

THE NURSING HOME RESIDENTS' RIGHTS ACT — A GOOD IDEA GONE BAD!

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I. INTRODUCTION

In 1980, the Florida Legislature examined the results of a Dade County (Miami, Florida) Grand Jury investigation of nursing facilities which “described health hazards and deficiencies in patient care that allegedly have been allowed to continue for years.”¹ In response,

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1. COMMITTEE ON HEALTH AND REHABILITATIVE SERVS., NURSING HOMES: SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT, Bill No. 80-1218 (Fla. June 10, 1980) [hereinafter SENATE STAFF ANALYSIS]. See also FLA. STAT. §§ 400.022, 400.023 (1981). For a more in depth discussion of the contents of the Senate Staff report, see *infra* text

the Florida Legislature created § 400.022 of the Florida Statutes, commonly referred to as the Residents' Rights Act, designed to combat the health hazards and deficiencies identified in the investigation.²

Unfortunately, application of the Residents' Rights Act has reached beyond the initial intent of the legislature and has resulted in a statutory scheme that can have a punitive effect on nursing home facilities. Consequently, the legislation should be amended from its current form to a scheme that continues to protect the rights of the elderly, while at the same time protecting the rights of the nursing home facilities.

This Article will begin with an overview of the general causes of action available to an elderly claimant for personal injuries. It will then discuss the Residents' Rights Act and its potential adverse effects on both residents and the nursing home industry. The Article will then propose statutory changes designed to remedy the problems.

II. ELDERLY CLAIMS — AN OVERVIEW

A. Common Law Negligence

In a simple common law negligence claim, such as a slip and fall accident, whether a claimant will recover depends upon whether the defendant breached the standard of care.³ Negligence may consist of either doing what a reasonable and prudent person should not do under the circumstances, or failing to do what a reasonable and prudent person would have done under the circumstances.⁴ The elements to establish a cause of action based upon negligence are:

- (1) A duty, or obligation, recognized by law, requiring the actor to conform to a certain standard of conduct, for the protection of others against unreasonable risks;
- (2) A failure on his part to conform to the standard required;
- (3) A reasonable close causal connection between the conduct and the resulting injury;

accompanying notes 34–42.

2. FLA. STAT. § 400.011 (1995).

3. *See, e.g.*, *Simon v. Tampa Elec. Co.*, 202 So. 2d 209, 213 (Fla. 2d Dist. Ct. App. 1967).

4. *See Swilley v. Economy Cab Co.*, 46 So. 2d 173, 178 (Fla. 1950) (en banc).

(4) Actual loss or damage resulting to interests of another.⁵

Once the plaintiff establishes liability, the defendant becomes liable for damages that reasonably and naturally flow from the wrongful act.⁶ It is of no consequence that the personal injury was not actually within the contemplation of, or foreseen by the parties.⁷ According to the Florida Standard Jury Instructions, recoverable damages include:

a. Any bodily injury sustained by [Plaintiff] and any resulting pain and suffering, disability or physical impairment, disfigurement, mental anguish . . . [and] loss of capacity for the enjoyment of life experienced in the past or to be experienced in the future.

. . .

c. Medical expenses [past and future.]

. . .

d. Lost earnings, lost time, lost earning capacity [past and future].⁸

Punitive damages may also be recovered if the claim involves "wilful, wanton or gross misconduct."⁹ However, the total amount of punitive damages awarded to a claimant may not typically exceed three times the amount of compensatory damages.¹⁰

B. Automobile Negligence

The same standard of care that governs automobile negligence cases also governs common law negligence cases.¹¹ In addition, the damages are identical, with the exception of Florida's no-fault statute which, in some cases, limits a plaintiff's non-economic (pain and suffering) damages.¹² Specifically, Florida Statutes § 627.737 precludes the recovery of damages for non-economic damages (pain and suffering, loss of enjoyment of life, etc.) unless the

5. *Simon*, 202 So. 2d at 213.

6. *See, e.g.*, *King v. Cooney-Eckstein Co.*, 63 So. 659, 661 (Fla. 1913).

7. *See id.*

8. FLA. STD. J. INST. 6.2 PERSONAL INJURY AND PROPERTY DAMAGE: ELEMENTS (1995) (brackets from original omitted).

9. FLA. STAT. § 768.73(1)(a) (1995).

10. *See id.*

11. *Simon v. Tampa Elec. Co.*, 202 So. 2d 209, 213 (Fla. 2d Dist. Ct. App. 1967).

12. *See generally* FLA. STAT. § 627.737 (1995).

following can be shown:

- (a) Significant and permanent loss of an important bodily function.
- (b) Permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement.
- (c) Significant and permanent scarring or disfigurement.
- (d) [or] Death.¹³

If the plaintiff is able to establish any of the foregoing four elements, then he or she has met the “threshold” requirements of the statute; in addition to recovery of economic damages (past and future wages and medical expenses), the plaintiff may also receive non-economic damages (pain and suffering).¹⁴

C. Medical Negligence

Chapter 766 of the Florida Statutes governs medical negligence actions in Florida. Section 766.102(1) states that the plaintiff must prove “that the alleged actions of the health care provider represented a breach of the prevailing professional standard of care for that health care provider.”¹⁵ Further, the statute states that the “prevailing professional standard of care” is the level of care, skill, and treatment which is recognized as acceptable and appropriate by “reasonably prudent similar health care providers.”¹⁶ As to damages, generally the damages available in other common law negligence actions are also available in medical negligence actions.

D. Wrongful Death

Florida's Wrongful Death Act is found in Florida Statutes, chapter 768.¹⁷ When the wrongful act or negligence of another causes the death of a person, the Wrongful Death Act allows an action to be prosecuted against the tortfeasor by the decedent's personal representative.¹⁸ If the wrongful death arises from negligence, then

13. FLA. STAT. § 627.737(2)(a)–(d) (1995).

14. *See id.*

15. *Id.* § 766.102(1).

16. *Id.*

17. *Id.* § 768.12.

18. *See id.* § 768.21(6).

the standard of care in a regular negligence action applies.¹⁹ Damages in a wrongful death action, as they would typically apply to an elderly claimant, are found at Florida Statutes § 768.21, which alters the damages generally available in a non-death case.²⁰ For each statutorily defined survivor,²¹ the act allows recovery of the value of lost support and services from the date of injury to the date of death, and future loss of support and services from the date of death.²² A surviving spouse may recover for loss of companionship and protection, as well as for mental pain and suffering from the date of injury.²³ Adult children (those over the age of twenty-five years) of the decedent, if no spouse survives, may recover for loss of parental companionship, instruction and guidance, and for mental pain and suffering from the date of injury, unless the claim arises from medical malpractice.²⁴ In general, medical or funeral expenses due to the injury or death may be recovered by a survivor who has paid them.²⁵ Apart from the damages listed above, the decedent's personal representative may recover on behalf of the estate loss of earnings from the date of injury to the date of death.²⁶ Lastly, the personal representative may recover medical or funeral expenses that become a charge against the estate.²⁷

E. Survivor Actions

19. See, e.g., FLA. STAT. § 768.19 (1995), and *Simon v. Tampa Elec. Co.*, 202 So. 2d 209, 213 (Fla. 2d Dist. Ct. App. 1967).

20. See generally FLA. STAT. § 768.21 (1995).

21. See *id.* § 768.18(1). "Survivors' means the decedent's spouse, children, parents, and when partly or wholly dependent on the decedent for support or services, any blood relatives and adoptive brothers and sisters." *Id.*

22. See *id.* § 768.21.

23. See *id.* § 768.21(2).

24. See *id.* § 768.21(3), (8). Note, however, that § 768.21(8), limits the availability of non-economic damages to certain family members if the death results from medical negligence. The subsection states in pertinent part: "The damages specified in subsection (3) shall not be recoverable by adult children . . . with respect to claims for medical malpractice as defined in 766.106(1)." *Id.* § 768.21(8).

25. See FLA. STAT. § 768.21(6)(b) (1995).

26. See *id.* § 768.21(6)(a). "Loss of prospective net accumulations . . . which might reasonably have been expected . . . may also be recovered: (1) If the decedent's survivors include a surviving spouse or lineal descendants; or (2) If the decedent is not a minor child . . . [and] there are no lost support and services recoverable . . . and there is a surviving parent." *Id.* § 768.21(b)(a)(1)-(2).

27. See *id.* § 768.21(6)(b).

Under the survival statute, Florida Statutes § 46.021, the death of the person injured does not extinguish a cause of action for personal injuries.²⁸ Practitioners should distinguish this cause of action from a cause of action for wrongful death when the death of the injured person results from a tortious act. In that case, the cause of action is one for wrongful death. The damages recoverable by the personal representative in an action brought under the survival statute are those which the injured person would have recovered had she lived.²⁹ Such damages are generally limited to the losses sustained by the deceased between the time of his injury and death; damages are prohibited for losses extending beyond the date of death.³⁰

Finally, since a personal representative cannot make a claim for future lost wages and loss of earning capacity under the survival statute, no recovery exists for prospective earnings or savings which the decedent would have accumulated during his lifetime.³¹

F. Consortium Claims

In the causes of action discussed above (except wrongful death), a derivative claim for “loss of consortium” exists. Among the various definitions which have been offered for loss of consortium is the following:

The husband's loss of the wife's consortium and companionship, by which is meant the conjugal fellowship of husband and wife and the right of each to the company, cooperation and aid of the other in every conjugal relationship. Consortium means much more than mere sexual relationship and consists, also, of that affection, solace, comfort, companionship, conjugal life, fellowship, society and assistance so necessary to a successful marriage.³²

28. *See id.* § 46.021.

29. *See* Sinclair Ref. Co. v. Butler, 190 So. 2d 313, 316 (Fla. 1966); Ake v. Birnbaum, 25 So. 2d 213, 220–21 (Fla. 1945) (en banc).

30. *See* Ellis v. Brown, 77 So. 2d 845, 848 (Fla. 1955), *modified on other grounds*, Butler, 190 So. 2d at 319.

31. *See* Hooper Constr. Co. v. Drake, 73 So. 2d 279, 281 (Fla. 1954) (en banc).

32. Lithgow v. Hamilton, 69 So. 2d 776, 778 (Fla. 1954) (citations omitted). Additionally, while not discussed in this Article, elderly persons also have legal remedies for certain psychic injuries such as intentional or negligent infliction of emotional distress. *See generally* 25 C.J.S. *Damages* §§ 63–64 (1966 & Supp. 1996).

G. Summary of Elderly Rights

As demonstrated above, both Florida common law and statutory law provided and still provide legal remedies for elderly claimants who sustain personal injuries due to the wrongful acts of third persons. The availability of these remedies is in no way age-dependent and as shown, covers the typical activities elderly persons would be involved in such as driving a car or receiving medical attention. However, as applied, it is apparent that certain elements of damage have limited applicability when considering the elderly claimant, which is an issue of proof as compared to a question of right.³³

III. NURSING HOME CAUSES OF ACTION

A. Legislative Background

In 1980, the Florida Legislature examined the results of a Dade County Grand Jury investigation which "described health hazards and deficiencies in patient care that allegedly have been allowed to continue for years."³⁴ In fact, sixty percent of the nursing home facilities investigated were found to provide "unacceptable or consistently very poor care."³⁵ The Grand Jury concluded that the Department of Health and Rehabilitative Services (DHRS) licensure and inspection enforcement was inadequate in addressing the problem of sub-standard care.³⁶ In fact, the Grand Jury found that sanctions against the homes were invoked infrequently, "timidly, and ineffec-

33. See *infra* text accompanying notes 54-56.

34. SENATE STAFF ANALYSIS, *supra* note 1, at 1.

35. *Id.* While the Senate Staff Analysis did not specify the character of care which was deemed ineffective, plaintiff's attorneys provide several common examples. For instance, a Dade County plaintiff's attorney identified decubitus ulcers, "which are nothing more than the infection or rotting away of skin due to too much pressure on the body part involved, secondary to immobility," (e.g., pressure sores which result from the nursing home staff's failure to turn the patient as frequently as needed). Philip Freidin, *Recovering and Valuing Personal Injury Damages for the Elderly: A View from the Plaintiff and the Defense*, Presented at the Eighth Seminar on Elder Law, Center of the Study of Law and Aging at Stetson University College of Law 5 (Mar. 5, 1996) (manuscript available at Stetson University College of Law Continuing Legal Education office). Other more common alleged injuries found in sub-standard nursing homes include: contractures (joints becoming fixed, avoidable by simple exercise); dehydration and malnutrition; unexplained fractures; unexplained bruises and lacerations; pinching residents for discipline; overzealous use of restraints; deficient use of restraints resulting in injury; infections; and theft of property. See *id.* at 6-7.

36. See SENATE STAFF ANALYSIS, *supra* note 1, at 1.

tively.”³⁷ Moreover, even after DHRS identified the deficiencies, DHRS rarely pursued them and as such, effective corrective action rarely occurred.³⁸

Against this backdrop, in 1980, the legislature amended Florida Statutes § 400.022 in an attempt to protect the residents from these kinds of abuses.³⁹ The legislature created a list of rights belonging to the resident and created a statutory cause of action to enforce those rights.⁴⁰ The legislature predicted that this cause of action would save the public money because it provided safeguards for patients in facilities.⁴¹ However, the Senate Staff Analysis conceded that “it is difficult to estimate the fiscal impact of the private right of action on the nursing home industry.”⁴²

B. The Current Legislation

The Residents' Rights Act provisions are found at Florida Statutes, chapter 400. Florida Statutes § 400.011 states:

The purpose of [the resident's rights act] is to provide for the development, establishment and enforcement of basic standards for:

- (1) The health, care, and treatment of persons in nursing homes and related health care facilities; and
- (2) The construction, maintenance, and operation of such institutions which will ensure safe, adequate, and appropriate care, treatment, and health of persons in such facilities.⁴³

Florida Statutes § 400.022 mandates that all nursing home

37. *Id.*

38. *See id.* The Senate faced other concerns including a “lack of specific statutory requirements for information” contained in the contract for services between the home and the resident. *Id.* For instance, at the time of consideration of the legislation, statutes did not provide for a bed reservation policy, refund policy, provisions for the listing of services included in the standard per diem rate, and the cost of services and supplies not covered by the resident's health insurance. *See id.* at 2.

39. FLA. STAT. § 400.022 (1995).

40. *See* SENATE STAFF ANALYSIS, *supra* note 1, at 2. *See also* FLA. STAT. §§ 400.022 to .023 (1995) (containing the codified statutes enacted as a result of the suggestions brought forth by the Senate Staff Analysis).

41. *See* SENATE STAFF ANALYSIS, *supra* note 1, at 5. Unfortunately, the Senate Staff Analysis did not explain the basis for this arguably tenuous assertion.

42. *Id.* at 6. Again, no explanation can be found in the Senate Staff Analysis for this proposition.

43. FLA. STAT. § 400.011 (1995).

facilities adopt a statement of the rights and responsibilities of the residents as well as treatment of the residents in accordance with the provisions of that statement.⁴⁴

Florida Statutes § 400.022(1), sets out the minimal provisions which the statement of rights must contain:

- (a) The right to civil and religious liberties . . .
- (b) The right to private and uncensored communication, including, but not limited to, . . . reasonable visitation including reasonable access by health care providers, social, legal or other service providers]
- (c) [T]he right to deny or withdraw consent to access at any time by any entity or individual
- (d) The right to present grievances [to the administrator or others]
- (e) The right to organize and participate in resident groups
- (f) The right to participate in social, religious, and community activities
- (g) The right to examine . . . the results of the most recent inspection of the facility conducted by [authorities]
- (h) The right to manage his or her own financial affairs or to delegate such responsibility
- (i) The right to be fully informed . . . of services available . . . and of related charges
- (j) The right to be adequately informed of his or her medical condition and proposed treatment
- (k) The right to refuse medication or treatment and to be informed of the consequences of such decisions
- (l) The right to receive adequate and appropriate health care and protective and supportive services
- (m) The right to have privacy and treatment in caring for personal needs
- (n) The right to be treated courteously, fairly, and with the fullest measure of dignity
- (o) The right to be free from mental and physical abuse, corporal punishment, extended involuntary seclusion
- (p) The right to be transferred or discharged only for medical reasons or for the welfare of other residents
- (q) The right to freedom of choice in selecting a personal physician . . . [and] to obtain pharmaceutical supplies
- (r) The right to retain and use personal clothing . . . [when] space

44. *See id.* § 400.022.

permits

(s) The right to have copies of the rules and regulations of the facility and an explanation of the responsibility of the resident

(t) The right to receive notice before the room of the resident in the facility is changed. . . .

(u) The right to be informed of the bed reservation policy for hospitalization.⁴⁵

Florida Statutes § 400.023, defines the parameters of civil enforcement.⁴⁶ It states that if a nursing home violates a resident's rights as specified in the statutes, then the resident has a cause of action against the nursing home.⁴⁷ One may bring the action to enforce the rights and to recover actual damages and, if appropriate, punitive damages for "any deprivation or infringement of the rights of a resident."⁴⁸ Furthermore, a plaintiff who prevails may be able to recover "reasonable attorney's fees, costs of the action, and damages, unless the court finds that the plaintiff acted in bad faith, with malicious purpose, and that there was a complete absence of a justiciable issue of law or fact."⁴⁹ Defendants who prevail may also be entitled to recover reasonable attorney's fees pursuant to Florida Statutes § 57.105.⁵⁰ Further, the attorney's fee may be subject to the contingency fee multiplier, at the discretion of the court.⁵¹ The court may award punitive damages for conduct which is "willful, wanton, gross or flagrant, reckless, or consciously indifferent to the rights of the resident."⁵² Finally, Florida cases interpreting the nursing home resident's rights statutes held that where a plaintiff dies as a result

45. *Id.*

46. FLA. STAT. § 400.023 (1995).

47. *See id.*

48. *Id.*

49. *Id.* § 400.023.

50. *See id.* §§ 57.105, 400.022 to .023.

51. For a general discussion of the fee multiplier, see *Standard Guar. Ins. Co. v. Quanstrom*, 555 So. 2d 828 (Fla. 1990). In Florida, when an attorney takes a case on a contingency basis and statutory right exists to recover fees, the trial court must consider whether to apply the "contingency fee multiplier" when awarding the fee. First, the court determines the number of hours reasonably expended on the litigation. Second, the court determines a reasonable hourly rate for the services of the prevailing party's attorney. The number of hours multiplied by a reasonable hourly rate produces the lodestar. Once the court determines the lodestar, the court adds or subtracts from the fee based on a contingency risk factor and results obtained. *See Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145, 1150-51 (Fla. 1985).

52. FLA. STAT. § 400.023(5) (1995).

of the negligence of the nursing home, the plaintiff is not limited to the wrongful death damages but may continue to seek damages under the Residents' Rights provisions.⁵³

IV. NECESSITY OF NURSING HOME RESIDENTS' RIGHTS ACT

Comparison of the available common law causes of action to the available statutory claims arising from the Residents' Rights Act demonstrates that in claims involving actual physical injury, there is a clear duplication of remedies. Such duplication is not necessary. It unfairly burdens the nursing facilities and may ultimately be harmful to the very residents it was designed to protect.

A. The Act Is Unnecessary

As to "necessity," as shown in Section II above, elderly citizens, regardless of age and like all other persons, have legal remedies available to them if they sustain physical injuries resulting from negligent conduct.⁵⁴ Whether the claim arises from automobile negligence, premises liability, or professional negligence, no legal impediment exists to their right to file suit. Despite the absence of a legal impediment to pursuing a claim, advocates of the current statutory scheme argue that the common law causes of action, although technically available, are insufficient to fully compensate elderly claimants.⁵⁵ For example, the retired claimant will not typically have much of a past or future lost earnings claim. Future medical expenses are often limited because certain elderly claimants are not otherwise in a state of health that lends itself to very extensive medical intervention, such as surgery. Finally, because of a typically limited life expectancy, many elderly claimants' damages will not extend very far into the future. All of these factors may reduce the amount of money a jury is likely to award in a given case.

This argument is flawed because under our system of civil jurisprudence, there are no guarantees that all claimants will be able to recover money for all legally available elements of damage. Rather,

53. See, e.g., *Beverly Enterprises-Florida v. Spilman*, 661 So. 2d 867, 868-69 (Fla. 5th Dist. Ct. App. 1993), *review denied*, 668 So. 2d 602 (Fla. 1996).

54. See *Freidin*, *supra* note 35, at 5.

55. See *id.*

the elderly claimant, like all other claimants, must present sufficient evidence at trial to support a verdict. Because the verdict is designed to compensate the claimant, not punish the defendant,⁵⁶ if the evidence does not support an award of damages for lost earnings, for example, then the claimant should not recover for that element of damage. This scenario is not unfair to the elderly claimant and is no different than the claim of a minor child who may, due to her age, have a limited lost wage claim, or to the “stay at home” spouse who cares for the children and, therefore, would have difficulty proving a lost wage claim.

In addition, advocates of the statutory scheme will likely argue that because attorney's fees are not recoverable, as a right under the common law negligence claims, the resident's rights provisions will assure elderly claimants proper representation. Specifically, in recognition of the fact that the overall value of the elderly claimant's claim may be reduced as described above, advocates argue that under a contingency fee based system, competent attorneys would not routinely agree to represent physically injured elderly claimants. Therefore, without the resident's rights provisions, many deserving claimants would be denied access to the courts.

While the argument that resident's rights provisions protect elderly claimant's *intangible* rights⁵⁷ is persuasive, the same is not typically true in a claim involving actual physical injuries.⁵⁸ In such cases, the pain and suffering and loss of ability to enjoy life is a significant element of damage that the jury can value accordingly. As a matter of fact, some of the usual impediments to the elderly claimant's case may work to the claimant's advantage in that although

56. This assumes there is no allegation for punitive damages. *See, e.g.*, *Carraway v. Revell*, 116 So. 2d 16, 17–20 (Fla. 1959) (stating that the purpose of the civil tort system is to compensate the victim, not to punish the tortfeasor); *see also* *City of Hollywood v. Coley*, 258 So. 2d 828, 832 (Fla. 4th Dist. Ct. App. 1971).

57. Examples include the right to privacy or the right to be treated with dignity. *See supra* notes 44–46 and accompanying text.

58. For instance, attorneys consider elderly claims involving a broken hip, assuming liability lies with the defendant, valuable enough to represent on a contingency basis. *See, e.g.*, *Finazzo v. Sacred Heart Hosp.*, No. 89-1642 (Fla. Cir. Ct. 1989) (reporting 93-year-old plaintiff suffered right hip fracture and head laceration; verdict: \$34,033.47); *see also* *Santiago v. Sarasota County Pub. Health Bd.*, No. 86-5429-CA-01 (Fla. Cir. Ct. 1986) (reporting 76-year-old plaintiff broke her hip when she fell from her hospital bed; verdict: \$50,000.00); *Sherwin v. Loyal Order of the Moose Lodge 2276*, No. 93-5006-CA (Fla. Cir. Ct. 1993) (reporting 71-year-old plaintiff fell and broke left hip; verdict: \$103,798.72).

there may be a limited life expectancy, spending one's remaining "golden years" in pain and with physical limitations may, in the jury's opinion, entitle the claimant to more compensation. Consortium claims also present a compelling damage claim when two elderly claimants are dependent upon each other for many daily needs that younger claimants may take for granted.

The initial legislative history regarding the need for the statutory provisions summarizes a final argument likely to be propounded by the Residents' Rights advocate (as to the "necessity" of the act). Specifically, the Dade County Grand Jury found that the then available sanctions against the homes were invoked infrequently, "timidly, and ineffectively."⁵⁹ The history also noted that once DHRS identified deficiencies, effective corrective action rarely occurred.⁶⁰ It is interesting that the justification for passage of the Residents' Rights Act was not inadequate existing sanctions but rather, insufficient enforcement of those sanctions.⁶¹ Proper enforcement of the DHRS provisions may accomplish the same result.

B. Unfair Application and Punitive Affect

Aside from the "necessity" issue, the current statutory scheme is unfair, in application, to the nursing home facilities in that it seems to promote disproportionately large verdict and settlement values.⁶² As discussed previously, absent punitive conduct, a civil action for personal injuries is designed to compensate the victim of the tort for actual provable damages — nothing less and nothing more!⁶³ Unfortunately, allowing attorney's fees in all cases, coupled with the statutory language and make-up itself, creates a situation where facilities are being punished financially above and beyond what a

59. See *supra* text accompanying notes 34–38.

60. See *supra* notes 36–38 and accompanying text.

61. Note that the Senate Staff Analysis did not deem the then current administrative provisions insufficient from a legislative standpoint. Rather, the analysis focused on the lack of enforcement of the then existing regulations. See SENATE STAFF ANALYSIS, *supra* note 1, at 6. The *Florida Administrative Code*, at the time of enactment of the Residents' Rights Act, contained several provisions which, if adequately enforced, would help to protect the residents of nursing facilities from abuse. See, e.g., FLA. ADMIN. CODE ANN. Chs. 100-29 (1980).

62. The disproportionality relates to the amount of the settlement/verdict for a comparable injury to an elderly claimant who does not sustain the injuries in a nursing facility.

63. See *supra* note 56.

common law negligence claim would merit.⁶⁴ In fact, for many physical injuries caused by negligence, the attorney's fee provision will almost necessarily raise total verdict value.⁶⁵ Add to this the ability of the plaintiff's attorney to inflame the jury with a recitation of the resident's rights (as listed in the statute), and the potential for significantly larger verdicts further inflates settlement values.⁶⁶

C. Negative Impact Upon the Residents

As with any business, either the company absorbs increased costs, which results in reduced profits, or passes the costs on to the consumer. These increased costs take the form of a higher purchase price or a lesser quality product. As applied to the nursing home industry, the result is not likely to be different. Inflated settlement and verdict values may disproportionately affect the nursing facility's cost of doing business. This increased cost created by the Residents' Rights Act may then negatively affect the very persons the legislation was designed to protect.

For example, the facility must devote extensive management and/or staff time to defending statutory claims (via preparation of numerous discovery responses, extensive and burdensome document

64. The fact that the Act also allows for the nursing home to recover fees does not provide an adequate counter-balance. A defendant is still subject to the limitations set out in *Florida Statutes*, which provides for the recovery of fees where the court finds that there was a "complete absence of a justiciable issue of either law or fact." FLA. STAT. § 57.105(1) (1995). However, notwithstanding this limitation, the reality is that the potential to inflame the jury with the Residents' Rights Act can make a defense verdict difficult to obtain. The defense attorney and the home's insurance carrier must evaluate the case in light of a probable plaintiff's verdict and then add in the cost of potentially inflated attorney's fees which will be claimed by the plaintiff's counsel. This, in turn, causes an upward spiral of the settlement value.

65. For instance, in a case where a resident is visited by an elderly non-resident and both fall and break a hip, an attorney values the resident's claim substantially higher because of the nursing home act and its provision for fees.

Here, the "total verdict value" means the entire value of a case from an attorney's perspective, e.g., likely verdict, attorney fees, and costs of litigation. Attorneys necessarily must evaluate a case based on all three factors in determining settlement values. The three factors also play a significant role in helping to decide whether to settle or to proceed to trial.

66. At trial, the language found in the Residents' Rights Act has the tendency to be inflammatory when read to the jury. For instance, an attorney who asks the jury whether the defendant violated the resident's right to be treated with the "fullest measure of dignity" may accidentally evoke emotions in the jurors and cloud the true negligence issues involved in the claim. *See supra* text accompanying note 45.

production, extensive and multiple employee deposition appearances and potential trial appearances). The facility may then pay higher liability insurance premiums as a result of claims and/or the facility may have to focus on suit prevention which diminishes the amount of resources available for patient care. The residents may, in turn, incur these costs in the form of increased expenses.

In the alternative, if the monetary amount that the residents pay remains unchanged, then the quality of care provided to the residents will likely diminish because of common facility budget constraints. If the facility cannot pay salaries comparable to other facilities, it may experience difficulty attracting and retaining qualified and experienced employees with the best and most desirable skills. On the other hand, if the facility wants to continue to attract the most qualified personnel through competitive compensation packages, then the number of overall staff members may decrease. Finally, if the facility maintains staff compensation and patient to staff ratios, then the amount or quality of leisure and/or other activities made available to the residents may be sacrificed. Under any of these or other likely scenarios, the residents themselves may ultimately bear the excessive cost of litigating claims under the statutory nursing home provisions. Such a result, when applied to a segment of society which is largely existing on a fixed or limited income cannot continue on an indefinite basis without harming the residents it was designed to protect.

D. Conclusion

In conclusion, the unfair burden that the act places on the nursing facilities and the potential long-term harm it poses to the patients reveal that statutory modifications are appropriate and necessary; such modifications can be made to protect all interested parties.

V. *PROPOSED STATUTORY CHANGES*

The most significant total verdict/settlement-inflating feature of the legislation is the provision for recovery of attorney fees. Plaintiff attorneys argue that fees necessarily exist to induce an undertaking of the plaintiff's case. However, this approach is over simplistic. As seen above, non-statutory causes of action for many of the injuries

covered in the Nursing Home Residents' Rights Act exist.⁶⁷ A resident should find adequate representation for these injuries.⁶⁸ The plaintiff who will have a difficult time finding representation is the resident who suffers from mental or emotional abuse, or the resident whose privacy is compromised by the nursing home staff. In these cases, common law causes of action and their damages are potentially inadequate to provide an impetus for representation. The Legislature should find a balance between claims for which adequate representation is likely to be found and those for which representation is unlikely.

To accomplish this balance, the Legislature should amend the current statutory Residents' Rights provisions to limit their applicability to those claims where, absent such statutory provisions, ready access to the courts is unlikely. Under such legislation, a "threshold" requirement similar to that seen in Florida's automobile no-fault provisions should govern claims currently falling within the Residents' Rights Act.⁶⁹

Specifically, the Legislature should amend the civil enforcement provisions of the Residents' Rights Act as follows:

400.023 Civil Enforcement. —

- (6) The provisions of this part notwithstanding, no cause of action against any licensee for violation of the rights specified in this part shall exist in claims where the resident has sustained an injury or

67. These include personal injury actions, wrongful death actions, intentional infliction of emotional distress actions, etc.

68. Plaintiffs' attorneys often argue that an elderly person's claim is worth relatively little because of the absence of factual support for several components of damages such as lost wages and lost future earning capacity. However, note that young plaintiffs (children) have a difficult time proving these elements as well. Moreover, the middle-aged house wife/husband generally has a difficult time proving these elements of damages. However, these plaintiffs find representation. As such, the fact that some damage components are missing in an elderly plaintiff's case does not support an argument that they will not find representation. *See also supra* text accompanying notes 54-56.

69. In an automobile negligence case, Florida Statutes § 627.737 precludes the recovery of damages for non-economic damages (pain and suffering, loss of enjoyment of life, etc.) unless the following can be shown:

- (a) Significant and permanent loss of an important bodily function.
- (b) Permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement.
- (c) Significant and permanent scarring or disfigurement.
- (d) Death.

FLA. STAT. § 627.737(2) (1995).

disease which consists in whole or in part of:

- (a) Significant and permanent loss of an important bodily function;
- (b) Permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement;
- (c) Significant and permanent scarring or disfigurement;
- (d) Broken and/or fractured bones;
- (e) Decubitus ulcers, regardless of stage, upon any part of the resident's body; or
- (f) Death.

Through creation of such an amendment, the Legislature will create a more equitable balance between the rights of the nursing home residents and the nursing facilities. For example, in those cases involving violations of the resident's intangible rights such as violation of the patient's rights to privacy, emotional abuse and/or other non-physical based infringement, the Residents' Rights provisions will have full affect and continue to guarantee the availability of competent legal representation and access to courts that was envisioned by the initial drafters of the current legislation. On the other hand, in cases where there exist demonstrable physical injuries as defined in Florida Statutes § 400.023(6) (Proposed Amendment), the elderly claimant, regardless of the Residents' Rights provisions, must pursue his rights under the common law or non-nursing home statutory provisions. This course will not create a hardship upon elderly claimants. Rather, it will place them in the same position as their elderly counterparts who do not live in nursing facilities. Furthermore, it is important to note that this proposed amendment does not prevent the nursing facility from being sued civilly for its wrongs but rather, ensures the facility that the damages being sought by the elderly claimant are going to compensate the claimant for the actual losses and not punish the facility to the benefit of the claimant's counsel through imposition of an excessive attorney's fee award.⁷⁰

VI. CONCLUSION

70. Note that for repeated physical or non-physical abuses, whether the claim is brought under the Residents' Rights provisions or some other law, punitive damages are always available and recoverable against the facility if the facts support such a claim.

Although passage of the Residents' Rights Act was well-intentioned and designed to address a very real problem facing our aging society, it unfortunately has gone too far. The punitive nature of the act in cases involving physical injuries creates a system which treats nursing facilities unfairly. Simply, alternative common law actions exist which protect the elderly claimant's rights in the most typical situations. Statutory modifications to the existing Residents' Rights Act, such as implementation of a threshold requirement, would serve to strike an equitable balance between the interests of the residents, facilities, and their respective rights.