the legislature and victims’ families to search for an answer that will effectually stamp out elder abuse. Explicitly allowing criminal and regulatory elder abuse statutes to establish minimum standards of care and confer civil liability may be the answer.

First, setting standards of care using regulatory statutes conforms to Texas’ legislative intent. Texas’ Health and Safety Code section 242.001 governs nursing home operations. The statute aims “to ensure that [Texas] institutions . . . deliver the highest possible quality of care.” Although the legislature does not explicitly state that private individuals may use the statute to establish standards of care in ordinary negligence, plain language interpretation of the legislature’s word choice suggests this concept. Texas Health & Safety Code section 242.001 states, “This chapter, and the rules and standards adopted under this chapter, establish minimum acceptable levels of care.” In addition, “[t]he rules and standards . . . are designed to be useful to consumers and providers in assessing the quality of care provided in an institution.” The legislature deliberately selects the word “consumer” and not “prospective consumer,” indicating that the individual has already received care from the nursing home. “[A]ssessing the quality of care” already provided by an institution implies a determination of whether the

29. Id. at 1286. Elder abuse is classified as a class five felony in hopes that criminalizing elder abuse of an incapacitated or vulnerable adult will reduce rising elder abuse incidences.
30. Id. According to the Arizona code, “[A]n incapacitated or vulnerable adult whose life or health is being or has been endangered or injured by neglect, abuse or exploitation may file an action in superior court against any person or enterprise that has been employed to provide care . . .” A.R.S. REV. STAT. § 45-455(B) (1989).
31. Id.
32. Id.
33. Id. at § 242.001(a).
34. Id.
nursing home’s conduct was negligent.\footnote{276} Thus, a plain language interpretation coupled with legislative intent to broadly construe the statute logically suggests that private consumers may utilize regulatory statutes to establish ordinary negligence’s standard of care.

Second, allowing juries to consider statutes as standards of care promotes accountability. In the case of criminal statutes, nursing home corporations are virtually untouchable. Nursing home corporations are business entities that cannot be directly penalized by the justice department or equivalent state agencies.\footnote{277} Rather, criminal statutes shift criminal penalties from business corporations to highly ranked nursing home agents. Only corporate managers, directors, or officers may be held criminally accountable for illegal nursing home conduct.\footnote{278} Thus, nursing home corporations escape accountability. Although individuals are prevented from committing further elder abuse, nursing homes are allowed to continue fostering an environment for elder abuse. Prosecuted individuals may no longer abuse residents, but nursing home environments ripe for elder abuse can permit new individuals to continue the abuse. Thus, allowing nursing home corporations to evade accountability propels the cycle of elder abuse. Introducing criminal statutes as standards of care may facilitate civil recovery against negligent nursing homes.

Nursing homes also tend to economically breach their duty of care. Nursing home corporations may find it more profitable to provide inadequate care and run the risk of civil liability than to hire expensive, skilled health professionals. In Texas, regulatory agencies are allowed to penalize nursing homes at least $100, but no more than $10,000 per violation each day.\footnote{279} Agency penalties may be mere slaps on the wrists for multi-million dollar corporations that participate in economical breaches of duty. Permitting criminal statutes to establish the standard of care in ordinary negligence actions may resolve a corporation’s lack of accountability. The threat of outrageous punitive damages stemming from ordinary negligence may force nursing home corporations to provide adequate care lest they risk encountering angry jurors and losing millions of dollars.

Third, allowing private individuals to introduce criminal and regulatory statutes as minimum standards of care increases statutory enforcement against elder abuse. Although the explosion of elder abuse is apparent, few individuals or nursing homes are ever prosecuted or penalized.\footnote{280} Rare prosecutions can be attributed to a number of factors, including: 1) the prosecuting department’s lack of time, resources, or experience; 2) difficulty in successfully prosecuting the perpetrator due to a heightened standard of proof; 3) the hurdle of proving causation; 4) the nursing home resident’s inability to aid in prosecuting the perpetrator due to poor health, memory loss, or death; and 5) the belief that nursing home quarantines should be resolved through the regulatory system or in civil court.\footnote{281} Expressly allowing regulatory and criminal statutes to establish standards of care and permitting punitive damages and compensation for legal fees will motivate attorneys to aggressively police nursing home violators and deter elder abuse. Government agencies enforcing criminal and regulatory statutes lack the necessary manpower and funds to effectively deter institutional elder abuse. Expressly permitting compensation for legal fees and punitive damages will fuel private statutory enforcement and counter balance the criminal justice system and regulatory agencies’ hesitation to prosecute and civilly penalize violators.

Finally, Texas case law suggests that statutes may establish standards of care to assist jurors. In Texas, organizational bylaws, state health regulations, and national standards are admissible to define the standard of care.\footnote{282} Three state laws primarily govern Texas’s nursing homes: the Health and Safety Code, the Nursing Facility Requirements for Licensure and Medicaid Certification.\footnote{283}

\footnote{275} See generally Moskowitz, supra note 93, at 111-18.

\footnote{276} John Pray, Note, State v. Seretibis: Causation and the Criminal Liability of Nursing Home Administrators, 1986 Wis. L. Rev. 339, 358 (1988) (discussing the various factors which lead to prosecutorial hesitation in elder abuse cases).

\footnote{277} Hernandez v. Nueces County Med. Soc'y, 779 S.W.2d 667, 671 (Tex. App.—Corpus Christi 1989, no writ) (indicating that such evidence is not conclusive, but is merely one factor used to determine the standard of care).

\footnote{278} TEX. HEALTH & SAFETY CODE ANN. § 242.001(a).

\footnote{279} Id. (stating that corporate officers, managers, and directors can be held criminally liable for illegal corporate conduct).

\footnote{280} Id. (stating that corporate officers, managers, and directors can be held criminally liable for illegal corporate conduct).

\footnote{281} TEX. HEALTH & SAFETY CODE ANN. § 242.045 (Vernon 1998).
and the Certification for Long-Term Facilities. Over the years, Texas cases have progressively utilized regulatory statutes to satisfy negligence's standard of care element. Three cases in particular illustrate this point.

In Deering's West Nursing Center v. Scott, a visitor sued a Texas nursing home after being slapped by a staff member and knocked to the ground. The nursing home negligently hired staff member Ken Hopper over the telephone without ever having met him. During the phone interview, Hopper falsely maintained that he was a Texas licensed vocational nurse (LVN) who had never been convicted of a crime. The nursing home failed to discover the falsification by not validating Hopper's LVN license. Given the opportunity to rely on either case law or a regulatory statute to determine the standard of care, the jurors chose to rely on Article 4442d of the Nursing Home Administrators Licensure Act as the standard of care.

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§ 19.701 states, "A facility must care for its residents in a manner and in an environment that promotes maintenance or enhancement of each resident's quality of life."

§ 19.801 requires a facility to "conduct initially and periodically a comprehensive accurate, standardized, reproducible assessment of each resident's functional capacity."

§ 19.901 emphasizes that "[b]ased on the comprehensive assessment of the resident, the facility must ensure that: (A) a resident enters the facility without pressure sores does not develop pressure sores unless his clinical condition demonstrates that they are unavoidable; and (B) a resident having pressure sores receives necessary treatment and services to promote healing, prevent infection, and prevent new sores from developing."

§ 19.1001 requires a facility to "have sufficient staff to provide nursing and related services to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident, as determined by resident assessments and individual plans of care."

§ 19.1002 states "(a) [the ratio of licensed nurses to residents must be sufficient to meet the needs of the residents."

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Also as discussed earlier, the Golden Villa case explicitly recognizes the importance of statutory regulations. The court stated, "The title of the Texas regulations alone makes it clear that the Texas Department of Health considers compliance with such standards to be merely the minimum duty owed by a nursing home to its patients rather than the fully owed duty." Similarly, Hickson v. Martinez allowed the jury to consider federal regulations in determining the standard of care. The court declared that federal regulations governing hospital operations and care for Medicare and Medicaid recipients were relevant in establishing the facility's standard of care.

CONCLUSION

Facing an upsurge of elder abuse, Texas must take action to protect vulnerable nursing home residents. Explicitly allowing private individuals to establish standards of care using criminal and regulatory statutes in ordinary negligence may solve Texas' difficulty with enforcing elder abuse statutes, regulating nursing homes' quality of care, and deterring institutional elder abuse. Although criminal and regulatory elder abuse statutes do not expressly permit private individuals to establish standards of care in ordinary negligence, an analysis of legislative intent, Texas case law, and policy suggests otherwise. Hopefully, private policing of nursing homes will purge facilities of elder abuse so that the nation can return to a time when inhumane treatment of its elders is virtually unheard of.

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28 Golden Villa Nursing Home, Inc. v. Smith, 674 S.W.2d 343, 349-50 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.).

29 Id.

30 Hickson v. Martinez, 707 S.W.2d 919 (Tex. App.—Dallas 1985).

31 Id. at 927.