

Statement of
Martin Berger, President
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on proposed
Non-economic Damage Caps in Medical Malpractice Cases
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My name is Martin Berger. I am the President of the Pennsylvania Alliance of Retired Americans. We are an organization of primarily union retirees with a substantial percentage of lifelong community activists. — 250,000 members since we began in January, 2001. Our purpose is progressive advocacy on issues of concern to seniors and their families. We exert influence on public policy on all levels.

I'd like to thank Senator Greenleaf and members of the Senate Judiciary Committee for allowing me to speak today about the issue of malpractice and the proposal to impose caps on non-economic damages for victims of malpractice.

Long-term Care

The need for long-term care affects nearly all American families. Six of every 10 Americans have experienced a long-term care situation, either within their families or through a close friend. Nearly 11 million Americans of all ages living in their community and 1.6 million living in nursing homes have significant limitations in activities of daily living because of illness or disability and need personal assistance or long-term care services.

Even though the actual numbers (1.6 million) or percentage (5%) of older persons in nursing homes are small compared to the older population residing in their own homes and communities, the likelihood of knowing someone who has spent sometime in a nursing home increases significantly with age.

Consequently, the quality of nursing home care is important to our members. The Alliance has published, *Nursing Home Care: When Will We Get It Right*, a report which

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shows that despite decades of congressional hearings, reports, federal and state legislation, quality of care in nursing homes is still a problem. The report's executive summary - which I've included along with my testimony - includes emphasis on the importance of not only adequate staffing but also decent wages, benefits, incentives and safety protections for nursing staff. It ends with recommendations of what can be done on federal and state levels, as well as what nursing homes and individual advocates can do.

Nursing Home Malpractice and our Civil Justice System

Across America, nursing homes residents are suffering serious injuries, and many are dying as a result of abuse and neglect. Last summer, the National Citizens' Coalition for Nursing Home Reform issued a statement in opposition to "tort-reform" measures proposed on the national level because "tort-reform" would deny nursing home residents basic legal protections and Access to the Courts. The Coalition's Director of Public Policy, Janet Wells, mentioned in her statement that Federal investigators have reported that although more than 30 percent of the nation's 17,000 nursing homes have "been cited by state inspectors for violations that harmed residents or put them in immediate jeopardy," physical and sexual abuse in nursing homes is not promptly reported and is rarely prosecuted. She also mentioned how other government studies show that the 30 percent of facilities that are cited are only the top of the iceberg because inspectors regularly under-report the seriousness of deficiencies and do not impose penalties for harm to residents.

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Despite those staggering statistics, the nursing home industry and members of Pennsylvania's General Assembly are supporting legislation that would put limits on one of the few protections shielding our nation's frail elderly nursing home residents: civil lawsuits that hold facilities accountable for the injuries that they have inflicted.

In the states that have already enacted tort-reform legislation, nursing home residents have been robbed of their basic legal protections and denied access to the courts where they need it most.

The nursing home industry says that it is reeling from the high cost of litigation and claims that lawyers receive huge judgments for nursing homes "relatively minor miscues".

These "minor miscues" they want to escape responsibility for are failure to prevent and treat bedsores failure to prevent accidents, failure to administer pain medication, unsanitary conditions improper chemical restraints, and dangerously low staffing to name a few. Before Congress or our Commonwealth accept the complaints of the nursing home industry that it is suffering from malpractice legislation, the Pennsylvania Alliance for retired Americans hopes that these legislative bodies will examine the suffering of the elderly and disabled men and women whose poor treatment results in these lawsuits state legislature.

Caps on Non-Economic Damages

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The debate in Pennsylvania over the last few years to cap non-economic damages in medical malpractice cases would especially harm those living in nursing homes or assisted living homes. Non-economic damages send a clear message to negligent nursing homes that society will not tolerate profound neglect and abuse of elderly and disabled persons. Any cap on non-economic damages would shield negligent nursing homes from accountability for their misconduct.

Pennsylvania cannot solve its insurance crisis by stripping the elderly of their rights if anyone needs more, not fewer, legal protections it's nursing home residents.

Introduction

Laws have been passed; national commitments have been made; declarations of high purpose have been uttered at national conferences and by representatives of the nursing home industry. But for all of that, long-term care for older Americans stands today as the most troubled, and troublesome, component of our entire health care system.

*Senator Frank E. Moss
November, 1974*

The words of Senator Moss, chair of the subcommittee on long-term care of the Senate Special Committee on Aging, remain as relevant today as they were in 1974. Despite the studies, legislation and regulations, residents in the nation's nursing homes remain subject to abuse and neglect and the means of protecting them are still falling short. The basic question posed by Senator Moss in a series of reports on the failure of public policy regarding nursing home care remains current:

Why should placement in a nursing home be the occasion for despair and desperation, when it should be simply a sensible accommodation to need?

There are 1.6 million older and disabled persons who reside in 17,000 nursing homes in America.¹ They are among the most vulnerable people in the country—relying on others for assistance with daily activities as well as nursing and rehabilitative care. This report highlights cases of abuse and neglect, examines the status of what is being done, or not done, to protect residents and improve the quality of care in nursing homes,² and proposes actions that can be taken on a number of levels.

Twenty-three percent of Americans have had substantial experience with a family member, friend, or themselves in a nursing home and most of them (60 percent) have positive views about the care provided. However, 37 percent are dissatisfied with the care and one-fourth report that the resident they know has either developed bed sores, been over-medicated, placed in physical restraints, or otherwise treated badly or abused by staff.

Of those with substantial nursing home experience, 34 percent have made a complaint to the administration of the home but 56 percent of these felt that the complaint was not resolved to their satisfaction. Eight percent have made a complaint to a state or federal government agency.

Source: "The NewsHour" with Jim Lehrer/Kaiser Family Foundation/Harvard School of Public Health. National Survey on Nursing Homes. October 2001

What Is Quality Care?

Understanding quality of care is not as imprecise as it may seem. Family and friends of nursing home residents recognize whether good care exists based on the extent of attention and services provided to meet the physical and mental health needs of their loved ones.

One objective approach to measuring quality of care in nursing homes has been to develop quality indicators that assess the care delivered. Such indicators include incidence of accidents, contractures, pressure sores and skin trauma, infections, use of restraints, transfers to hospitals, use of medication, catheters, tube feeding, weight loss, and lack of participation in activities. These indicators are used by state inspectors in conducting certification and survey inspections.

A second approach to assessing care is to ask nursing home residents themselves. In a study of residents' point of view on what is quality care, residents emphasized the importance of quality of staff as the most important factor—more staff, more supervision, orientation and training. Choices—in activities, food, living arrangements, and personal care—and the right to make choices were the primary markers of quality care for residents.³

A related but third approach is to link staffing with quality of care. A report from the Centers for Medicare and Medicaid Services (CMS) on nurse staffing in nursing homes found evidence of a relationship between staffing ratios and quality of care and identified staffing ratios that maximized quality. In addition, the study found a strong relationship between nursing assistant retention and several quality measures.⁴

Who are the Residents and Who Takes Care of Them?

The typical nursing home resident is a white female over age 75 and a Medicaid beneficiary. Three in four residents are women and their average age upon first admission is 81. The frontline workers who care for the residents are also overwhelmingly women—over 90 percent. About 55 percent of Certified Nursing Assistants (CNAs) are white, 35 percent are black, and 10 percent are Hispanic. Twenty-seven percent are over age 45.⁵

Summarizing the Situation

The majority of nursing home residents are in nursing homes because they have medical and/or mental health needs that are too difficult to be handled at home or there is no one available to provide appropriate care at home.

The average resident requires assistance with 3.75 of five activities of daily living (ADLs) which include bathing, dressing, transferring such as from bed to chair, toileting, and eating.⁶

Forty-seven percent of nursing home residents need some assistance in eating, and 21 percent are totally dependent on assistance.⁷

Over half (51.5 percent) of nursing home residents are chair bound, i.e. depend on a wheelchair for mobility or are unable to walk without constant support from others. Another 5.6 percent are bedfast.⁸

Over four in ten residents (42.7 percent) have some dementia and another 15.4 percent have other psychiatric conditions. Fifty-two percent receive psychoactive medications including anti-depressants, anti-anxiety drugs, sedatives and hypnotics, and anti-psychotics, up from 34.8 percent in 1994.⁹

Those over age 85, the fastest growing segment of the population and most likely to need long-term care, will increase from 4 million today to 6.5 million by 2020 and 8.5 million by 2030.

The senior citizens who live in nursing homes... deserve to be treated with respect and dignity—not to live in fear of abuse and mistreatment.

It would have been intolerable if we had found a hundred cases of abuse; it is unconscionable that we have found thousands upon thousands.

*Representative Henry Waxman
July 30, 2001*

Twenty-six percent of residents have restrictions in full range of motion of any joint due to deformity, disuse and/or pain.¹⁰

Sixty-two percent of nursing homes provided special skin care for residents in 2000—up from 32 percent in 1994 but the percentage of residents who have pressure sores in 2000 remains nearly the same as in 1994 (7.3 percent in 2000 and 7.9 percent in 1994).¹¹

Over 52 percent of residents have urinary incontinence yet only 6.7 percent are recipients of bladder training programs. The situation is similar regarding bowel incontinence: 43.1 percent have the condition but only 4.2 percent have access to training programs.¹²

Perhaps because of their debilitating conditions and vulnerability, nursing home residents are particularly at risk of being abused or neglected. A Congressional report on abuse violations found that 30 percent of nursing home were cited for abuse violations between January 1999 and January 2001 and 10 percent were cited for abuse violations that caused actual harm or worse to residents.¹³ The most frequent violation was the failure to properly investigate and report allegations of abuse, followed by failure to develop and implement written policies that prohibit abuse and failure to protect residents from sexual, physical or verbal abuse.

