

CARIE
100 NORTH 17TH STREET – Suite 600
PHILADELPHIA, PA 19103

PHONE: 215-545-5728

FAX: 215-545-5372

E-MAIL: www.carie.org

DIANE A. MENIO, MS – EXECUTIVE DIRECTOR

**CENTER FOR ADVOCACY FOR THE RIGHTS
AND
INTERESTS OF THE ELDERLY**

#11

“(“The Medical Liability Insurance Crisis: A Review of the Situation in Pennsylvania” |)

The Committee on Energy and Commerce
Subcommittee on Oversight and Investigations
February 10, 2003

Thank you for convening today's hearing about medical liability in Pennsylvania and for the opportunity to present testimony.

My name is Diane Menio and I represent CARIE, the Center for Advocacy for the Rights and Interests of the Elderly. Founded in 1977, CARIE is a non-profit organization dedicated to improving the quality of life for frail older adults. CARIE's focus of concern spans the long-term care continuum of needs from those who are homebound to those who are institutionalized. Older adults who experience physical or psychological impairment frequently have difficulty advocating for themselves and are often a silent group. CARIE works to protect their rights and promote awareness of their special needs and concerns. CARIE serves as the long-term care ombudsman providing complaint handling and general advocacy services for about 7,500 residents of approximately 140 nursing homes and personal care facilities located in various Philadelphia neighborhoods. CARIE also provides a model training program that has worked to reduce the incidence of resident abuse and neglect. We are also pleased to be initiating a Long Term Care Ethics Network for providers in Pennsylvania that is helping them address challenging situations at their facilities. It is through this experience that we offer the following comments.

Introduction

Medical liability presents a dynamic issue for advocates concerned about older adults.

Public Citizen documents that only a very small percentage of doctors in Pennsylvania with multiple malpractice payments are disciplined. Good doctors should not be forced to pay for their colleagues' errors. Targeting policies that minimize "repeat offenders" and improve oversight would not only help consumers from becoming victims of poor practices but would also help contain malpractice costs.

Case Examples

CARIE has visited many facilities that are understaffed, dirty, bug infested, and where residents are being neglected. The indignities that many residents endure reflect the fears and anxieties that prospective residents and families have about turning to a nursing home for care. The U.S. Attorney's Office for the Eastern District of Pennsylvania lists some very compelling case examples and these lawsuits have had a dramatic impact on care provided. The cases can be found at www.usao-edpa.com/Invest/nursing.htm. (Please see the attached cover page.) One case example describes a 60-year-old man with dementia who could walk with a walker when he was admitted to the facility and participated in activities. He had no bedsores. Two years later, he could no longer walk. He lost a substantial amount of weight and continued to lose weight even after a feeding tube was inserted. Three years after his admission, he had 15 bedsores. The pain associated with the bedsores and his contracting limbs went unattended. His autopsy showed that several of his bedsores could have easily been prevented with "simple nursing intervention."

11

\$250,000 Cap on Non-Economic Damages

The debate as to how to solve the problem with rising malpractice premiums has led

some legislators to propose caps of \$250,000 for non-economic damages. While conflicting information exists as to whether this cap will help reduce malpractice premiums, we want to testify that this proposal will ultimately prevent residents of long term care facilities from obtaining justice from egregious acts against them. Limits on non-economic damages discriminate against older adults. Since residents do not have damages for lost wages, the non-economic damages are the only damages nursing home residents can be awarded. Legal fees and expenses are deducted from the amount awarded. Lawyers are not likely to litigate expensive cases if a \$250,000 cap is imposed unless there are sizeable "economic" damages. Since California instituted its \$250,000 cap, virtually no malpractice lawsuits have been litigated on behalf of a nursing home resident. While it's clear that residents lost rights in California, data shows that the cap has done little to decrease malpractice premiums.

Federal estate recovery policies are another factor to consider. The federal government requires states to have estate recovery regulations in place for older adults who receive Medicaid services as a condition for participation. If they have resources, older Medicaid beneficiaries are required to pay the state back for any Medicaid expenditures paid on their behalf. As you know, there are many nursing home residents who rely upon Medicaid to help pay for their care. Obviously, nursing home residents cannot even begin to repay this debt, unless there is a property that is sold. However, should a resident receive a settlement, they may ultimately receive little or any compensation for their pain and loss to their quality of life as the money would go to pay their debt.

Ageism is pervasive in our society and rears its ugly head in many ways. For example, as

we described the substandard level of care that many nursing facility residents receive becomes at times “acceptable” or “unavoidable” because they are old. Very little value is placed upon nursing facility residents. The last time nursing home residents in Pennsylvania saw a meager increase in their income was when the federal government increased their personal needs allowance from \$25 to \$30 per month in 1988.

Civil lawsuits can help to improve care. We have witnessed that when a lawsuit is filed, regulators who may have been unresponsive, heighten their attention to that facility and often take action to bring the facility into compliance. Lawsuits and even the threat of a lawsuit can serve as a deterrent and improve care. Particularly since most cases in nursing homes relate to a systemic problem that negatively impacted the individual filing the suit, any improvement tends to impact other residents in the facility. Oftentimes as part of the settlement of civil lawsuits, facilities are required to establish policies or implement a follow-up plan to be sure problems are corrected. Residents and their families demand that something be done to prevent another human being from suffering as they have. //

Solutions

As we described, more needs to be done to distinguish between good and poor performing providers. There is no better way to decrease liability than to quickly bring poor performing providers into compliance, or as a last resort after other remedies have been exhausted, force them out of business. Those providers that have established risk reduction programs, addressing such resident care concerns, as nutrition and preventing bedsores, should