<table>
<thead>
<tr>
<th>INTRODUCTION</th>
<th>ALABAMA</th>
<th>ILLINOIS</th>
<th>MONTANA</th>
<th>RHODE ISLAND</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>ALASKA</td>
<td>INDIANA</td>
<td>NEBRASKA</td>
<td>SOUTH CAROLINA</td>
</tr>
<tr>
<td></td>
<td>ARIZONA</td>
<td>IOWA</td>
<td>NEVADA</td>
<td>SOUTH DAKOTA</td>
</tr>
<tr>
<td></td>
<td>ARKANSAS</td>
<td>KANSAS</td>
<td>NEW HAMPSHIRE</td>
<td>TENNESSEE</td>
</tr>
<tr>
<td></td>
<td>CALIFORNIA</td>
<td>KENTUCKY</td>
<td>NEW JERSEY</td>
<td>TEXAS</td>
</tr>
<tr>
<td></td>
<td>COLORADO</td>
<td>LOUISIANA</td>
<td>NEW MEXICO</td>
<td>UTAH</td>
</tr>
<tr>
<td></td>
<td>CONNECTICUT</td>
<td>MAINE</td>
<td>NEW YORK</td>
<td>VERMONT</td>
</tr>
<tr>
<td></td>
<td>DELAWARE</td>
<td>MARYLAND</td>
<td>NORTH CAROLINA</td>
<td>VIRGINIA</td>
</tr>
<tr>
<td></td>
<td>DISTRICT OF COLUMBIA</td>
<td>MASSACHUSETTS</td>
<td>NORTH DAKOTA</td>
<td>WASHINGTON</td>
</tr>
<tr>
<td></td>
<td>FLORIDA</td>
<td>MICHIGAN</td>
<td>OHIO</td>
<td>WEST VIRGINIA</td>
</tr>
<tr>
<td></td>
<td>GEORGIA</td>
<td>MINNESOTA</td>
<td>OKLAHOMA</td>
<td>WISCONSIN</td>
</tr>
<tr>
<td></td>
<td>HAWAII</td>
<td>MISSISSIPPI</td>
<td>OREGON</td>
<td>WYOMING</td>
</tr>
<tr>
<td></td>
<td>IDAHO</td>
<td>MISSOURI</td>
<td>PENNSYLVANIA</td>
<td></td>
</tr>
</tbody>
</table>
FOREWORD

This Compendium is an assemblage of legal digests authored by participating ALFA International Law Firms in the United States. It is designed to provide an overview of applicable law and legal issues relevant to elderly, vulnerable adults and what constitutes abuse, neglect or exploitation of persons comprising this population. The Compendium is presented by the ALFA International Healthcare Practice Group.

Renaud Cook Drury Mesaros, PA have had the pleasure to coordinating this project and compiling these materials for the benefit of ALFA International member firms and their clients and friends, especially those who attended the ALFA International Healthcare Law Conference in Austin, Texas in May of 2014. Please recognize that only minor, nonsubstantive editing has been performed. Questions on the laws of a particular jurisdiction or the content of a particular digest should be directed to the ALFA International Firm that prepared it or any other ALFA International Firm in the applicable jurisdiction. Firm names and relevant contact information are located at the beginning of each digest.

Renaud Cook Drury Mesaros, PA
Carol M. Romano, Esq.
One North Central, Suite 900
Phoenix, Arizona 85004
(602) 256-3080
cromano@rcdmlaw.com
I. Civil Statute Protecting Dependent Adults or Elders from Neglect or Abuse: There is no “elder abuse” statute in Alabama which provides a civil remedy for elder abuse. Plaintiffs must bring a medical malpractice action under the Alabama Medical Liability Act (Ala.Code § 6-5-540 et seq.)

A. Conduct: There is no private cause of action for elder abuse. However, the following conduct could be used as evidence in a medical malpractice action.

1. Abuse: The infliction of physical pain, injury, or the willful deprivation by a caregiver or other person of services necessary to maintain mental and physical health. *Code of Alabama §38-9-2(1)*

   (a) Intentionally: A person acts intentionally with respect to a result or to conduct described by a statute defining an offense, when his or her purpose is to cause that result or to engage in that conduct. *Code of Alabama §38-9-2(9)*

2. Neglect: The failure of a caregiver to provide food, shelter, clothing, medical services, or health care for the person unable to care for himself or herself; or the failure of the person to provide these basic needs for himself or herself when the failure is the result of the person's mental or physical inability. *Code of Alabama §38-9-2(10)*

3. Emotional Abuse: The willful or reckless infliction of emotional or mental anguish or the use of a physical or chemical restraint, medication or isolation as punishment or as a substitute for treatment or care of any protected person. *Code of Alabama §38-9-2(6)*

4. Exploitation\(^1\): The expenditure, diminution, or use of the property, assets, or resources of a protected person without the express voluntary consent of that person or his or her legally authorized representative. *Code of Alabama §38-9-2(8)*

B. Individuals Subject To The Statute: Again, there is no elder abuse civil statute, any individual can bring a claim under the Medical Liability Act, however, if a

---

\(^1\) This Compendium will not address the issue of exploitation, but instead will only focus on “neglect” and “abuse” cases.
resident falls under the “protected person” provision, then the provisions of Code of Alabama §38-9-2, et seq. will apply.

1. **Protected Person:** Any person over 18 years of age subject to protection under this chapter or any person, including, but not limited to, persons who are senile, mentally ill, developmentally disabled, or mentally retarded, or any person over 18 years of age that is mentally or physically incapable of adequately caring for himself or herself and his or her interests without serious consequences to himself or herself or others. *Code of Alabama §38-9-2(17)*

**C. Persons/Entities That Are Included In the Statute**

1. Types of Individuals Whose Care Is Subject to the Statute

    (a) “Caregiver2” An individual who has the responsibility for the care of a protected person as a result of family relationship or who has assumed the responsibility for the care of the person voluntarily, by contract or as a result of the ties of friendship.

    (1) Employee of a Nursing Home: Includes a person permitted to perform work in a nursing home by the nursing home administrator or by a person or an entity with an ownership interest in the facility, or by both. A person shall be considered an employee whether or not he or she receives compensation for the work performed. *Code of Alabama §38-9-2(7)*

**D. Reporting Requirement for Litigation to State**

None.

**E. Arbitration As It Relates To Elder Abuse Litigation**

The Alabama Supreme Court found that as it related to the nursing facility and resident: (1) a valid arbitration agreement existed between nursing home resident and nursing home, and (2) the arbitration agreement between nursing home and nursing home resident was not unconscionable. *Carraway v. Beverly Enterprises Alabama, Inc.*, 978 So.2d 27 (Ala. 2007)

**F. Relationship to Medical Malpractice actions**

As there is no “elder abuse” act in Alabama, claims alleging abuse and neglect against a nursing facility or hospital are subject to the Medical Liability Act. *Ex parte Northport Health Service, Inc.*, 682 So.2d 52 (Ala. 1996).

---

2 As defined in *Code of Alabama §38-9-2*
G. Caps

1. Caps on noneconomic damages under the Medical Liability Act were found to be unconstitutional (although not repealed – statute originally limited damages to $400,000). See Moore v. Mobile Infirmary Ass’n, 592 So.2d 156 (Ala. 1991); See also Mobile Infirmary Medical Center v. Hodgen, 884 So.2d 801 (Ala. 2003).

2. Caps on Punitive Damages: In all civil actions, no award of punitive damages shall exceed three times the compensatory damages of the party claiming punitive damages or five hundred thousand dollars ($500,000), whichever is greater. Actions based on wrongful death, intentional infliction of injury, and class actions are excluded. Alabama Code § 6-11-21(a)

   (a) As to a defendant who is a small business, no award of punitive damages shall exceed fifty thousand dollars ($50,000) or 10 percent of the business' net worth, whichever is greater. Alabama Code § 6-11-21(b)

H. Criminal Provision

1. Any person who intentionally abuses or neglects a person in violation of Alabama Code Title 38 Chapter 9 shall be guilty of a Class B felony if the intentional abuse or neglect causes serious physical injury. Alabama Code § 38-9-7(b)

2. Any person who recklessly abuses or neglects a person in violation of Alabama Code Title 38 Chapter 9 shall be guilty of a Class C felony if the reckless abuse or neglect causes serious physical injury. Alabama Code § 38-9-7(c)

3. Any person who intentionally abuses or neglects a person in violation of Alabama Code Title 38 Chapter 9 shall be guilty of a Class C felony if the intentional abuse or neglect causes physical injury. Alabama Code § 38-9-7(c)

4. Any person who recklessly abuses or neglects a person in violation of Alabama Code Title 38 Chapter 9 shall be guilty of a Class A misdemeanor if the reckless abuse or neglect causes physical injury. Alabama Code § 38-9-7(d)

5. Any person who emotionally abuses a person in violation of Alabama Code Title 38 Chapter 9 shall be guilty of a Class A misdemeanor. Alabama Code § 38-9-7(e)

I. Statute of Limitations: Two Years. Alabama Code § 6-5-482
J. **Burden of Proof:**

1. Claims brought under the Medical Liability Act: substantial evidence. *See Alabama Code 1975 § 6-5-549*

2. Punitive Damages: Clear and convincing evidence. *See Alabama Code § 6-11-20*

K. **Do Pain and Suffering Survive Death**


II. **DAMAGES**

A. **Damages Available**

1. Actual Damages

2. Special Damages

3. Punitive Damages (wrongful death actions or intentional infliction of injuries only)

4. Costs of Suit

B. **Attorney’s Fees Available:** No. (As no private right of action)

1. If available, are the attorney’s fees limited? N/A

III. **LEGISLATION AFFECTING STATUTE**

A. **Anticipated:** None
I. Civil Statute Protecting Dependent Adults or Elders from Neglect or Abuse: ALASKA STAT. § 47.24.010 et seq.

A. Conduct

1. **Neglect:** The intentional, knowing, or reckless failure by a caregiver to provide essential care or services or access to essential care or services or to carry out a prescribed treatment plan necessary to maintain the physical and mental health of the vulnerable adult when the vulnerable adult is unable to provide or obtain the essential care or services or to carry out the prescribed treatment plan on the vulnerable adult's own behalf. In this paragraph, "essential care or services" includes food, clothing, shelter, medical care, and supervision. ALASKA STAT. § 47.24.900(12).

2. **Abuse:**

   (a) **Definition:** ALASKA STAT. § 47.24.900(2)

      (i) The intentional, knowing, or reckless nonaccidental and nontherapeutic infliction of physical pain, injury, mental or emotional distress, or fear, including coercion and intimidation; or

      (ii) Sexual assault under ALASKA STAT. § 11.41.410 or § 11.41.420

   (b) **Single Act/Pattern**

      (i) It is unclear by a reading of the statute if a single act is sufficient or if a pattern of abuse and/or neglect is necessary to invoke the protective statutes. It is noted that in Hill v. Giani, 296 P.3d 14 (Alaska 2013), a report made pursuant to ALASKA STAT. § 47.24.010 alleged both repeated and isolated conducts of abusive behavior.
(c) Legal Requirement for the act(s) or omission(s)

(i) While the definition of “neglect” requires the omission to come from a “caregiver,” no such requirement is made in the definition for “abuse.” Although, § 47.24.013 is triggered when such abuse occurs by the staff or a volunteer of an out-of-home care facility.

As primarily a reporting statute, the emphasis is on the requirements imposed upon those who are required to report abuse and neglect. Those who are required to report abuse and neglect are only required to have reasonable cause to believe that the definitions of abuse and neglect are met. ALASKA STAT. § 47.24.010.

3. Exploitation: ALASKA STAT. § 47.24.900(8)

(a) Unjust or improper use of another person or another person's resources for one's own profit or advantage, with or without the person's consent; and

(b) Includes acts by a person who stands in a position of trust or confidence with a vulnerable adult or who knows or should know that the vulnerable adult lacks the capacity to consent that involve obtaining profit or advantage through undue influence, deception, fraud, intimidation, or breach of fiduciary duty; in this subparagraph, "fraud" has the meaning given in ALASKA STAT. § 13.26.324(1) and (2).

B. Vulnerable Adults

1. Types of Impairment

A “vulnerable adult” is anyone 18 years of age or older who, because of incapacity, mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, fraud, confinement, or disappearance, is unable to meet the person's own needs or to seek help without assistance. ALASKA STAT. § 47.24.900(21).

C. Person/Entities Excluded from the Statute

A person who in good faith makes a report under ALASKA STAT. § 47.24.010, regardless of whether the person is required to do so, is immune from civil or criminal liability that might otherwise be incurred or imposed for making the report. ALASKA STAT. § 47.24.120(a).

A person may not bring an action for damages against a police officer, a village public safety officer, the state, or a political subdivision of the state based on a
decision under *Alaska Stat.* § 47.24.010 to take or not to take immediate action to protect a vulnerable adult.

D. Reporting Requirement for Litigation to State

There are no statutory provisions requiring reporting litigation to the State.

E. Preclusion of Arbitration

The effect of arbitration clauses on Alaska’s protection of vulnerable adult statute is not addressed in the statute and is untested by Alaska courts.

F. Relationship to Medical Malpractice Actions

The relationship between Alaska’s protection of vulnerable adult statute and medical malpractice claims has not been specifically addressed. In *Hynes v. DeRamus*, 222 P.3d 874 (Alaska 2010), the plaintiff brought claims for failure to report elder abuse and medical malpractice. The court there made no mention of any special relationship between the claims. It is important to note, however, that the claim for failure to report elder abuse was not made pursuant to the protective statute and the claim was ultimately dismissed for failure to state a claim.

G. Criminal Provision

A person commits the crime of endangering the welfare of a vulnerable adult in the first degree if the person intentionally abandons a vulnerable adult in any place under circumstances creating a substantial risk of physical injury to the vulnerable adult and the vulnerable adult is in the person's care by contract or authority of law, or in a facility or program that is required by law to be licensed by the state, or violates *Alaska Stat.* § 11.51.210 and, as a result of the violation, the vulnerable adult suffers serious physical injury. *Alaska Stat.* § 11.51.200.

A person commits the crime of endangering the welfare of a vulnerable adult in the second degree if the person fails without lawful excuse to provide support for the vulnerable adult and the vulnerable adult is in the person's care by contract or authority of law or in a facility or program that is required by law to be licensed by the state. *Alaska Stat.* § 11.51.210.

1. Interplay with Civil Statute

A person listed in § 47.24.010(a) who, because of the circumstances, should have had reasonable cause to believe that a vulnerable adult suffers from undue influence, abandonment, exploitation, abuse, neglect, or self-neglect but who knowingly fails to comply with this section is guilty of a class B misdemeanor. If a person convicted under this section is a member of a profession or occupation that is licensed, certified, or regulated by the state, the court shall notify the appropriate licensing,
certifying, or regulating entity of the conviction.  **Alaska Stat. § 47.24.010(c).**

**H. Statute of Limitations**

Alaska’s protection of vulnerable adults statute does not create a civil cause of action specifically for elder abuse.  **Hymes v. DeRamus**, 222 P.3d 874 (Alaska 2010). Therefore, no statute of limitations for elder abuse is prescribed by this statute.

An action for damages for personal injury based on the protective services undertaken pursuant to **Alaska Stat. § 47.24.015** may only be brought if the actions taken were performed with gross negligence or intentional misconduct. **Alaska Stat. § 47.24.015(f).** There is no statute of limitations specifically provided by the statutes regarding protection of vulnerable adults. Alaska generally provides for a two-year statute of limitations on tort actions and upon a liability created by statute.  **Alaska Stat. § 09.10.070(a).**

**I. Burden of Proof**

Alaska’s protection of vulnerable adults statute does not prescribe a burden of proof for civil actions.

The statute provides a process for reporting abuse and neglect of vulnerable adults, which includes *inter alia* reporting to licensing boards and agencies. If an agency, pursuant to its investigation permitted by **Alaska Stat. § 47.24.013**, finds *reasonable cause* that a certified nurse aid has committed abuse or neglect, the agency must report the matter to the Board of Nursing. **Alaska Stat. § 47.24.013(f).**

Those individuals making reports of abuse only need to have *reasonable cause* to believe that abuse or neglect is occurring. **Alaska Stat. § 47.24.010.** Once a report is made and an investigation is undertaken, *reasonable cause* is needed before a court may be petitioned for certain protective services. **Alaska Stat. § 47.24.019(a).**

Under some circumstances, *probable cause* is needed to support a prescribed course of action to protect a vulnerable adult from abuse. **Alaska Stat. § 47.24.015(c).**

**J. Can Regulations Establish Standard of Care:**

Alaska courts have not yet used the statute regarding protection of vulnerable adults to establish a standard of care. Alaska has adopted the Restatement (Second) of Torts §§ 286, 288A, and 288B regarding negligence per se.  **Ferrell v. Baxter**, 484 P.2d 250 (Alaska 1971). A court may adopt as the standard of care the requirements of a statute whose purpose is to protect the class of persons to which the plaintiff belong, to protect the particular interest invaded, to protect that
interest against the kind of harm which resulted, and to protect that interest against the particular hazard from which the harm results, and that the unexcused violation of such a statute is negligence itself. *Shanks v. Upjohn Co*, 835 P.2d 1189, 2101 (Alaska 1992).

Notably, there does not appear to be an independent civil cause of action for failing to report abuse or neglect of vulnerable adults pursuant to *Alaska Stat.* § 47.24.010 and the Alaska courts appear to be reluctant to allow the statute to serve as a basis for such a cause of action. *See Hymes v. DeRamus*, 222 P.3d 874 (Alaska 2010) (stating that nothing in §§ 47.24.013, 47.24.015(a) create a private cause of action for elder abuse and therefore dismissing plaintiff’s claims for failure to report elder abuse).

II. DAMAGES

A. **Damages Available:** Damages available under Alaska’s protection of vulnerable adults statute are those resulting from the gross negligence or intentional misconduct regarding the protective services rendered. Those damages are limited to direct compensatory damages. *Alaska Stat.* §§ 47.24.010(e), 47.24.015(f).

B. **Does Pain and Suffering of Decedent/Resident Survive Death:**

Not addressed in either the statutes providing for protection of vulnerable adults or case law pertaining to the protection of vulnerable adult statutes since no independent cause of action is created by the statutes for elder abuse or neglect.

C. **Attorney’s Fees Available:**

Not addressed in either the statutes providing for protection of vulnerable adults or case law pertaining to the protection of vulnerable adult statutes since no independent cause of action is created by the statutes for elder abuse or neglect.

III. LEGISLATION AFFECTING STATUTE

A. **Pending:** None at this time.

B. **Anticipated:** None at this time.
I. Civil Statute Protecting Dependent Adults or Elders from Neglect or Abuse: Adult Protective Services Act, Arizona Revised Statutes §46-451, et seq.

A. Conduct

1. **Neglect**: A pattern of conduct without the person's informed consent resulting in deprivation of food, water, medication, medical services, shelter, cooling, heating or other services necessary to maintain minimum physical or mental health. *A.R.S. §46-451(A)(6).*

2. **Abuse**

   (a) **Definition**

   (i) Intentional infliction of physical harm;

   (ii) Injury caused by negligent acts or omissions;

   (iii) Unreasonable confinement; or

   (iv) Sexual abuse or sexual assault

   (b) **Single Act and/or Pattern**


   (b) **Legal Requirement for the act(s) or omission(s)**

   (i) Arise from the relationship of caregiver and recipient;

   (ii) Be closely connected to that relationship;

   (iii) Be linked to the service the caregiver undertook due to the resident’s incapacity; and

---

1 *A.R.S. §46-451(A)(1)(a)-(d).*

(iv) Be related to the problem or problems that caused the incapacity.

3. **Exploitation**\(^3\): The illegal or improper use of a vulnerable adult or his resources for another's profit or advantage\(^4\).

**B. Vulnerable Adults**

1. **Types of Impairment**

   An “incapacitated person” within the meaning of the Adult Protective Services Act (APSA) is a person that cannot make informed decisions. *See Davis v. Zlatos*, (Ariz. App. Div. 1 2005), 211 Ariz. 519, 525, 123 P.3d 1156, 1162.

**C. Persons/Entities Excluded From Statute**


2. Persons who provide services within the scope of their licensure are not subject to civil liability for damages (physician licensed pursuant to A.R.S. title 32, chapter 13 or 17; a podiatrist licensed pursuant to title 32, chapter 7; a registered nurse practitioner licensed pursuant to title 32, chapter 15; or a physician assistant licensed pursuant to title 32, chapter 25) *(A.R.S. §46-455(B)(1), (2)(a)-(b))*, unless either:

   (a) At the time of the events giving rise to a cause of action the person served as a medical director; or

   (b) At the time of the events giving rise to a cause of action, the person was:

      (i) Licensed as a physician, podiatrist, a registered nurse or a physician assistant; and

      (ii) The person was the primary provider responsible for the medical services to the patient

**D. Reporting Requirement for Litigation to State**

The plaintiff is required to serve notice and one copy of the Complaint on the attorney general within 30 days after the action is filed in Superior Court. The notice is required to identify the action, person, and the person’s attorney. *See A.R.S. §46-455(J).*

---

\(^3\) Exploitation will not be addressed in this compendium – instead, only the abuse and/or neglect portions of the statutes.

\(^4\) *A.R.S. §46-451(A)(4).*
E. Preclusion of Arbitration

A voluntary arbitration agreement between a “health care facility” and a resident’s guardian or conservator and enforcement of same is considered a “means to resolve a civil action in an alternative forum.” Mathews ex rel. Mathews v. Life Care Centers of America, Inc. 217 Ariz. 606, 177 P.3d 867 (App. Div.1 2008).

F. Relationship to Medical Malpractice actions

The APSA is not limited by any other civil remedy including the Medical Malpractice Act (MMA) (A.R.S. §12-563, et seq.). Estate of McGill ex rel. McGill v. Albrecht, 203 Ariz. 525, 531 57 P.3d 384, 390 (Ariz. 2002). An act or acts of medical negligence may provide a basis for an APSA action. Id.

G. Criminal Provision

A person who has been employed to provide care, who is a de facto guardian or de facto conservator or who has been appointed by a court to provide care to a vulnerable adult, and who causes or permits the life of the adult to be endangered or that person's health to be injured or endangered by neglect, is guilty of a class 5 felony. A.R.S. §46-455(A) [emphasis added].

1. Interplay with State Civil Statute

The class 5 felony provisions of APSA only apply to abuse cases wherein a pattern of conduct is required. See A.R.S. §46-455(A) and Estate of McGill ex rel. McGill v. Albrecht, 203 Ariz. 525, 531 57 P.3d 384, 390 (Ariz. 2002).

H. Statute of Limitations: Two Years – A.R.S. §46-455(K)

I. Burden of Proof: Preponderance of the Evidence – A.R.S. §46-455(L)

J. Can Regulations Establish Standard of Care:

Unclear. In Arizona, in order to receive a negligence per se instruction, a regulation pertaining to safety must be sufficiently specific. See Deering v. Carter, 92 Ariz. 329, 333, 376 P.2d 857, 860 (1962). Although it is untested, what is clear is that the conduct alleged and the subject injuries must be causally linked to the purpose behind the skilled nursing facility regulation.

II. DAMAGES

A. Damages Available

1. Actual Damages
2. Special Damages
3. Punitive Damages
4. Injunctive Relief

5. Costs of Suit

B. Does Pain and Suffering of Decedent/Resident Survive Death:

Yes. If the decedent dies before judgment, he/she is still entitled to damages for pain and suffering. Since the legislature intended that the elder abuse statute be excluded from the survival statute’s limitation, then application of the survival statute would “contravene the express provision in A.R.S. § 46-455(O) that the cause of action shall not be limited or affected by the victim’s death.” Matter of Guardianship/Conservatorship of Denton, 190 Ariz. 152, 156, 945 P.2d 1283, 1287 (Ariz. 1997).

C. Attorney’s Fees Available: No.

1. If available, are the attorney’s fees limited? N/A

III. LEGISLATION AFFECTING STATUTE

A. Pending: Senate Bill 1341 (May 17, 2013): The amendment proposes to change the definition section of “informed consent” to add the following in bold:

"Informed consent” means any of the following:

1. A written expression by the person that the person fully understands the potential risks and benefits of the withdrawal of food, water, medication, medical services, shelter, cooling, heating or other services necessary to maintain minimum physical or mental health and that the person desires that the services be withdrawn. A written expression is valid only if the person is of sound mind and if the consent is witnessed by at least two individuals who do not benefit by the withdrawal of services.

B. Anticipated: None
I. Civil Statute Protecting Dependent Adults or Elders from Neglect or Abuse: Arkansas Annotated Code (A.A.C.) § 9-20-101, et seq. - Adult Maltreatment Custody Act and A.A.C. §20-10-209

A. Conduct

1. **Neglect** – as defined in A.A.C. § 9-20-103(17)

   (a) An act or omission by an endangered person or an impaired person, for example, self-neglect; or

   (b) An act or omission by a caregiver responsible for the care and supervision of an endangered person or an impaired person constituting:

      (i) Negligently failing to provide necessary treatment, rehabilitation, care, food, clothing, shelter, supervision, or medical services to an endangered person or an impaired person;

      (ii) Negligently failing to report health problems or changes in health problems or changes in the health condition of an endangered person or an impaired person to the appropriate medical personnel;

      (iii) Negligently failing to carry out a prescribed treatment plan; or

      (iv) Negligently failing to provide goods or services to a long-term care facility resident necessary to avoid physical harm, mental anguish, or mental illness as defined in rules promulgated by the Office of Long-Term Care;

2. **Abuse** – as defined in A.A.C. § 9-20-103(1)(A) means with regard to any long-term care facility resident or any patient at the Arkansas State Hospital by a caregiver and includes the following conduct:

---

1“Long-term care facility” means:

(A) A nursing home;
(B) A residential care facility;
(a) Any intentional and unnecessary physical act that inflicts pain on or causes injury to an endangered person or an impaired person, excluding court-ordered medical care or medical care requested by the patient or long-term care facility resident or a person legally authorized to make medical decisions on behalf of the patient or long-term care facility resident;

(b) Any intentional act that a reasonable person would believe subjects an endangered person or an impaired person, regardless of age, ability to comprehend, or disability, to ridicule or psychological injury in a manner likely to provoke fear or alarm, excluding necessary care and treatment provided in accordance with generally recognized professional standards of care;

(c) Any intentional threat that a reasonable person would find credible and non-frivolous to inflict pain on or cause injury to an endangered person or an impaired person except in the course of medical treatment or for justifiable cause; or

(d) Any willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain, or mental anguish.

3. **Exploitation**

4. **Sexual Abuse**

**B. Individuals Subject To the Statute**

1. **Endangered Adult (as defined in A.A.C. § 9-20-103(6))**

   (a) A person eighteen (18) years of age or older who:

   (i) Is found to be in a situation or condition that poses a danger to himself or herself; and

   (ii) Demonstrates a lack of capacity to comprehend the nature and consequences of remaining in that situation or condition; or

   (C) A post-acute head injury retraining and residential facility;

   (D) An assisted living facility;

   (E) An intermediate care facility for individuals with mental retardation; or

   (F) Any facility that provides long-term medical or personal care;

2 Exploitation will not be addressed in this compendium – instead, only the abuse and/or neglect portions of the statutes. The definition of exploitation is set forth in A.C.A. §9-20-103(7)(A)-(D).

3 Sexual Abuse will not be addressed in this compendium – instead, only the abuse and/or neglect portions of the statutes. The definition of sexual abuse is set forth in A.C.A. § 9-20-103(23).
(b) A long-term care facility resident or an Arkansas State Hospital resident who:

(i) Is found to be in a situation or condition that poses an imminent risk of death or serious bodily harm to the long-term care facility resident; and

(ii) Demonstrates a lack of capacity to comprehend the nature and consequences of remaining in that situation or condition;

2. Impaired Adult (as defined in A.A.C. § 9-20-103(10))

(a) “Impaired adult” means a person eighteen (18) years of age or older who as a result of mental or physical impairment is unable to protect himself or herself from abuse, sexual abuse, neglect, or exploitation.

(i) For purposes of this subchapter, a long-term care facility resident is presumed to be an impaired person;

C. Persons/Entities That Are Included/Excluded In the Statute

1. Types of Individuals Whose Care Is Subject To the Statute

(a) “Caregiver” means any of the following that has the responsibility for the protection, care, or custody of an endangered person or an impaired person as a result of assuming the responsibility voluntarily, by contract, through employment, or by order of a court:

(i) A related person or an unrelated person;

(ii) An owner, an agent, or a high managerial agent of a public or private organization; or

(iii) A public or private organization

2. Persons Excluded From Liability

(a) Sole member of a governing body. See Bedell v. Williams, 2012 Ark. 75, 386 S.W.3d 493 (Ark. 2012) (finding that a governing body was required for nursing homes in order to participate in Medicare and Medicaid, but did not create an independent duty on behalf of its members).

D. Reporting Requirement for Litigation to State

4 As defined in A.C.A. § 9-20-103(3))
E. Arbitration As It Relates To Elder Abuse Litigation

In Courtyard Gardens Health and Rehabilitation, LLC v. Quarles, 2013 Ark. 228, the Court found that (1) evidence did not demonstrate, as a matter of law, that resident's son, who signed arbitration agreement, had actual authority to bind nursing home resident to the arbitration agreement; (2) as a matter of apparent first impression, resident's adult son did not have authority to bind nursing home resident to the arbitration agreement by virtue of statute providing that any adult child, for his or her mother or father of unsound mind, may consent to any surgical or medical treatment or procedure not prohibited by law that is suggested by a licensed physician.

F. Resident Rights Violations (Not a Separate Cause of Action)

1. Statute – A.A.C. §20-10-209
   
   (a) Any resident who is injured by a deprivation or infringement of his or her rights under A.A.C. §20-10-1209 (Resident’s Rights Statute) may bring a cause of action under §16-114-201 et seq., against any licensee responsible for the deprivation or infringement.
   
   (b) A deprivation or infringement of rights under this subchapter may be used as evidence of negligence.

2. Case law
   

G. Persons Who Can Bring an Action for Elder Abuse5

1. Resident;
2. Resident’s Guardian
3. Personal Representative of the estate of a deceased resident.

H. Evidence Not Admissible At Trial in an Elder Abuse Case

Nurses employed by a defendant hospital or nursing home cannot be called as expert witnesses and testify against their defendant employer. See A.A.C. §16–114–207(3); and Bedell v. Williams, 386 S.W.3d 493, 504-505 (Ark. 2012).

5 See A.C.A. §20-10-209(A)(2)
I. Relationship to Medical Malpractice actions

An action for medical injury is the sole remedy against a medical provider. See A.A.C. §16-114-213

An action for medical injury includes all actions against a medical care provider (including nursing homes) whether based in tort, contract, or otherwise, to recover damages on account of medical injury. See A.A.C. §16-114-201

J. Criminal Provision

Pursuant to A.A.C. § 5-28-103(a), it is unlawful for any person or caregiver to abuse, neglect, or exploit any endangered person or impaired person.

1. If the abuse causes serious physical injury or a substantial risk of death, any person or caregiver who purposely abuses an endangered person or an impaired person is guilty of a Class B felony. A.A.C. § 5-28-103(b)(1)

2. If the abuse causes physical injury, any person or caregiver who purposely abuses an adult endangered person or an adult impaired person is guilty of a Class D felony. A.A.C. § 5-28-103(b)(2)

3. Any person or caregiver who neglects an adult endangered person or an adult impaired person, causing serious physical injury or substantial risk of death, is guilty of a Class D felony. A.A.C. § 5-28-103(c)(1)

4. Any person or caregiver who neglects an adult endangered person or an adult impaired person, causing physical injury, is guilty of a Class B misdemeanor. A.A.C. § 5-28-103(c)(2)

5. Any person or caregiver who abuses an adult endangered person or an adult impaired person is guilty of a Class B misdemeanor. A.A.C. § 5-28-103(d)

K. Statute of Limitations: Two Years – A.A.C. § 16-114-203


M. Can Regulations Establish Standard of Care:

1. Company Rules and Regulations: Such rules or regulations must establish a standard of care (i.e. an industry standard) in order to be considered evidence of negligence. Arkansas Louisiana Gas Co. v. Stracener, 239 Ark. 1001, 395 S.W.2d 745 (1965)

2. State and Federal Regulations: The violation of state and federal statutes or regulations may be considered to be evidence of negligence. Jackson v. Cadillac Cowboy, Inc., 337 Ark. 24, 986 S.W.2d 410 (1999). However, a plaintiff must still prove that the violation proximately caused injury. See

N. Admissibility of Adult Maltreatment Reports

1. A written report from a person or official required by this subchapter to report shall be admissible in evidence in any proceeding relating to adult maltreatment or long-term care facility resident maltreatment. See A.A.C. §9-20-107(a)

2. The affidavit of a physician, psychiatrist, psychologist, or licensed certified social worker shall be admissible in evidence in any proceeding relating to adult maltreatment or long-term care facility resident maltreatment. See A.A.C. §9-20-107(b)

II. DAMAGES

A. Damages Available

1. Actual Damages

2. Special Damages

3. Punitive Damages – A.A.C. §16-114-209


5. Costs of Suit

B. Does Pain and Suffering of Decedent/Resident Survive Death:

Yes.

C. Attorney’s Fees Available: No.

1. If available, are the attorney’s fees limited? N/A

III. LEGISLATION AFFECTING STATUTE

A. Anticipated: None

---

6 When there is a finding that an employee of the long-term care facility failed to do something which a reasonably careful person would do or did something which a reasonable person would not do under circumstances similar to those shown by the evidence in the case, which caused an injury due to an infringement or a deprivation of the resident’s rights. See A.C.A. §20-10-1209(A)(4).
CALIFORNIA

Roxanne Irani, Esq.
HAIGHT BROWN & BONESTEEL, LLP
555 S. Flower St., 55th Fl.
Los Angeles, CA 90071
(213) 542-8000

I. Civil Statute: Elder Abuse and Dependent Adult Civil Protection Act, California Welfare and Institutions Code § 15600 et seq.

A. Conduct

1. Abuse

(a) Definition\(^1\)

(1) Physical abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering; or

(2) The deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering.

(b) Abandonment: "[T]he desertion or willful forsaking of an elder or a dependent adult by anyone having care or custody of that person under circumstances in which a reasonable person would continue to provide care and custody." *Welf. & Inst. Code* § 15610.05.

(c) Abduction: "[T]he removal from this state and the restraint from returning to this state, or the restraint from returning to this state, of any elder or dependent adult who does not have the capacity to consent to the removal from this state and the restraint from returning to this state, or the restraint from returning to this state, as well as the removal from this state or the restraint from returning to this state, of any conservatee without the consent of the conservator or the court." *Welf. & Inst. Code* § 15610.06.

(d) Goods or services necessary to avoid physical harm or mental suffering: Includes the provision of medical care for physical and mental health needs, assistance in personal hygiene, adequate clothing, adequately heated and ventilated shelter, protection from health and safety hazards, protection from malnutrition,
transportation and assistance necessary to secure any of these needs. *Welf. & Inst. Code § 15610.35.*

**Financial abuse:** Occurs when a person or entity does any of the following:

1. Takes, secrete, appropriates, obtains, or retains real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both;

2. Assists in taking, secreting, appropriating, obtaining, or retaining real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both; or

3. Takes, secrete, appropriates, obtains, or retains, or assists in taking, secreting, appropriating, obtaining, or retaining, real or personal property of an elder or dependent adult by undue influence.

**Isolation:**

4. Acts intentionally committed for the purpose of preventing, and that do serve to prevent, an elder or dependent adult from receiving his or her mail or telephone calls;

5. Telling a caller or prospective visitor that an elder or dependent adult is not present, or does not wish to talk with the caller, or does not wish to meet with the visitor where the statement is false, is contrary to the express wishes of the elder or the dependent adult, whether he or she is competent or not, and is made for the purpose of preventing the elder or dependent adult from having contact with family, friends, or concerned persons;

6. False imprisonment; or

7. Physical restraint of an elder or dependent adult, for the purpose of preventing the elder or dependent adult from meeting with visitors.

**Physical abuse:** Includes assault [with a deadly weapon or force likely to produce great bodily injury], battery, unreasonable physical constraint, or prolonged or continual deprivation of food

---

2 *Welf. & Inst. Code § 15610.30.*

3 *Welf. & Inst. Code § 15610.43.*
or water, sexual assault, use of a physical or chemical restraint or psychotropic medication for punishment, for a period beyond that prescribed or for any purpose not authorized by a physician or surgeon. *Welf. & Inst. Code § 15610.63.*

2. **Neglect**

   (a) **Definition**

   (i) The negligent failure of any person having the care or custody of an elder or a dependent adult to exercise that degree of care that a reasonable person in a like position would exercise; or

   (ii) The negligent failure of an elder or dependent adult to exercise that degree of self care that a reasonable person in a like position would exercise.

**B. Vulnerable Adults**

1. **Dependent Adult:** "[A]ny person between the ages of 18 and 64 years who resides in this state and who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities, or whose physical or mental abilities have diminished because of age." This includes "any person between the ages of 18 and 64 years who is admitted as an inpatient to a 24-hour health facility...." *Welf. & Inst. Code § 15610.23.*

2. **Elder:** "[A] ny person residing in this state, 65 years of age or older." *Welf. & Inst. Code § 15610.27.*

**C. Persons/Entities Excluded from Statute**

Health practitioners "who assume care or custody of the elderly are subject to liability if their misconduct rises to the level of neglect, abuse, or abandonment." *Mack v. Soung, (2000)* 80 Cal.App.4th 966, 975.

A "health practitioner" includes "a physician and surgeon, psychiatrist, psychologist, dentist, resident, intern, podiatrist, chiropractor, registered nurse, dental hygienist, licensed clinical social worker or associate clinical social worker, marriage and family therapist, licensed professional clinical counselor, or any other person who is currently licensed under Division 2 (commencing with Section 500) of the Business and Professions Code, any emergency medical technician I or II, paramedic, or person certified pursuant to Division 2.5 (commencing with Section 1797) of the Health and Safety Code, a psychological assistant registered pursuant to

---

4 *Welf. & Inst. Code § 15610.57.*
Section 2913 of the Business and Professions Code, a marriage and family therapist trainee, as defined in subdivision (c) of Section 4980.03 of the Business and Professions Code, an unlicensed marriage and family therapist intern registered under Section 4980.44 of the Business and Professions Code, a clinical counselor trainee, as defined in subdivision (g) of Section 4999.12 of the Business and Professions Code, a clinical counselor intern registered under Section 4999.42 of the Business and Professions Code, a state or county public health or social service employee who treats an elder or a dependent adult for any condition, or a coroner." Welf. & Inst. Code § 15610.37.

D. Reporting Requirements

There is no requirement that a person serve notice and a copy of the Summons and Complaint to the state at or before the time of filing the civil action.

However, any mandated reporter must report known or suspected cases of elder abuse and neglect. Reports may be made to adult protective services agencies, local law enforcement agencies, the Long-Term Care Ombudsman's Office, the Licensing and Certification Program of the California DHS or the Attorney General's office.

A "mandated reporter" includes any person who has assumed responsibility for the care or custody of an elder or dependent adult (i.e. administrators, supervisors and/or licensed staff), health practitioners, care custodians, clergy members and employees of county adult protective services agencies and local law enforcement agencies.

E. Preclusion of Arbitration


F. Relationship to Medical Malpractice Actions

The Elder Abuse and Dependent Civil Protection Act excludes liability for acts of professional negligence, thus not applying to simple or gross negligence by healthcare providers. Welf. & Inst. Code § 15657.2; Sababin v. Superior Court, (2006) 144 Cal.App.4th 81, 88. An act or acts of medical negligence, however, may provide a basis for an Elder Abuse and Dependent Civil Protection Act action if it can be proven by clear and convincing evidence that the medical professional acted with recklessness.

G. Criminal Provision

Any person who knows or reasonably should know that a person is an elder or dependent adult and, under circumstances or conditions likely to produce great bodily harm or death, (1) willfully causes or permits any elder or dependent adult to suffer, be injured or to be placed in a situation where the person's health or person is endangered, or (2) inflicts unjustifiable physical pain or mental suffering upon the adult is punishable by imprisonment in county jail for up to
one year, or in state prison for two, three or four years. *Welf. & Inst. Code § 15656(a)* (emphasis added).

Any person who knows or reasonably should know that a person is an elder or dependent adult and, under circumstances or conditions other than those likely to produce great bodily harm or death, (1) willfully causes or permits any elder or dependent adult to suffer, be injured or to be placed in a situation where the person's health or person is endangered, or (2) inflicts unjustifiable physical pain or mental suffering upon the adult is guilty of a misdemeanor. *Welf. & Inst. Code § 15656(b)* (emphasis added).

Any caretaker of an elder or dependent adult who violates any provision of law prescribing theft or embezzlement as to the property of the adult is punishable by imprisonment in county jail for up to one year, or in state prison for two, three, or four years when the value of the violation exceeds $950. If the value is lower than $950, then the caretaker is punishable by a fine of up to $1,000, or by imprisonment in county jail for up to one year. *Welf. & Inst. Code § 15656(c)* (emphasis added).

**H. Statute of Limitations**

Four years for an action for financial abuse. *Welf. & Inst. Code § 15657.7.*

Two years for an action for physical abuse. The statute of limitations for assault, battery or injury to or death of another individual, caused by the wrongful act or neglect of another is two years. *Code of Civil Procedure § 335.1.*

**I. Burden of Proof**

Clear and convincing evidence that defendant is guilty of something more than negligence, i.e. recklessness, oppression, fraud or malice. *Welf. & Inst. Code § 15657; Sabatin v. Superior Court*, (2006) 144 Cal.App.4th 81, 88.


**J. Can Regulations Establish Standard of Care?**

Yes.


A court may use the regulations "to assist the jury in determining whether defendants' conduct involved physical abuse or neglect, or recklessness, oppression, fraud, or malice within the meaning of the Elder Abuse Act." *In re Conservatorship of Gregory*, (2000) 80 Cal.App.4th 514, 523.
II. DAMAGES

A. Damages Available

1. Actual damages;
2. Special damages;
3. Punitive damages;
4. Attachment;
5. Protective orders in the form of restraining orders and/or injunctive relief;
6. Costs of suit;
7. Attorneys' fees (in specified instances).

B. Does Pain and Suffering of Decedent/Resident Survive Death?

Maybe. If it is proven by clear and convincing evidence that the defendant was guilty of recklessness, oppression, fraud or malice in the commission of abuse, neglect or financial abuse, then the limitation on recovery for pain and suffering where the decedent/resident dies before judgment does not apply. However, the noneconomic damages are capped at $250,000.

C. Attorneys' Fees Available?

Yes, if it has been proven by clear and convincing evidence that the defendant has been guilty of recklessness, oppression, fraud or malice. Welf. & Inst. Code § 15657(a).

Yes, if it has been proven by clear and convincing evidence that the defendant is liable for abduction. Welf. & Inst. Code § 15657.05.

Yes, if it has been proven by a preponderance of the evidence that a defendant is liable for financial abuse. Welf. & Inst. Code § 15657.5.

If the employer is the sole defendant, then the burden is clear and convincing evidence for recovery of attorneys' fees.

III. LEGISLATION AFFECTING STATUTE

A. Pending:

Yes.

2013 California Assembly Bill No. 140, California 2013-2014 Regular Session (July 2, 2013): This amendment would create Section 15610.70, to supplement the common law definition of "undue influence" to mean the "excessive persuasion that causes another person to act or refrain from acting and results in inequity." Factors in determining undue influence would
include the vulnerability of the victim, the influencer's apparent authority, the influencer's actions or tactics and the equity of the result. In doing so, the definition of "Financial Abuse" in Section 15610.30 would be modified to reflect the new definition of "undue influence."

2013 California Assembly Bill No. 383, California 2013-2014 Regular Session (July 10, 2013): This amendment makes non-substantive changes to Sections 15630 and 15650, including various grammatical and other technical changes.

2013 California Assembly Bill No. 477, California 2013-2014 Regular Session (May 6, 2013): This amendment would affect Sections 15630.1, 15632, 15633, 15634, 15637, 15640 and 15655.5. The amendment would include a notary public in the "mandated reporter" definition, as well as prohibit a notary public from performing a notarial act for an elder or dependent adult in certain circumstances. These new mandated reporters would, like the current list, be immunized from liability for the required, authorized reports. The amendment would also subject a mandated reporter to civil penalties should the mandated reporter fail to report suspected financial abuse. The penalties would be payable to the party bringing the action. The amendment would also exempt financial officers from the notary public provisions. Lastly, the amendment would revise the attorney-client privilege provision to provide the privilege for information protected by the attorney-client privilege.

**B. Anticipated: None.**
I. Civil Statute Protecting Dependent Adults or Elders from Neglect or Abuse: None

A. Vulnerable Adults

“At-risk adult” means any person who is seventy years of age or older or any person who is eighteen years of age or older and is a person with a disability.

_Colo. Rev. Stat. § 18-6.5-102._

C. Persons/Entities Excluded From Statute: None

D. Reporting Requirement for Litigation to State: None

E. Preclusion of Arbitration

Any agreement for the provision of medical services which contains a provision for binding arbitration of any dispute as to professional negligence of a health care provider that conforms to the provisions of _Colo. Rev. Stat. § 13-64-103_ shall be enforceable.

F. Relationship to Medical Malpractice actions

There is no elder abuse legislation in Colorado that affects medical malpractice actions.

G. Criminal Provision

Any person who knowingly commits caretaker neglect against an at-risk elder, or knowingly acts in a manner likely to be injurious to the physical or mental welfare of an at-risk adult commits a class 1 misdemeanor.

_Colo. Rev. Stat. § 18-6.5-103 et seq._

Interplay with State Civil Statute: No Civil Statute.


J. Can Regulations Establish Standard of Care: No
II. DAMAGES

A. Damages Available

1. Actual Damages
2. Special Damages
3. Punitive Damages
4. Injunctive Relief
5. Costs of Suit

B. Does Pain and Suffering of Decedent/Resident Survive Death:


C. Attorney’s Fees Available: No.

1. If available, are the attorney’s fees limited?

III. LEGISLATION AFFECTING STATUTE

A. Pending: None

B. Anticipated: None
I. Civil Statute Regarding Suspected Abuse, Neglect, Abandonment, and Exploitation in Nursing Home Facilities, from the Office of the Long-Term Care Ombudsman: Conn. Gen. Stat. § 17b-400 et seq.¹

A. Conduct²

1. **Neglect**: means the failure by an employee, through action or inaction, to provide a department client with the services necessary to maintain such client's physical and mental health and safety. *Conn. Gen. Stat. §17a-247a(8)*

2. **Abuse**: means the willful infliction by an employee of physical pain or injury or the willful deprivation of services necessary to the physical and mental health and safety of a department client. *Conn. Gen. Stat. §17a-247a(1)*

3. **Substantiated abuse or neglect**: means a determination by an authorized agency, following an investigation conducted or monitored by such agency, that (A) abuse or neglect of a department client has occurred, or (B) there has been a criminal conviction of a felony or misdemeanor involving abuse or neglect. *Conn. Gen. Stat. §17a-247a(11)*

B. Vulnerable Adults

An elderly person shall be deemed to be "in need of protective services" if such person is unable to perform or obtain services which are necessary to maintain physical and mental health. *Conn. Gen. Stat. § 17b-450(2)*

---

¹ Conn. Gen. Stat. §17b-450 et seq. is a separate statute detailing Protective Services for the Elderly, but is not specific to long-term care or nursing facilities.

² Definitions are provided by the Department of Developmental Services, they do not fall under the Department of Social Services or the Protective Services for the Elderly statute.
C. Persons/Entities Excluded From Statute

Any person who makes a report or complaint pursuant to §17b-407 or who testifies in any administrative or judicial proceeding arising from the report shall be immune from any civil or criminal liability on account of such report or complaint or testimony, except for liability for perjury, unless such person acted in bad faith or with malicious purpose. §17b-407(e)

D. Reporting Requirements

1. Any physician or surgeon licensed under the provisions of chapter 370,

2. Any resident physician or intern in any hospital in this state, whether or not so licensed,

3. Any registered nurse, licensed practical nurse, medical examiner, dentist, optometrist, chiropractor, podiatrist, social worker, clergyman, police officer, pharmacist, physical therapist, long-term care facility administrator, nurse's aide or orderly in a long-term care facility,

4. Any person paid for caring for a patient in a long-term care facility,

5. Any staff person employed by a long-term care facility and any person who is a sexual assault counselor or a domestic violence counselor as defined in section 52-146k,

6. Who has reasonable cause to suspect or believe that a resident in a long-term care facility has been abused, neglected, exploited or abandoned, or is in a condition that is the result of such abuse, neglect, exploitation or abandonment,

7. Shall, not later than seventy-two hours after such suspicion or belief arose, report such information or cause a report to be made in any reasonable manner to the Commissioner of Social Services pursuant to chapter 319dd.

8. Such report shall contain the name and address of the long-term care facility, the name of the involved resident, information regarding the nature and extent of the abuse, neglect, exploitation or abandonment and any other information which the reporter believes might be helpful in an investigation of the case and for the protection of the resident.

E. Reporting Requirements for Those Not Addressed in §17b-407(a)

Any other person having reasonable cause to believe that a resident in a long-term care facility is being, or has been, abused, neglected, exploited or abandoned, or any person who wishes to file any other complaint regarding a long-term care

---

3 Conn. Gen. Stat. §17b-407(a)
facility, shall report such information in accordance with subsection (b) (see item 8 above) in any reasonable manner to the Commissioner of Social Services who shall inform the resident of the services of the Office of the Long-Term Care Ombudsman. **Conn. Gen. Stat §17b-407(c)**

F. **Privacy of Reports**

Reports or complaints shall not be deemed a public record. Information derived from such reports or complaints for which reasonable grounds are determined to exist after investigation, including the identity of the long-term care facility, the number of complaints received, the number of complaints substantiated and the types of complaints, may be disclosed by the Commissioner of Social Services, except that in no case shall the name of the resident or the complainant be revealed, unless such person specifically requests such disclosure or unless a judicial proceeding results from such report or complaint. **Conn. Gen. Stat §17b-407(d)**

G. **Criminal Provision**

Any person required to report under § 17b-407 who fails to make such report within the prescribed time period shall be fined not more than five hundred dollars, except that, if such person intentionally fails to make such report within the prescribed time period, such person shall be guilty of a class C misdemeanor for the first offense and a class A misdemeanor for any subsequent offense. **Conn. Gen. Stat §17b-407(a)**

H. **Retaliation**

Any person who is discharged or in any manner discriminated or retaliated against for making, in good faith, a report or complaint shall be entitled to all remedies available under law. **Conn. Gen. Stat §17b-407(f)**

I. **Notification and Maintenance of Reports**

1. The person filing a report or complaint shall be notified of the findings of any investigation conducted by the Commissioner of Social Services, upon request.

2. The Commissioner of Social Services shall maintain a registry of the reports received, the investigations made, the findings and the actions recommended and taken.

J. **Statute of Limitations:**

1. For negligence, misconduct, and malpractice: 2 years – **Conn. Gen. Stat. §52-584**

---

4 Conn. Gen. Stat. §17b-407(g,h)
2. For intentional torts: 3 years - *Conn. Gen. Stat. §52-577*

3. For injuries that result in death – 5 years - *Conn. Gen. Stat. §52-555*


**L. Can Regulations Establish Standard of Care:**

**Yes.** In Connecticut, “if a plaintiff alleges that a statute, ordinance or regulation has been violated, thereby relying on negligence per se, and also alleges that there is a causal connection between such negligence and the injuries sustained, a cause of action has been stated.” *Parker by Yerkes v. Nelson*, 1997 Conn. Super. LEXIS 1638 (Conn. Super. Ct. June 13, 1997).

Furthermore, although there is reluctance on the part of courts to imply private causes of action in federal statutes, the federal principles do not preclude a state common law negligence action premised on a breach of statute. In *Hebert v. Frontier of Northeast Conn., Inc.*, the regulations cited all pertained to the minimum standard of care a Medicare nursing home is required to provide. The decedent was a patient in the defendant's nursing home. The regulations cited by the plaintiff were intended to prevent the injuries allegedly suffered by the decedent. The decedent was, therefore, a member of the class protected by the statute and the statute was intended to prevent the type of injuries she allegedly suffered. 2004 Conn. Super. LEXIS 229 (Conn. Super. Ct. Jan. 29, 2004).

**II. DAMAGES**

**A. Damages Available**

1. Compensatory Damages

2. Punitive Damages (aka Exemplary Damages)

3. Injunctive Relief

4. Costs of Suit

**B. Does Pain and Suffering of Decedent/Resident Survive Death:** Yes.

“In actions for injuries resulting in death, a plaintiff is entitled to just damages together with the cost of reasonably necessary medical, hospital and nursing services, and including funeral expenses.” *Conn. Gen. Stat. § 52-555*. "Just damages" include (1) the value of the decedent's lost earning capacity less deductions for her necessary living expenses and taking into consideration that a present cash payment will be made, (2) compensation for the destruction of her capacity to carry on and enjoy life's activities in a way she would have done had
she lived, and (3) compensation for **conscious pain and suffering**. Conn. Gen. Stat. § 52-555 allows for the action to survive death or to be brought by an administrator or executor after death.

C. **Attorney’s Fees Available:** Yes.

Generally, attorney’s fees may not be recovered, either as costs or damages, absent contractual or statutory authorization. Attorney’s fees may be awarded, however, as a component of punitive damages. To furnish a basis for recovery of such damages, the pleadings must allege and the evidence must show wanton or willful malicious misconduct, and the language contained in the pleadings must be sufficiently explicit to inform the court and opposing counsel that such damages are being sought. *Russo v. Brock’s Hospitality Group*, 1997 Conn. Super. LEXIS 561, 1997 WL 120078 (Conn. Super. Ct. Feb. 28, 1997)

### III. LEGISLATION AFFECTING STATUTE

A. **Pending:**

1. **Conn. Gen Stat. §17b – 407:** will be amended effective October 1, 2013. Changes are administrative in nature and do not affect the substantive law.

2. **Conn. Gen. Stat. §52 – 584:** Senate Bill 97 was introduced on January 10, 2013 proposing to extend the statute of limitations for medical malpractice to 10 years from the date of act or omission which serves as the basis for the action.

B. **Anticipated:** None
DELAWARE

Diane C. Fernald, RN JD
MORRISON MAHONEY, LLP
1500 Main Street, Suite 2400
Springfield, MA 01115
www.morrisonmahoney.com

I. Civil Statute Protecting Dependent Adults or Elders from Neglect or Abuse: Delaware Code Annotated (Del. C.) tit. 31 § 3901, et seq.

A. Conduct

1. Abuse

(a) Definition

(i) Physical abuse by unnecessarily inflicting pain or injury on an adult who is impaired, or

(ii) Emotional abuse, including ridiculing, demeaning, making derogatory remarks, cursing, or threatening an impaired adult

2. Mistreatment

(a) Definition

(i) The failure to provide appropriate physical or emotional care to an adult who is impaired.

3. Neglect

(a) Definition

(i) Lack of attention by a caregiver to the physical needs of the impaired adult including but not limited to toileting, bathing, meals, and safety.

(ii) Failure by a caregiver to carry out a treatment plan prescribed by a health care professional for the impaired adult.

(iii) Intentional and permanent abandonment or desertion in any place of an adult who is impaired by a caregiver who does not make reasonable efforts to ensure that essential services will be provided for said adult who is impaired.

---

1 Id. § 3902(1)
2 Id. § 3902(13)
3 Id. § 3902(14)
4. **Exploitation**

   (a) **Definition**

      (i) The illegal use or abuse of a person who is impaired or their resources by another person by profit or advantage.

5. **Spiritual Treatment and Medical Care Exception**

   An impaired adult shall not be considered abused, mistreated, neglected, or otherwise in need of protective services for the sole reason that the person relies on prayer or spiritual treatment in accordance with the practice and tenets of a recognized church. Furthermore, nothing in this statute shall require or authorize medical care over the implied or express objections of the impaired person.

6. **Single Act and/or Pattern**

   (a) A single act may qualify as abuse, mistreatment, neglect, or abandonment.

B. **Impaired Adult**

   Any person 18 years of age or older who, because of a physical or mental disability, is substantially impaired in the ability to provide adequately for the person’s own care or custody. Physical and mental disabilities include any such disability, including intellectual and developmental disabilities, brain damage, physical degeneration, senility, deterioration, habitual drunkenness, drug addiction, and mental or physical impairment.

C. **Persons/Entities Excluded From Statute**

   1. Anyone participating in good faith in the making of a report that an impaired adult is in need of protective services is immune from any liability, civil or criminal.

D. **Reporting Requirement for Litigation to the State**

   Any person who has reasonable cause to believe that an impaired adult is in need of protective services must report such information to the Department of Health and Social Services.

---

4. *Id. 31 § 3902(9)*
5. *Id. § 3911*
6. *See id. § 3902*
7. *Id. § 3902(2)*
8. *Id. § 3902(16)*
9. *Id. §§ 3910(a),(c)*
10. *Id. § 3910(a)*
E. Preclusion of Arbitration

Delaware has instituted the Delaware Uniform Arbitration Act, which holds that any arbitration decision is “valid, enforceable, and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract”. 10 Del. C. § 5701.

F. Relationship to Medical Malpractice Actions

The Delaware Patient Abuse Act, 11 Del. C. § 1131 et seq. protects patients and residents of long term care facilities from various forms of abuse and neglect. It contains many of the same provisions as the impaired adult statute. See id. However, the Patient Abuse Act only covers the basic treatment of a patient by any healthcare provider. Delaware’s medical malpractice applies when the wrongdoer is a trained professional, and distinctly considers the training and expertise of the medical provider for establishing the proper standard of care. Delaware Dept. of Health and Social Services v. Jain, 29 A.3d 207, 212-213 (2011).

G. Criminal Provision

1. Any person who knowingly or recklessly abuses, neglects, exploits or mistreats an adult who is impaired shall be guilty of a class A misdemeanor. If such acts cause bodily harm, permanent disfigurement, or permanent disability, the person shall be guilty of a class D felony. If such acts result in the death of an impaired person, the person shall be guilty of a class A felony.

2. Any person who knowingly or recklessly exploits an adult who is impaired by using their resources shall be guilty of:

   (a) A class A misdemeanor for use of resources of less than $500

   (b) A class G felony where the resources are worth more than $500 but less than $5,000.

   (c) A class E felony where the resources are worth more than $5,000 but less than $10,000.

   (d) A class D felony where the resources are worth more than $10,000 but less than $50,000

   (e) For any exploitation of more than $50,000, the wrongdoer shall be guilty of a class C felony.

3. Interplay with Civil Statute

   11 32 Del. C. § 3913(a)
   12 Id. § 3913(c)
   13 Id. § 3913(b)
The criminal statute’s inclusion with the other provisions of the impaired adult statute, along with the clear intent of the legislature to protect vulnerable adults in Delaware, provides for an unambiguous interpretation of the statute. *State v. Sailer*, 684 A.2d 1247, 1250 (Del. Super. 1995).

H. **Statute of Limitations:** Three years – *10 Del. C. § 8106*


J. **Can Regulations Establish Standard of Care?**

Yes. A negligence per se instruction may be received for the violation of a regulation, but only if the regulation is “promulgated pursuant to a legislative directive and enacted for a valid purpose”. *Toll Bros., Inc. v. Considine*, 706 A.2d 493, 497 (1998).

II. **DAMAGES**

A. **Damages Available**

(1) Actual Damages  
(2) Special Damages  
(3) Punitive Damages  
(4) Injunctive Relief  
(5) Costs of Suit

B. **Does Pain and Suffering of Decedent/Resident Survive Death:**

Yes. A decedent’s survivors are entitled to compensation for pain and suffering that occurred from the time of the injury to the time of death. *Magee v. Rose*, 405 A.2d 143, 146 (1979). Delaware’s Survival Statute allows that all causes of action survive to the executor or the personal representative for the deceased party upon their death. *10 Del. C. § 3701*. Damages for conscious pain and suffering are included as recoverable damages under the Survival Statute. *405 A.2d 143 at 146*.

C. **Attorney’s Fees Available:** No.

III. **LEGISLATION AFFECTING STATUTE**

A. **Pending:** None

B. **Anticipated:** None
I. Civil Statute Protecting Dependent Adults or Elders from Neglect or Abuse: District of Columbia

A. Conduct

1. Neglect

(a) Definition: D.C. Code § 7-1901(9)(A)

   (i) Repeated, careless infliction of serious physical pain or injury;

   (ii) Repeated failure of a caregiver to take reasonable steps to protect against acts abuse;

   (iii) Repeated, careless imposition of unreasonable confinement resulting in severe mental distress; or

   (iv) Careless deprivation of essential food, shelter, or health care by a caregiver when the deprivation constitutes a serious threat to one’s life or physical health.

(b) Treatment by Spiritual Means Alone: D.C. Code § 7-1901(9)(B)

   (i) Neglect has not occurred when the adult seeks or his caregiver provides or permits, with express consent or in accordance with the practice of the adult, provides or permits to be provided, treatment by prayer alone according to the religious method of healing, in lieu of medical treatment.

2. Abuse

(a) Definition: D.C. Code § 7-1901(1)(A)

   (i) Intentional or reckless infliction of serious physical pain or injury;

   (ii) The use or threatened use of violence to force participation in “sexual conduct” defined in D.C. Code §22-2310(5);
(iii) The repeated, intentional imposition of unreasonable confinement or threats to impose unreasonable confinement, resulting in severe mental distress

(iv) The repeated use of threat or violence, resulting in shock or intense, expressed fear for one’s life or of serious physical injury; or

(v) The intentional or deliberately indifferent deprivation of essential food, shelter, or health care in violation of a caregiver’s responsibilities, when that deprivation constitutes a serious threat to one’s life or physical health.

(b) **Treatment by Spiritual Means Alone.**

(i) Abuse has not occurred when the adult seeks or his caregiver provides or permits, with express consent or in accordance with the practice of the adult, provides or permits to be provided, treatment by prayer alone according to the religious method of healing, in lieu of medical treatment. *D.C. Code § 7-1901(1)(B)*

(c) **Legal Requirement for the act(s) or omission(s) to constitute abuse or neglect:** No specific requirements are given.

3. **Exploitation**

(a) **Definition:** The unlawful appropriation or use of another’s “property”, defined in §22-3201 for one’s own benefit or that of a third person. *D.C. Code § 7-1901(8)*

B. **Vulnerable Adults**

1. **Those “adults in need of protective services”**

   (a) Physically or mentally impaired, self-neglected, or incapacitated *D.C. Code § 7-1901(2)(A)*

      (i) Self-neglect is the failure of an adult, due to physical or mental impairments or incapacity, to perform essential self-care tasks including providing essential food, shelter, medical care; obtain goods or services to maintain physical health, mental health, emotional well-being, and general safety; or manage financial affairs. *D.C. Code § 7-1901(13)(A)*

      (ii) Self-neglect does not occur when the adult seeks treatment by spiritual means through prayer alone in accordance with a religious method of healing, in lieu of medical treatment. *D.C. Code § 7-1901(13)(B)*
(b) Recently or currently abused, neglected, or exploited. **D.C. Code § 7-1901(2)(A)**

(c) Has no one willing and able to provide adequate protection. **D.C. Code § 7-1901(2)(A)**

C. **Persons/Entities Excluded From Statute:** None stated

D. **Reporting Requirement for Litigation to State.**

1. No specific reporting requirements were provided for litigation outside those that exist generally.

2. Reporting requirements to initiate protective actions by Adult Protective Services:

   (a) Mandatory immediate reporting: Those who have substantial cause to believe an adult is in need of protective services because of abuse, neglect, or exploitation by another shall immediately report the belief. **D.C. Code §7-1903(a)(1)**

      (i) Penalties for failure to report: Guilty of misdemeanor and subject to a fine not exceeding $300. **D.C. Code § 7-1912(a)(1)**

      (ii) Penalties for false report: Guilty of misdemeanor and subject to a fine not exceeding $1,000 if knowledgeable and willful. **D.C. Code §7-1912(a)(2)**

      (iii) Penalties for healthcare administrator or professional: If fail to report or give false report then subject to sanction from governmental board, commission or authority responsible for the license. **D.C. Code § 7-1912(a)(5)**

      (iv) Penalties for retaliation: Anyone who retaliates against the reporting party by adversely affecting their rights, privileges, living arrangements or employment is liable for civil damages and punitive damages not exceeding $5,000. **D. C. Code § 7-1912(a)(4)**

      (v) Criminal prosecutions for reporting failure or falsehood: Take place in Superior Court of the District of Columbia. **D.C. Code § 7-1912(b)**

      (vi) Party bringing the cause of action: Any person aggrieved by violation or who is acting on behalf of a person aggrieved by a violation. **D.C. Code §7-1912(c)(1)**

(b) Voluntary optional reporting: Those with reason to believe an adult is in need of protective services because of abuse, neglect, or
exploitation by another may voluntarily report the belief. **D.C. Code §7-1903(a)(2)**

(c) Format: The report must be made to the division designated by the mayor orally or in writing. The report must include the name, age, physical description, location of the adult in need of protective services; the location of the person responsible for the abuse; the nature and extent of the abuse or neglect; and the basis of the knowledge. **D.C. Code §7-1903(c)**

3. **Exceptions**

E. **Investigations to Identify Abuse or Neglect**


   (a) Exceptions: The report fails to allege facts sufficient to show the adult is in need of protective service or is substantively repetitive of a previous report. **D.C. Code §7-1904(a)(2)(A), §7-1904(a)(2)(B)**

2. Timing:

   (a) Within 24 hours: Immediate substantial risk of life threatening harm shall be reported to the police for investigation and Adult Protective Services will commence an investigation. **D.C. Code §7-1904(a)(3)**

   (b) Within 10 days: Lack an immediate substantial risk of life threatening harm. **D.C. Code §7-1904(a)(4)**

3. Protocol for investigation: Before entering a residence announce the purpose and the presence of any police officer present and secure consent of adult in need of protective series and any other adult present who appears to have expectation of privacy. If adult objects to investigation and does not appear objection is prompted by fear, then investigation terminates. **D.C. Code §7-1904(b)**

4. Factual inquiry: If objection prompted by fear or another refuses to allow the investigation to take place, then may request Attorney General to petition for an ex parte order to conduct a factual inquiry. If facts show that a need of protective services existed and a person denied access directly or through fear or intimidation then may enjoin the 3rd party from interfering with the investigation. **D.C. Code §7-1904(c), §7-1904(d), and §7-1904(e)**

F. **Situations Where Protective Services Are Provided**
1. Investigation shows abuse, neglect, or exploitation is present  
   **D.C. Code §7-1905(a)(1)**
   (a) Abuse, neglect, or exploitation is present;
   (b) Consent is obtained by the adult in need or one authorized by law or court order to give consent;
   (c) Reasonable access is not denied by a third person; and
   (d) Adult in need agrees to reimburse or make reasonable contribution for the services unless exigent or indigent circumstances exist.

2. Investigation shows self-neglect is present. **D.C. Code §7-1905(a-1)**
   (a) Self-neglect is present;
   (b) Consent is obtained by the adult in need or one authorized by law or court order to give consent;
   (c) Reasonable access is not denied by a third person; and
   (d) Adult in need agrees to reimburse or make reasonable contribution for the services unless exigent or indigent circumstances exist.

**G. Preclusion of Arbitration:** None stated.

**H. Relationship to Medical Malpractice actions:** None stated.

**I. Criminal Provision**

1. **Abuse Defined. D.C. Code §22-933**
   (a) Intentional or knowing infliction or threat to inflict physical pain or injury;
   (b) Intentional or knowing repeated use of malicious oral or written statements that a reasonable person would consider harassing or threatening; or
   (c) Intentional or knowing unreasonable confinement or involuntary seclusion including forced separation from other persons against their will or against the directions of a legal representative.

2. **Neglect Defined.**
   (a) Knowing, willful, reckless, or willfully indifferent discharge of a duty to provide care and service to maintain the physical and mental health of a vulnerable adult. **D.C. Code §22-934**

3. **Exception to Abuse or Neglect Defined.**
(a) Treatment through spiritual means: Abuse or neglect does not occur when treatment is provided by spiritual means through prayer alone in accordance with religious healing, in lieu of medical treatment when express consent is given by the vulnerable adult or in accord with the vulnerable adults practices.  

D.C. Code §22-935

4. Vulnerable Adults.

(a) Has physical or mental condition which substantially impairs the person from providing for his or her own care or protection.  

D.C. Code §22-932

5. Penalties.

(a) Abuse or Neglect: up to $1,000 and imprisoned for not more than 180 days.  

D.C. Code §22-936(a)

(b) Abuse or Neglect resulting in serious bodily injury or severe mental distress: up to $100,000 and may be imprisoned for not more than 10 years.  

D.C. Code §22-936(b)

(c) Abuse or Neglect resulting in permanent bodily harm or death: up to $250,000 and may be imprisoned for not more than 20 years.  

D.C. Code §22-936(c)

J. Statute of Limitations: None stated.

K. Burden of Proof: None Stated.

L. Can Regulations Establish Standard of Care: Not Stated.

II. DAMAGES: None stated.

A. Damages Available: N/A

B. Does Pain and Suffering of Decedent/Resident Survive Death: N/A

C. Attorney’s Fees Available: N/A

III. LEGISLATION AFFECTING STATUTE: None stated.

A. Pending: N/A

B. Anticipated: N/A
FLORIDA

Mark S. Kopson, Esq.
Adele P. Jorissen, Esq.¹
PLUNKETT COONEY
38505 Woodward, Suite 2000
Bloomfield Hills MI 48304
(248) 901-4000

I. Civil Statute Protecting Dependent Adults or Elders from Neglect or Abuse: Florida Statutes 415.101, et seq.

A. Conduct

1. Neglect:

   a) Definition

   The failure or omission on the part of the caregiver or vulnerable adult to provide the care, supervision, and services necessary to maintain the physical and mental health of the vulnerable adult, including, but not limited to, food, clothing, medicine, shelter, supervision, and medical services, which a prudent person would consider essential for the well-being of a vulnerable adult.²

   b) Third Party Conduct

   The failure of a caregiver to make a reasonable effort to protect a vulnerable adult from abuse, neglect, or exploitation by others.

   c) Single Act and/or Pattern

   A single negligent act or omission or series of acts or omissions, which produces or could reasonably be expected to result in serious physical or psychological injury or a substantial risk of death will qualify as neglect.³

¹ The authors gratefully acknowledge the assistance of Summer Associate, Mohammad Khaleelullah.

² Fla. Stat. §415.102(16).

³ Id.
2. **Abuse:** Any willful act or threatened act by a relative, caregiver, or household member which causes or is likely to cause significant impairment to a vulnerable adult’s physical, mental, or emotional health constitutes abuse. Abuse includes acts and omissions.4

3. **Exploitation:**5

   (a) A person who stands in a position of trust and confidence with a vulnerable adult and knowingly, by deception or intimidation, obtains or uses, or endeavors to obtain or use, a vulnerable adult’s funds, assets, or property with the intent to temporarily or permanently deprive a vulnerable adult of the use, benefit, or possession of the funds, assets, or property for the benefit of someone other than the vulnerable adult; or

   (b) A person who knows or should know that the vulnerable adult lacks the capacity to consent, and obtains or uses, or endeavors to obtain or use, the vulnerable adult’s funds, assets, or property with the intent to temporarily or permanently deprive the vulnerable adult of the use, benefit, or possession of the funds, assets, or property for the benefit of someone other than the vulnerable adult.6

4. **Intimidation:**7 The communication by word or act to a vulnerable adult that the vulnerable adult will be deprived of food, nutrition, clothing, shelter, supervision, medicine, medical services, money, or financial support or will suffer physical violence.8

**B. Vulnerable Adults**

1. **Types of Impairment**

   Any person 18 years of age or older whose ability to perform the normal activities of daily living or to provide for his or her own care or protection is impaired due to a mental, emotional, sensory, long-term physical, or developmental disability or dysfunction, or brain damage, or the infirmities of aging.9

**C. Persons/Entities Excluded From Statute**

---

4 *Fla. Stat. §415.102(1)*; no legal duty or relationship appears to be required under the statute’s express terms.
5 Exploitation will not be addressed in this compendium – instead, only the abuse and/or neglect portions of the statutes.
6 *Fla. Stat. §415.102(8).*
7 Intimidation will not be addressed in this compendium – instead, only the abuse and/or neglect portions of the statutes.
8 *Fla. Stat. §415.102(14).*
9 *Fla. Stat §415.102(27).*
Any person who participates in making a report under mandatory reporting requirements or participates in a judicial proceeding resulting there from is presumed to be acting in good faith and, unless lack of good faith is shown by clear and convincing evidence, is immune from any liability, civil or criminal, that otherwise might be incurred or imposed. However, no immunity is granted to any person who is suspected of having abused, neglected, or exploited, or committed any illegal act upon or against, a vulnerable adult.¹⁰

D. Reporting Requirement for Litigation to State – The statute does not provide specific notice and process requirements to the state for litigation.

1. Other Applicable Statutes

(a) Civil actions for damages against any licensee or entity who establishes, controls, conducts, manages, or operates a facility licensed under state laws relating to the operation of the licensed facility shall be brought pursuant to civil enforcement under Nursing Homes and Related Health Care Facilities Fla. Stat. §400.023(1).

E. Preclusion of Arbitration

A party to an agreement or provision for arbitration subject to this law claiming the neglect or refusal of another party thereto to comply therewith may make application to the court for an order directing the parties to proceed with arbitration in accordance with the terms thereof. If the court is satisfied that no substantial issue exists as to the making of the agreement or provision, it shall grant the application. If the court shall find that a substantial issue is raised as to the making of the agreement or provision, it shall summarily hear and determine the issue and, according to its determination, shall grant or deny the application. Fla. Stat. §682.03.

F. Relationship to Medical Malpractice actions

The Florida Adult Protective Services Act (APSA), Fla. Stat. § 415.1111, is in addition to and cumulative with other legal and administrative remedies available to a vulnerable adult. However, the APSA was not intended to provide an alternate cause of action for medical negligence. Bohannon v. Shands Teaching Hosp. & Clinics, Inc., 983 So. 2d 717, 721 (Fla. Dist. Ct. App. 2008).

G. Criminal Provision

1. Abuse

¹⁰ Fla. Stat. §415.1036.
(a) Intentional infliction of physical or psychological injury upon an elderly person or disabled adult;

(b) An intentional act that could reasonably be expected to result in physical or psychological injury to an elderly person or disabled adult; or

(c) Active encouragement of any person to commit an act that results or could reasonably be expected to result in physical or psychological injury to an elderly person or disabled adult.

(d) A person who knowingly or willfully abuses an elderly person or disabled adult without causing great bodily harm, permanent disability, or permanent disfigurement to the elderly person or disabled adult commits a **felony of the third degree**.\(^\text{11}\)

2. **Aggravated abuse**

(a) Committing aggravated battery on an elderly person or disabled adult;

(b) Willfully tortures, maliciously punishes, or willfully and unlawfully cages, an elderly person or disabled adult; or

(c) Knowingly or willfully abuses an elderly person or disabled adult and in so doing causes great bodily harm, permanent disability, or permanent disfigurement to the elderly person disabled adult.

(d) A person who commits aggravated abuse of an elderly person or disabled adult commits a **felony of the first degree**.\(^\text{12}\)

3. **Neglect**

(a) A person who willfully or by culpable negligence neglects an elderly person or disabled adult and in so doing causes great bodily harm, permanent disability, or permanent disfigurement to the elderly person or disabled adult commits a **felony of the second degree**.

(b) A person who willfully or by culpable negligence neglects an elderly person or disabled adult without causing great bodily harm, permanent disability, or permanent disfigurement to the elderly person or disabled adult commits a **felony of the third degree**.\(^\text{13}\)

\[^{11}\] Fla. Stat. §825.102(1).

\[^{12}\] Fla. Stat. §825.102(2).

\[^{13}\] Fla. Stat. §825.102(3).
H.   Statute of Limitations

An action founded on alleged abuse, as defined in Fla. Stat. § 415.102, may be commenced at any time within 7 years after the age of majority, or within 4 years after the injured person leaves the dependency of the abuser, or within 4 years from the time of discovery by the injured party of both the injury and the causal relationship between the injury and the abuse, whichever occurs later. Fla. Stat. § 95.11(7).

I.   Burden of Proof

In Florida, in civil action, a party must present a preponderance of the evidence to discharge his or her burden of production in a civil action. In re Estate of Ziy, 223 So. 2d 42, 43 (Fla. 1969).

J.   Can Regulations Establish A Standard Of Care:

Unclear. Florida law recognizes statutory standards of care where a statute expresses requirements. Insurance Co. of North America v. Pasakarnis, 451 So. 2d 447, 453 (Fla. 1984). However, resident’s rights in both assisted care communities and nursing care facilities do not recognize a statutory standard of care. See Fla. Stat. § 400.023. See also Fla. Stat. § 429.29.

II.   Damages

A.   Damages available

(1) Actual Damages

(2) Punitive Damages

B.   Does Pain and Suffering of Decedent/Resident Survive Death:

Yes. All causes of action survive and may be commenced, prosecuted, and defended in the name of the person prescribed by law. Fla. Stat. § 46.021.

C.   Attorney’s Fees Available: Yes.

A prevailing party may be entitled to recover reasonable attorney’s fees.

III. Legislation Affecting Statute

15 Id.
A.  **Pending:**  None

B.  **Anticipated:**  None
I. The Disabled Adults and Elder Persons Protections Act, O.C.G.A. § 30-5-1 et seq.

A. Conduct

1. **Neglect**: means the absence or omission of essential services to the degree that it harms or threatens with harm the physical or emotional health of a disabled adult or elder person. O.C.G.A. § 30-5-3(9).

2. **Abuse**: means the willful infliction of physical pain, physical injury, sexual abuse, mental anguish, unreasonable confinement, or the willful deprivation of essential services to a disabled adult or elder person. O.C.G.A. § 30-5-3(1).

3. **Exploitation**: means the illegal or improper use of a disabled adult or elder person or that person's resources through undue influence, coercion, harassment, duress, deception, false representation, false pretense, or other similar means for one's own or another's profit or advantage. O.C.G.A. § 30-5-3(8).

B. Applicable to:

1. "Elder person" means a person 65 years of age or older who is not a resident of a long-term care facility. O.C.G.A. § 30-5-3(6).

2. "Disabled adult" means a person 18 years of age or older who is not a resident of a long-term care facility, but who is mentally or physically incapacitated or has Alzheimer's disease. O.C.G.A. § 30-5-3(5).

C. Criminal Provision

1. Any person who knowingly and willfully exploits a disabled adult, elder person, or resident, willfully inflicts physical pain, physical injury, sexual

---

1 "Resident" is defined by O.C.G.A. § 16-5-100(8) as any person who is receiving treatment or care in any long-term care facility.
abuse, mental anguish, or unreasonable confinement upon a disabled adult, elder person, or resident, or willfully deprives of essential services a disabled adult, elder person, or resident shall be guilty of a felony. O.C.G.A. § 16-5-102.

2. **Persons/Entities Excluded From Statute:** An owner, officer, administrator, board member, employee, or agent of a long-term care facility shall not be held criminally liable for the actions of another person who is convicted pursuant to this article unless such owner, officer, administrator, board member, employee, or agent was a knowing and willful party to or conspirator to the abuse or neglect. O.C.G.A. § 16-5-103

3. O.C.G.A. § 16-3-25 also provides that a person who is an employee, agent, or volunteer at a long-term care facilities, assisted living communities, or personal care homes, or who is required to be licensed pursuant to Georgia law, relating to home health care and hospices, who commits the offense of simple battery against a person who is admitted to or receiving services from such facility, person, or entity shall be punished for a misdemeanor of a high and aggravated nature.

4. O.C.G.A. § 30-5-8 makes the failure to report abuse, neglect or exploitation by someone required to make such a report under O.C.G.A. § 30-5-4, including physicians and nurses, a misdemeanor.

5. Interplay with State Civil Statute: O.C.G.A. § 16-5-103 provides that the criminal statute is cumulative and supplemental to any other state law.

II. **Bill of Rights for Residents of Long-term Care Facilities, O.C.G.A. § 31-8-100 et seq.**

A. **Regulations Establishing Standard of Care:** O.C.G.A. § 31-8-108(a)(2) provides that each resident shall receive care, treatment, and services which are adequate and appropriate. Care, treatment, and services shall be provided in compliance with applicable laws and regulations. In the context of a nursing home, over and above the contractual obligation the nursing home assumed to take care of its residents, the state has imposed a statutory obligation for it to exercise "reasonable care and skill." O.C.G.A. § 31-8-108. The general standard of care required of a nursing home is that degree of care, skill, and diligence usually exhibited by such homes generally in the community. Associated Health Systems v. Jones, 185 Ga. App. 798, 801 (366 SE2d 147) (1988).

B. **Required care, treatment, and services; rights in regard thereto; experimental research or treatment**

---

2 O.C.G.A. § 30-5-8 previously provided that in addition to any other provision of law, it was unlawful for a person to act with the specific intent to abuse, neglect, or commit exploitation of any disabled adult or elder person. Any violation of this statute was a felony. The 2013 amendment to the statute omitted these provisions. Sections 16-5-102 through 16-5-104 were enacted in 2013.
1. Each resident shall receive care, treatment, and services which are adequate and appropriate. Care, treatment, and services shall be provided as follows:

   (a) With reasonable care and skill;

   (b) In compliance with applicable laws and regulations;

   (c) Without discrimination in the quality of a service based on the source of payment for the service;

   (d) With respect for the resident's personal dignity and privacy; and

   (e) With the goal of the resident's return home or to another environment less restrictive than the facility.

2. In the provision of care, treatment, and services to the resident by the facility, each resident or guardian shall be entitled to the following:

   (a) To choose the resident's physician. The physician so chosen shall inform the resident in advance whether or not the physician's fees can be paid from public or private benefits to which the resident is entitled and shall provide such documentation as may be required by law or regulation;

   (b) To participate in the overall planning of the resident's care and treatment. The resident or guardian shall be informed of this right each time a substantial change in the treatment plan is made;

   (c) To refuse medical treatment, dietary restrictions, and medications for the resident. The resident or guardian shall be informed of the probable consequences of such refusal, the refusal shall be noted in the resident's medical records, and the resident's attending physician shall be notified as soon as practical. If such refusal apparently would be seriously harmful to the health or safety of the resident, the facility shall either refer the resident to a hospital or notify a responsible family member or, if such a family member is not readily available, the county department of family and children services. If such refusal would be harmful to the health or safety of others, as documented in the resident's medical records by the resident's physician, this subsection shall not apply. Any facility or employee of such facility which complies with this paragraph shall not be liable for any damages resulting from such refusal;

   (d) To receive from the facility upon the request of the resident, guardian, or representative the name, address, and telephone number of the resident's physician;
(e) To have any significant change in the resident's health status reported to persons of his choice by the facility within a reasonable time; and

(f) To obtain from the resident's physician or the physician attached to the facility a complete and current explanation concerning the resident's medical diagnosis, treatment, and prognosis in language the resident can understand. Each resident shall have access to all information in the medical records of the resident and shall be permitted to inspect and receive a copy of such records unless medically contraindicated. The facility may charge a reasonable fee for duplication, which fee shall not exceed actual cost.

3. Each resident shall be free from experimental research or treatment unless the informed, written consent of the resident or guardian is first obtained.

C. Any resident, guardian, or representative who believes his rights under the statute have been violated shall have the right to request a hearing from the department pursuant to the Georgia Administrative Procedure Act. O.C.G.A. § 31-8-125.

D. Any person or persons aggrieved because a long-term care facility has violated or failed to provide any right granted under this article shall have a cause of action against such facility for damages and such other relief as the court deems proper. O.C.G.A. § 31-8-126.

E. Relationship to Medical Malpractice actions: The right of a resident to bring an action pursuant to this Code section is in addition to any and all other rights, remedies, or causes of action the resident may have by statute or at common law. O.C.G.A. § 31-8-126(c).

F. Statute of Limitations: Two Years – § O.C.G.A. 9-3-33

G. Burden of Proof: Preponderance of the Evidence

III. DAMAGES

A. Damages Available: The statute does not provide specifically the types of damages available, but presumably common law damages including actual and compensatory damages are recoverable along with punitive damages pursuant to O.C.G.A. § 51-12-5 and attorney's fees pursuant to O.C.G.A. § 13-6-11 where applicable.

IV. LEGISLATION AFFECTING STATUTE

A. Pending: The Disabled Adults and Elder Persons Protections Act, O.C.G.A. § 30-5-1 et seq. was amended in 2013.

B. Anticipated: None
I. Civil Statute Protecting Dependent Adults or Elders from Neglect or Abuse: *Hawaii Revised Statutes (H.R.S.) § 346-201, et seq.*

A. Conduct (there is no private cause of action for elder abuse) – however, the following conduct could be used as evidence in a medical malpractice action.

(1) **Abuse** – (as defined in H.R.S. § 346-222) means any of the following, separately or in combination:

   (a) **Physical abuse** includes

      (1) The non-accidental infliction of physical or bodily injury, pain, or impairment, including but not limited to hitting, slapping, causing burns or bruises, poisoning, or improper physical restraint; or

      (2) Causing physical injuries that are not justifiably explained or where the history given for an injury is at variance with the degree or type of injury.

   (b) **Psychological abuse**: The infliction of mental or emotional distress by use of threats, insults, harassment, humiliation, provocation, intimidation, or other means that profoundly confuse or frighten a vulnerable adult;

   (c) **Sexual abuse**;

   (d) **Financial exploitation**;

   (e) **Caregiver neglect**: Means the failure of a caregiver to exercise that degree of care for a vulnerable adult that a reasonable person with the responsibility of a caregiver would exercise within the scope of the caregiver's assumed, legal or contractual duties, including but not limited to the failure to:

   

---

1 Sexual Abuse will not be addressed in this compendium – instead, only the abuse and/or neglect portions of the statutes. The definition of sexual abuse is set forth in H.R.S. §346-222.

2 Exploitation will not be addressed in this compendium – instead, only the abuse and/or neglect portions of the statutes. The definition of exploitation is set forth in H.R.S. §346-222.
(1) Assist with personal hygiene;
(2) Protect the vulnerable adult from abandonment;
(3) Provide, in a timely manner, necessary food, shelter, or clothing;
(4) Provide, in a timely manner, necessary health care, access to health care, prescribed medication, psychological care, physical care, or supervision;
(5) Protect the vulnerable adult from dangerous, harmful, or detrimental drugs, as defined in section 712-1240; provided that this paragraph shall not apply to drugs that are provided to the vulnerable adult pursuant to the direction or prescription of a practitioner, as defined in section 712-1240;
(6) Protect the vulnerable adult from health and safety hazards; or
(7) Protect the vulnerable adult from abuse by third parties.

(f) Self-neglect[^3];

B. Individuals Subject to the Statute

(1) Vulnerable Adult (as defined in H.R.S. §346-222) means a person eighteen years of age or older who, because of mental, developmental, or physical impairment, is unable to:

(a) Communicate or make responsible decisions to manage the person's own care or resources;
(b) Carry out or arrange for essential activities of daily living; or
(c) Protect oneself from abuse, as defined in this part.

C. Persons/Entities That Are Included In The Statute

(1) Types of Individuals Whose Care is Subject to the Statute

(a) “Caregiver[^4]” means any person who has knowingly and willingly assumed, on a part-time or full-time basis, the care, supervision, or physical control of, or who has a legal or contractual duty to care for the health, safety, and welfare of a vulnerable adult.

[^3]: Self neglect will not be addressed in this compendium – instead, only the abuse and/or neglect portions of the statutes. The definition of self-neglect is set forth in H.R.S. §346-222.

[^4]: As defined in H.R.S. §346-222
D. Reporting Requirement for Litigation to State

None.

E. Arbitration As It Relates To Elder Abuse Litigation

Untested.

F. Relationship to Medical Malpractice actions

Claims which allege neglect and/or abuse of nursing home resident do not constitute medical torts. *Campos v. Marrhey Care Home, LLC*, 128 Hawai‘i 405, 289 P.3d 1041 (Hawai‘i App. 2012). Medical torts encompass claims against health care providers for medical malpractice. These are generally claims against physicians and related medical professionals arising out of the practice of medicine and the provision of medical care or treatment to patients. See *id*.

G. Caps

(1) Damages recoverable for pain and suffering are capped at $375,000.

H. Criminal Provision

Defendant, a certified nurse's aide who operated an adult residential care home, was convicted of manslaughter by omission of an 80-year-old resident in the home who developed untreated pressure sores. See *State v. Bermisa*, 104 Hawai‘i 387, 90 P.3d 1256 (Hawai‘i App. 2004)

I. Statute of Limitations:

Two Years – H.R.S. § 657-7.3

J. Burden of Proof:


K. Do Pain and Suffering Survive Death

Yes. Pursuant to H.R.S. §663-7, a cause of action arising out of a wrongful act, neglect, shall not be extinguished by reason of the death of the injured person. The cause of action survives in favor of the legal representative of the person and any damages recovered shall form part of the estate of the deceased.

II. DAMAGES
A. **Damages Available**
   (1) Actual Damages
   (2) Special Damages
   (3) Punitive Damages
   (4) Costs of Suit

B. **Does Pain and Suffering of Decedent/Resident Survive Death:**
   Yes.

C. **Attorney’s Fees Available:**
   No. (As no private right of action)
   (1) If available, are the attorney’s fees limited?
       N/A

III. **LEGISLATION AFFECTING STATUTE**
A. **Anticipated:** None
I. Civil Statute Protecting Dependent Adults or Elders from Neglect or Abuse: *Idaho Code Annotated 18-1505*

A. Conduct

(1) **Neglect:** Failure of a caretaker to provide food, clothing, shelter or medical care to a vulnerable adult, in such a manner as to jeopardize the life, health and safety of the vulnerable adult.\(^2\)

(2) **Abuse:**

(a) **Definition:** The intentional or negligent infliction of physical pain, injury or mental injury.\(^3\)

(b) **Single Act and/or Pattern:** Unknown.

(3) **Abandoning a Vulnerable Adult:** The desertion or willful forsaking of a vulnerable adult by any individual, caretaker, or entity which has assumed responsibility for the care of the vulnerable adult by contract, receipt of payment of care, any relationship arising from blood or marriage wherein the vulnerable adult has become the dependent of another or by order of a court of competent jurisdiction; provided that abandon shall not mean the termination of services to a vulnerable adult by a physician, or anyone under his direct supervision, where the physician determines, in the exercise of his professional judgment, that termination of such services is in the best interests of the patient.\(^4\)

(4) **Sexual Abuse of a Vulnerable Adult:** It is a felony for any person, with the intent of arousing, appealing to or gratifying the lust, passion or sexual desires of such person, a vulnerable adult or a third party, to:

---

\(^1\) Please note that authors are not licensed to practice in the State of Idaho.


(a) Commit any lewd or lascivious act or acts upon or with the body or any part or member thereof of a vulnerable adult including, but not limited to: genital-genital contact, oral-genital contact, anal-genital contact, oral-anal contact, manual-anal contact or manual-genital contact, whether between persons of the same or opposite sex;

(b) Involve a vulnerable adult in any act of bestiality or sadomasochism; or

(c) Cause or have sexual contact with a vulnerable adult, not amounting to lewd conduct as defined in paragraph (a) of this subsection.5

(5) **Sexual Exploitation of a Vulnerable Adult:** It shall be a felony for any person to commit sexual exploitation of a vulnerable adult if, for any commercial purpose, he knowingly:

(a) Causes, induces or permits a vulnerable adult to engage in or be used in any explicit sexual conduct; or

(b) Prepares, arranges for, publishes, produces, promotes, makes, sells, finances, offers, exhibits, advertises, deals in, possesses or distributes sexually exploitative material.6

(6) **Exploitation:**7 An action which may include, but is not limited to, the unjust or improper use of a vulnerable adult's financial power of attorney, funds, property or resources by another person for profit or advantage.8

B. **Vulnerable Adults**

(1) **Vulnerable Adult:** A person eighteen (18) years of age or older who is unable to protect himself from abuse, neglect or exploitation due to physical or mental impairment which affects the person's judgment or behavior to the extent that he lacks sufficient understanding or capacity to

---

7 Exploitation will not be addressed in this compendium – instead, only the abuse and/or neglect portions of the statutes.
make or communicate or implement decisions regarding his person, funds, property or resources.  

C. Persons/Entities Excluded From Statute

(1) Nothing in this section shall be construed to mean a person is abused, neglected or exploited for the sole reason he is relying upon treatment by spiritual means through prayer alone in accordance with the tenets and practices of a recognized church or religious denomination; nor shall the provisions of this section be construed to require any medical care or treatment in contravention of the stated or implied objection of such a person.

(2) Nothing in this section shall be construed to mean that an employer or supervisor of a person who abuses, exploits or neglects a vulnerable adult may be prosecuted unless there is direct evidence of a violation of this statute by the employer or supervisor.

(3) Any action taken by a physician or health facility pursuant to an agreement with a vulnerable adult shall not be construed to constitute abuse, exploitation, or neglect, so long as it is consistent with the withholding or withdrawal of artificial life-sustaining procedures from a qualified patient.

D. Reporting Requirement for Litigation to State

If, as the result of any investigation initiated under the provisions of this chapter, it appears that the abuse, neglect, or exploitation has caused injury or a serious imposition on the rights of the vulnerable adult, the commission shall immediately notify the appropriate law enforcement agency which shall initiate an investigation and shall determine whether criminal proceedings should be initiated against the caretaker or other persons in accordance with applicable state law. Notwithstanding the prohibition against disclosure of names of persons associated with the written report of an investigation, the commission shall

disclose names associated with the written report when notification is made as required in this section.13

E. Preclusion of Arbitration: Unknown.

F. Relationship to Medical Malpractice Actions: Unknown.

G. Criminal Provisions

(1) Any person who abandons a vulnerable adult in deliberate disregard of the vulnerable adult's safety or welfare, regardless of whether the vulnerable adult suffered physical harm from the act of abandonment, shall be guilty of a felony and shall be imprisoned in the state prison for a period not in excess of five (5) years, or by a fine not exceeding five thousand dollars ($5,000), or by both such fine and imprisonment. It shall not be a defense to prosecution under the provisions of this section that the perpetrator lacked the financial ability or means to provide food, clothing, shelter or medical care reasonably necessary to sustain the life and health of a vulnerable adult.14

(2) Sexual abuse of a vulnerable adult is a felony and shall be punishable by imprisonment in the state prison for a period not to exceed twenty-five (25) years or by a fine not to exceed twenty-five thousand dollars ($25,000), or by both such fine and imprisonment.15

(3) Sexual exploitation of a vulnerable adult shall be punishable by imprisonment in the state prison for a period not to exceed fifteen (15) years or by a fine not to exceed twenty-five thousand dollars ($25,000), or by both such fine and imprisonment.16

(4) Any person who abuses or neglects a vulnerable adult under circumstances likely to produce great bodily harm or death is guilty of a felony punishable by imprisonment for not more than ten (10) years and not more than a twenty-five thousand dollar ($25,000) fine.17

(5) Any person who abuses or neglects a vulnerable adult under circumstances other than those likely to produce great bodily harm or death is guilty of a misdemeanor.\(^\text{18}\)

**H. Statute of Limitations:**

A prosecution for any felony must be commenced by the filing of the complaint or the finding of an indictment within five (5) years after its commission.\(^\text{19}\)

A prosecution for any misdemeanor must be commenced by the filing of the complaint or the finding of an indictment within one (1) year after its commission.\(^\text{20}\)

**I. Burden of Proof:** Unknown.

**J. Can Regulations Establish Standard of Care:** Unknown.

**K. Commission on Aging**

The director of the commission shall have the authority to adopt, promulgate and enforce such rules as he deems necessary in carrying out the provisions of this chapter.\(^\text{21}\)

**II. DAMAGES**

**A. Damages Available:** Unknown.

**B. Does Pain and Suffering of Decedent/Resident Survive Death**

No.\(^\text{22}\)

**C. Attorney’s Fees Available**

---


Yes and No. Attorney fees are not available by “merely proving the existence of elder abuse or neglect” but attorney fees are available if the plaintiff “is able to prove by an elevated standard (‘clear and convincing evidence’) that the defendant (i) committed abuse or neglect under the Elder Abuse Act and (ii) was guilty of recklessness, oppression, fraud, or malice in the commission of such abuse.”23

III. LEGISLATION AFFECTING STATUTE

A. Pending: None known.

B. Anticipated: None known.

---

23 Bickel v. Sunrise Assisted Living, 141 Cal. Rptr. 3d 586 (9th Cir. 2012).
I. Civil Statute Protecting Dependent Adults or Elders from Neglect or Abuse:

A. Conduct

1. **Neglect:** Within the context of the Elder Abuse and Neglect Act, neglect has been defined as another individual’s failure to provide to or willful withholding from an eligible adult life necessities including, but not limited to, food, clothing, health care or shelter. 320 ILCS 20/2(g) (2012). Under the Nursing Home Care Act and Abused and Neglected Long Term Care Facility Residents Reporting Act, neglect occurs when there is a failure to provide such necessities adequately, and said failure results in physical harm or mental illness of a resident. 210 ILCS 45/1-117 (2012); 210 ILCS 30/3 (2012).

2. **Abuse:**

   (a) **Definition**

   Abuse is defined in the Elder Abuse and Neglect Act as “causing any physical, mental or sexual injury to an eligible adult, including exploitation of such adult's financial resources.” 320 ILCS 20/2(a) (2012). The Nursing Home Care Act and Abused and Neglected Long Term Care Facility Residents Reporting Act further expand on definition, stating that such abuse must occur by other than accidental means in a facility. 210 ILCS 45/1–103 (2013); 210 ILCS 30/3 (2012).

   (b) **Single Act and/or Pattern**

that abuse upon the elderly, no matter how infrequent, will not be tolerated. *Cnty. Of De Witt*, 298 Ill. App. 3d at 638, 699 N.E. 2d at 166.

(c) **Legal Requirement for the act(s) or omission(s):**

(i) The standard of care in assessing whether an act or omission qualifies as neglect or abuse under the Nursing Home Care Act and regulations is whether the care is adequate. *Harris v. Manor Healthcare Corp.*, 111 Ill. 2d 350, 367, 489 N.E.2d 1374, 1381 (1986). “Adequate care” is synonymous with ordinary, due, or reasonably care used to describe the standard of care for negligence. *Id.*

(ii) In determining whether a facility has violated the Nursing Home Care Act and the applicable standard of care, the following factors are considered:

   a. The severity of the finding;
   
   b. The danger posed to the resident’s health and safety;
   
   c. The comments and documentation provided by the nursing home;
   
   d. The diligence and efforts to correct deficiencies;
   
   e. Correction of the reported deficiencies;
   
   f. The frequency and duration of similar findings in previous reports; and
   
   g. The nursing home’s general inspection history.¹

(iii) These criteria are factors to be considered in determining whether a violation should be issued, and if it should be issued, what its severity should be. *Springwood Assocs. v. Lumpkin*, 239 Ill.App.3d 771, 780, 606 N.E.2d 733 (4th Dist. 1992).

3. **Exploitation**

   Financial exploitation of the elderly is included as a possible form of abuse in the Elderly Abuse and Neglect Act. 320 ILCS 20/2(a) (2012).²

B. Vulnerable Adults

1. Types of Impairment

(a) An “eligible adult” under the Elder Abuse and Neglect Act is “a person 60 years of age or older who resides in a domestic living situation and is, or is alleged to be, abused, neglected, or financially exploited by another individual or who neglects himself or herself.” 320 ILCS 20/2(e) (2012).

(b) A “resident” for purposes of the Nursing Home Care Act is “a person receiving personal or medical care, including but not limited to mental health treatment, psychiatric rehabilitation, physical rehabilitation, and assistance with activities of daily living, from a facility.” 210 ILCS 45/1-122 (2006).

(c) A “resident” for purposes of the Abused and Neglected Long Term Care Facility Residents Reporting Act “means a person residing in and receiving personal care from a long term care facility, or residing in a mental health facility or developmental disability facility as defined in the Mental Health and Developmental Disabilities Code.” 210 ILCS 30/3 (2013).

C. Persons/Entities Excluded from Statute

A person making a report under the Elder Abuse and Neglect Act, in the good faith belief that such report is in the alleged victim’s best interest, is immune from civil or criminal liability or professional discipline due to making the report, notwithstanding any requirements regarding the confidentiality of information with respect to the relevant eligible adult which might otherwise be applicable. 320 ILCS 20/4(a-7) (2012). Further, any person, agency or institution that, in good faith, makes a report, investigates a report, or performs the services it is authorized to perform under the Department has immunity from civil, criminal, or other proceedings brought. 320 ILCS 20/4(b) (2012); 210 ILCS 30/8 (2013).

D. Reporting Requirement for Litigation to State

1. Under the Elder Abuse and Neglect Act, any person who suspects abuse or neglect of an eligible adult may, but is not required to, report such suspicion to the Department or to an agency designated to receive the reports under this Act. 320 ILCS 20/4(a) (2013). Some reporters, however, are mandatory. A mandated reporter is someone engaged in carrying out professional duties related to the care of the eligible adult.3 320 ILCS

---

2 Exploitation will not be addressed in this compendium – instead only the abuse and/or neglect portions of the statutes and regulations will be discussed.

3 See 320 ILCS 20/2(f-5) for a specific in-depth list of all mandated reporters.
20/2(f-5) (2013). If a mandated reporter has reason to believe an eligible adult has been subjected to abuse or neglect within the past year, the mandated reporter must report this suspicion within 24 hours of developing this suspicion. 320 ILCS 20/4(a-5) (2013).

2. Under the Nursing Home Care Act, there is a duty to report violations to the Department immediately. 210 ILCS 45/3-610 (2006). The Department then investigates all complaints alleging abuse within seven days of receiving said complaints, unless the complaints are regarding abuse or neglect and indicate imminent danger, which would then compel investigation within 24 hours. 210 ILCS 45/3–702(d) (2012); UDI No. 2, LLC v. Dep’t of Pub. Health, 2012 IL App (4th) 110691, ¶18, 970 N.E.2d 585, 591. Upon receiving a valid report, the Department has 30 days to determine whether any portion of the Nursing Home Care Act has been violated. Id. These time frames are directory rather than mandatory. Moon Lake Convalescent Ctr. v. Margolis, 180 Ill. App. 3d 245, 255-56, 535 N.E.2d 956, 963-64 (1st Dist. 1989).

3. Under the Abused and Neglected Long Term Care Facility Residents Reporting Act, mandatory reporters include nearly all practitioners and employees who treat the eligible adult, and they must report to the Department any incidences of abuse immediately upon becoming aware of the occurrences. 210 ILCS 30/4 (2012). Of note, while the Nursing Home Care Act only has a narrow category of mandatory reporters, the permissive reporters under the Nursing Home Care Act are still considered mandatory reporters under the Abused and Neglected Long Term Care Facility Residents Reporting Act. Id.

E. Preclusion of Arbitration

1. The Nursing Home Care Act contains anti-arbitration provisions, as illustrated by its judicial forum provisions. 210 ILCS 45/3-606 (2012); 210 ILCS 45/3-607 (2012). However, there has been litigation focusing on whether these provisions are pre-empted by the Federal Arbitration Act. Such pre-emption depends on the facility and whether it involves interstate commerce. Carter v. SSC Odin Operating Co., 2012 IL 113204, ¶ 16. In Carter, the Court cited its own prior ruling that “the antiwaiver provisions of sections 3–606 and 3–607 of the Nursing Home Care Act are the functional equivalent of antiarbitration legislation, which is preempted by the FAA and Supreme Court precedent.” Id. (citing Carter v. SSC Odin Operating Co., 237 Ill. 2d 30, 927 N.E.2d 1207 (2010). In Carter, the appellate court held that the arbitration agreements at issue between the defendant nursing home and the plaintiff’s decedent were governed by the FAA because the agreements stated they were governed by the FAA, and because interstate commerce was involved. Id. Of note, “an arbitration agreement may be invalidated by a state law contract defense of general
applicability,” but “may not be invalidated, however, by a state law applicable only to arbitration agreements.” *Id.*

F. **Relationship to Medical Malpractice actions**


G. **Criminal Provision**

1. Abuse of a long term care facility resident is a Class 3 felony. 720 ILCS 5/12-4.4a(d)(1) (2013). Criminal neglect of a long term care facility resident is a Class 4 felony, unless it results in the resident's death in which case it is a Class 3 felony. *Id.* Neglect of a long term care facility resident is a petty offense. *Id.* Criminal abuse or neglect of an elderly person or person with a disability is a Class 3 felony, unless it results in the person's death in which case it is a Class 2 felony, and if imprisonment is imposed it shall be for a minimum term of 3 years and a maximum term of 14 years. 720 ILCS 5/12-4.4a(d)(1) (2013).

2. **Interplay with State Civil Statute**

(a) While abuse and neglect of elderly adults in long term care facilities are treated the same in civil actions, criminal abuse is a more serious felony than criminal neglect, unless the criminal neglect results in death. 720 ILCS 5/12-4.4a(d)(1) (2013).

H. **Statute of Limitations**

1. **No discussion of statute of limitations in statutes/ case law. Dependent on action brought.**

I. **Burden of Proof**

1. **No discussion of burden of proof in statutes or case law.**

J. **Can Regulations Establish Standard of Care:**

1. Unclear. The existing regulations in Illinois seem to establish that the applicable standards of care for elder and adult abuse and neglect cases are the same as the reasonableness standard of care for negligence. *Harris v.*
II. DAMAGES

A. Damages Available

1. Actual Damages

2. Treble and Punitive Damages

(a) 210 ILCS 45/3-602 was amended on July 21, 1995. Per this amendment, the treble damages provision of the original Nursing Home Care Act was repealed. *Dardeen v. Heartland Manor, Inc.*, 186 Ill. 2d 291, 292, 710 N.E.2d 827, 828 (1999). But, punitive damages are still available if there is a statutory basis for the claim or a strong equitable reason, such as willful and wanton conduct. *Id.* at 300, 710 N.E.2d at 832.

3. Attorney’s Fees

4. Costs of Suit

B. Does Pain and Suffering of Decedent/Resident Survive Death:


C. Attorney’s Fees Available:


2. If available, are the attorney’s fees limited?

(a) No. The legislative intent behind this provision of the Nursing Home Care Reform Act indicates that attorney’s fees should be awarded whenever there is a violation of the act, even if the monetary recovery of the plaintiff is minimal. *Berlak v. Villa Scalabrini Home for the Aged, Inc.*, 284 Ill. App. 3d 231, 237, 671 N.E.2d 768, 772 (1st Dist. 1996).

(i) Of note, “the existence of a contingent fee agreement between the plaintiff and her attorney is a relevant factor to be considered in determining the amount of statutory
III. LEGISLATION AFFECTING STATUTE

A. Pending: None.

B. Anticipated: None.
I. Statute Protecting Dependent Adults or Elders from Neglect or Abuse: Indiana Code 12-10-3, et seq.²

A. Conduct

1. **Neglect**: A person who has the care, custody, or control of a dependent knowingly or intentionally: (1) places the dependent in a situation that may endanger his life or health; (2) abandons or cruelly confines the dependent; (3) deprives the dependent of necessary support; or (4) deprives the dependent of education as required by law.³

2. **Abuse (Battery)**: A person who knowingly or intentionally touches another person in a rude, insolent, or angry manner commits battery.⁴

3. **Exploitation⁵**: A person who recklessly, knowingly, or intentionally exerts unauthorized use of the personal services or the property of an endangered adult or a dependent eighteen (18) years of age or older for the person's own profit or advantage or for the profit or advantage of another person commits exploitation of a dependent or an endangered adult.

B. Endangered Adult

1. **Types of Impairment**: An individual who is at least eighteen (18) years of age and is incapable of reason due to mental illness, mental retardation, dementia, habitual drunkenness, excessive use of drugs, or other physical or mental incapacity of managing or directing the management of the individual's property or providing or directing the provision of self-care.⁶

---

¹ The authors gratefully acknowledge the assistance of Summer Associate, Mohammad Khaleelullah.

² Indiana’s APSA program is unique because it is administered by local prosecutor’s offices. This may explain why its definitions seem very different from those of other states.

³ Ind. Code § 35-46-1-4

⁴ Ind. Code § 35-42-2-1

⁵ Ind. Code § 35-46-1-12. Exploitation will not be addressed in this compendium – instead, only the abuse and/or neglect portions of the statutes.

⁶ Ind. Code § 12-10-3-2
C. Persons Excluded From Statute\textsuperscript{7}

1. Persons who make or cause to be made a report required to be made under this chapter;

2. Persons who testify or participate in any investigation or administrative or judicial proceeding on matters arising from the report;

3. Persons who make or cause to be made photographs or x-rays of an endangered adult; or

4. Persons who discuss a report required to be made under this chapter with the division, the adult protective services unit, a law enforcement agency, or other appropriate agency;

5. An officer, agency, or employee of the division or adult protective services unit who performs duties in good faith under this chapter in rendering care to an endangered adult is immune from both civil and criminal liability arising from acts or omissions in rendering the service or care to the endangered adult.\textsuperscript{8}

D. Mandatory Reporting Requirements - The statute does not provide specific notice and process requirements to the state for litigation.

E. Preclusion of Arbitration

A written agreement to submit to arbitration is valid, enforceable, and an existing controversy or a controversy thereafter arising is valid and enforceable.\textsuperscript{9}

F. Relationships to Medical Malpractice Actions

The APSA is not expressly limited by any other civil remedy including those available for medical malpractice actions. However, malpractice actions have limits on recovery damages including a $1.25 million for an act of malpractice that occurs after June 30, 1999.\textsuperscript{10}

G. Criminal Provision\textsuperscript{11} - Indiana’s APSA program is administered by local prosecutor’s offices. The definition of conduct arising under APSA is defined by their criminal definitions may be prosecuted under the criminal code.

\textsuperscript{7} Ind. Code § 12-10-3-11.
\textsuperscript{8} Ind. Code § 12-10-3-29.
\textsuperscript{9} Ind. Code § 34-57-2-1.
\textsuperscript{10} Ind. Code § 34-18-14-3.
\textsuperscript{11} Ind. Code § 35-46-1-4.
1. Whoever commits neglect of a dependent commits a Class D felony. [emphasis added].

2. If the neglect results in serious bodily injury, a **Class B felony** is committed. [emphasis added].

3. If the abuse results in bodily injury a **Class D felony** is committed. [emphasis added].

4. A **Class C felony** is committed if the abuse results in serious bodily injury to an endangered adult. [emphasis added].

5. A **Class B felony** is committed if the abuse results in the death of an endangered adult. [emphasis added].

**H. Statute of Limitations:** Two Years.\(^\text{12}\)

**I. Burden of Proof:** The burden of proof in Indiana for civil actions is based upon a preponderance of the evidence, unless otherwise provided. Any finding of guilt for a crime must be based upon proof beyond a reasonable doubt.\(^\text{13}\)

**J. Can regulations establish a standard of care?**

Yes. Indiana courts have a long and continuous history of recognizing negligence actions for statutory violations. *Kho v Pennington*, 875 N.E.2d 208, 212 (Ind. 2007).

**II. Remedies**

**A. Order of protection**\(^\text{14}\)

**B. Damages**

1. Actual Damages\(^\text{15}\)

2. Punitive Damages\(^\text{16}\)

3. Costs of Suit\(^\text{17}\)

**C. Does Pain and Suffering of Decedent/Resident Survive Death:**

---

\(^\text{12}\) *Ind. Code § 34-11-2-4*

\(^\text{13}\) *Ind. Code § 31-34-12-3*; Burden of proof for civil actions for conduct under the APSA is not otherwise provided in the code.

\(^\text{14}\) *Ind. Code § 12-10-3-24.*

\(^\text{15}\) *Ind. Code § 34-51-2.*

\(^\text{16}\) *Ind. Code § 34-51-3.*

\(^\text{17}\) *Ind. Code §34-52-1-1.*
Yes, if any person entitled to bring, or liable to, any action, dies before the expiration of the time limited for the action, the cause of action survives to or against the person's representatives and be brought at any time after the expiration of the time limited within 18 months after the death of the person. \(^{18}\) When the death of one is caused by the *wrongful act or omission* of another, the action shall be commenced by the personal representative of the decedent within two years. \(^{19}\)

**D. Attorney’s Fees available:** Yes \(^{20}\)

1. Attorney’s fees are limited to where the court finds that either party brought an action or defense based on any of the following:

   (a) A claim that is frivolous;

   (b) A claim continued to be litigated after the claim clearly becomes frivolous; or

   (c) A claim that is litigated in bad faith.

**III. Legislation Affecting Statute**

A. **Pending:** None

B. **Anticipated:** None

\(^{18}\) *Ind. Code § 34-11-7-1*

\(^{19}\) *Ind. Code § 34-23-1-1*

\(^{20}\) *Ind. Code §*
I. Civil Statute Protecting Dependent Adults or Elders from Neglect or Abuse: Iowa Code § 235B.2

A. Dependent Adult—Defined

A person eighteen years of age or older who is unable to protect the person’s own interests or unable to adequately perform or obtain services necessary to meet essential human needs, as a result of a physical or mental condition which requires assistance from another, or as defined by departmental rule.

B. Dependent Adult Abuse—Defined

1. Any of the following resulting from the willful or negligent acts or omissions of a caretaker:

   (a) physical injury to, or injury which is at a variance with the history given of the injury, or unreasonable confinement, unreasonable punishment, or assault of a dependent adult.³

   (b) The commission of a sexual offense as defined by chapter 709 or section 726.2 with or against a dependent adult.⁴

   (c) Exploitation of a dependent adult which means the act or process of taking unfair advantage of a dependent adult or the adult's physical or financial resources for one's own personal or pecuniary profit, without the informed consent of the dependent adult,

---

¹ Iowa Code § 235B.2(4).

² Iowa Code § 235B.2(5)(a).

³ The term “assault” is not defined in Iowa Code § 235B.2(5)(a). Therefore, when evaluating an alleged assault within the context of dependent adult abuse, Iowa courts look to the criminal definition of assault found in Iowa Code § 708.1, which requires specific intent (i.e., that the defendant intended both physical contact and that the physical contact is insulting or offensive). See Wyatt v. Iowa Dept. of Human Services, 744 N.W.2d 89, 94 (Iowa 2008).

⁴ Iowa Code § 726.2.
including theft, by the use of undue influence, harassment, duress, deception, false representation, or false pretenses.

(d) The deprivation of the minimum food, shelter, clothing, supervision, physical or mental health care, or other care necessary to maintain a dependent adult's life or health.

2. The deprivation of the minimum food, shelter, clothing, supervision, physical or mental health care, and other care necessary to maintain a dependent adult's life or health as a result of the acts or omissions of the dependent adult.

3. Sexual exploitation of a dependent adult by a caretaker.  

C. Single Act and/or Pattern

A single act may constitute “dependent adult abuse.” In other words, more than one act, or a pattern of acts, are not required to constitute dependent adult abuse.  

Iowa Code § 235B.2(5)(a).

D. Legal Requirement for the Act(s) or Omission(s)

1. Occur during the caretaker-dependent adult relationship.

2. Abuse must “result[] from” the acts or omissions.

E. Persons/Entities Excluded from Statute

Although the state of Iowa is not explicitly excluded from chapter 235B, it appears that Iowa Code § 669.14 exempts the state and its employees from liability under the Dependent Adult Abuse statutes. Further, chapter 669.4 states

---

5 Under Iowa Code § 235B.2(5)(a)(3)(b), “sexual exploitation” means any consensual or nonconsensual sexual conduct with a dependent adult which includes but is not limited to kissing; touching of the clothed or unclothed inner thigh, breast, groin, buttock, anus, pubes, or genitals; or a sex act, as defined in section 702.17. “Sexual exploitation” includes the transmission, display, taking of electronic images of the unclothed breast, groin, buttock, anus, pubes, or genitals of a dependent adult by a caretaker for a purpose not related to treatment or diagnosis or as part of an ongoing assessment, evaluation, or investigation. Sexual exploitation does not include touching which is part of a necessary examination, treatment, or care by a caretaker acting within the scope of the practice or employment of the caretaker; the exchange of a brief touch or hug between the dependent adult and a caretaker for the purpose of reassurance, comfort, or casual friendship; or touching between spouses.

6 Mosher v. Dept. of Inspections and Appeals, Health Facilities Div., 671 N.W.2d 501, 511 (Iowa 2003) (rejecting argument that once a caretaker, always a caretaker.) The Court in Mosher held, “Section 235B.2(5)(a)(1)(c) requires that a person qualify as a caretaker at the time of each specific act of abuse.” Id. at 518.

7 Mosher at 511-12.
“the immunity of the state from suit and liability is waived to the extent provided in this chapter.”

F. Required Notice of Litigation to the State

Iowa Code § 235B.11 permits an aggrieved person to initiate a civil action for damages under chapter 669 (Iowa Tort Claims Act) or chapter 670 (Tort Liability of Governmental Subdivisions). A lawsuit is commenced under the Iowa Tort Claims Act by serving the attorney general with a copy of the original notice of claim. Iowa Code § 669.4.

G. Preclusion of Arbitration

Iowa law does not explicitly preclude arbitration clauses in elder care situations. Enforceability of arbitration agreements is guided by statute, which provides that arbitration clauses are generally enforceable unless (1) the contract is one of adhesion; (2) the contract is between employer and employee; and (3) unless otherwise provided in a separate writing by all parties to the contract, any claim sounding in tort whether or not involving a breach of contract. Iowa Code § 679A.1(2).8

H. Relationship to Medical Malpractice Actions

Iowa law is silent on whether the conduct giving rise to an alleged violation of the Dependent Adult Abuse statutes can also form the basis of a medical malpractice action. Similarly, Iowa law is silent as to whether a person’s civil remedy permitted under Iowa Code § 235B.11 and chapter 669 is an exclusive remedy, thereby precluding a medical malpractice action.

I. Criminal Provision

Pursuant to Iowa Code § 235B.20(2)-(9), the degree of criminal liability increases with the increase in the degree of abuse:

(1) A caretaker who intentionally commits dependent adult abuse on a dependent adult in violation of this chapter is guilty of a class "C" felony if the intentional dependent adult abuse results in serious injury.

(2) A caretaker who recklessly commits dependent adult abuse on a dependent adult in violation of this chapter is guilty of a class "D" felony if the reckless dependent adult abuse results in serious injury.

8 See also Wesley Ret. Serv., Inc. v. Hansen Lind Meyer, Inc., 594 N.W.2d 22, 26 (Iowa 1999) (“tort claims are not subject to arbitration.”) (emphasis in original)
(3) A caretaker who intentionally commits dependent adult abuse on a dependent adult in violation of this chapter is guilty of a class "C" felony if the intentional dependent adult abuse results in physical injury.

(4) A caretaker who commits dependent adult abuse by exploiting a dependent adult in violation of this chapter is guilty of a class "D" felony if the value of the property, assets, or resources exceeds one hundred dollars.

(5) A caretaker who recklessly commits dependent adult abuse on a person in violation of this chapter is guilty of an aggravated misdemeanor if the reckless dependent adult abuse results in physical injury.

(6) A caretaker who otherwise intentionally or knowingly commits dependent adult abuse upon a dependent adult in violation of this chapter is guilty of a serious misdemeanor.

(7) A caretaker who commits dependent adult abuse by exploiting a dependent adult in violation of this chapter is guilty of a simple misdemeanor if the value of the property, assets, or resources is one hundred dollars or less.

(8) A caretaker alleged to have committed a violation of this chapter shall be charged with the respective offense cited, unless a charge may be brought based upon a more serious offense, in which case the charge of the more serious offense shall supersede the less serious charge.

J. Statute of Limitations

Two years. Iowa Code § 669.13(1).

K. Burden of Proof

Preponderance of the evidence. Iowa Code § 235B.9(1).

L. Can Regulations Establish Standard of Care?

Unclear. Civil liability under the Dependent Adult Abuse statutes is not couched in terms of standard of care. As stated by the district court in Hellickson v. Iowa Dept. of Inspections and Appeals, 2005 WL 2865518 at *7:

Section 235B.2 provides that negligent acts or omissions constitute dependent adult abuse, but the section does not define negligence. “Negligence is generally defined as conduct that falls below the standard established by law for the protection of others against unreasonable risk of harm.” Knake v. King, 492 N.W.2d 416, 417 (Iowa 1992).
II. DAMAGES

A. Damages Available

Actual damages, special damages, punitive damages, injunctive relief, and costs of suit. Iowa Code §§ 235B.11 & 669.4.

B. Does Pain and Suffering of Decedent/Resident Survive Death?

Yes. Damages that may be recovered include pre-death physical and mental pain and suffering, and pre-death loss of function of the mind and body. See Iowa Civil Jury Instruction 200.14.

C. Attorney’s Fees Available

Yes. When a claimant receives a judgment under chapter 669, the court shall, as part of the judgment or award, determine and allow reasonable attorney fees and expenses. The attorney fees and expenses shall be paid out of but not in addition to the amount of judgment or award recovered, to the claimant’s attorneys. Iowa Code § 669.15.

III. LEGISLATION AFFECTING STATUTE

A. Pending

IA H.F. 278 (NS); February 20, 2013:

This bill relates to Iowa Code § 235B in that it proposes modifications to the programs and services under the purview of the department on aging. It is unclear whether the bill will affect any pertinent definitions concerning dependent adult abuse. Will supplement.

B. Anticipated

None.
I. Civil Statutes Protecting Dependent Adults or Elders from Neglect or Abuse: Kansas Statutes Annotated 39-1401 et seq., and 39-1430 et seq.¹

A. Who is Protected

1. K.S.A. 39-1401 et seq. protects “residents.” “Resident” includes “any individual kept, cared for, treated, boarded, or otherwise accommodated” in any (1) adult-care home; (2) Medical care facility; (3) State psychiatric hospital; or (4) State institution for people with intellectual disability.

2. K.S.A. 39-1430 et seq. protects “adults.” “Adult” means an individual “18 years of age or older, alleged to be unable to protect their own interests.” “Adult” specifically excludes persons covered under K.S.A. 39-1401 (residents).

B. Conduct

1. Neglect: The failure or omission by one’s self, caretaker,² or another person with a duty to provide goods or services which are reasonably necessary to ensure safety and well-being and to avoid physical or mental harm or illness. K.S.A. 39-1401(g); see also K.S.A. 39-1430(c).

¹Kansas addresses adult and elder abuse and neglect with two statutory schemes: K.S.A. 39-1401 et seq. and K.S.A. 39-1430 et seq. K.S.A. 39-1401 addresses the abuse and/or neglect of “residents,” meaning individuals “kept, cared for, treated, boarded, or otherwise accommodated in” state hospitals, medical care facilities, adult care facilities, or similar facilities. See K.S.A. 39-1401(a). K.S.A. 39-1430 addresses the abuse and/or neglect of “adults,” meaning those “individuals 18 years of age or older, alleged to be unable to protect their own interests.” As a result, the phrase “[resident or adult]” is when the respective statutory scheme uses “resident” or “adult” in a statutory definition, to indicate that each statute uses the definition, but supplies its own term.

²A “caretaker” is a one “who has assumed the responsibility, whether legally or not, for an adult’s care or financial management or both.” K.S.A. 39-1430(i).
2. **Abuse**

   a. Any act or failure to act performed intentionally or recklessly that causes or is likely to cause harm, including:

   i. Infliction of physical or mental injury;

   ii. Any sexual act with a [resident or adult]:
   
      1. when the [resident or adult] does not consent; or
      
      2. when the other person knows or should know that the [resident or adult] is incapable of resisting or declining consent to the sexual act due to mental deficiency or disease or due to fear of retribution or hardship;

   iii. Unreasonable use of physical restraint, isolation, or medication that harms or is likely to harm;

   iv. Unreasonable use of physical or chemical restraint, medication, or isolation as punishment, for convenience, in conflict with a physician’s orders, or as a substitute for treatment, except where such conduct or physical restraint is in furtherance of the health and safety of the [resident or adult] *or of another resident*[^4];

   v. A threat or menacing conduct directed toward a [resident or adult] that results or might reasonably be expected to result in fear or emotional or mental distress;

   vi. Fiduciary abuse;

      1. A situation in which any person who is the caretaker of, or who stands in a position of trust to, a [resident or adult] takes, secretes, or appropriates the [resident or adult’s] money or property, to any use or purpose not in the due and lawful execution of such person’s trust.[^5]

---

[^3]: K.S.A. 39-1401(f); see also K.S.A. 39-1430(b).

[^4]: The phrase between the asterisks appears only in K.S.A. 39-1401(f), and has no counterpart in K.S.A. 39-1430(b). The asterisks are used to identify the phrase and do not appear in the original.

[^5]: K.S.A. 39-1401(k); see also K.S.A. 39-1430(e).
vii. Omission or depravation by a caretaker or another person of goods or services which are necessary to avoid physical or mental harm or illness.

3. **Exploitation**: Misappropriation of property or intentionally taking unfair advantage of a [resident or adult’s] physical or financial resources for another individual’s personal or financial advantage by the use of undue influence, coercion, harassment, duress, deception, false representation, or false pretense by a caretaker or another person. K.S.A. 39-1401 (i); see also K.S.A. 39-1430(d).

4. **Protective Services**: Services provided by the state or other governmental agency or any private organizations or individuals which are necessary to prevent abuse, neglect or exploitation. Such protective services shall include, but not be limited to, evaluation of the need for services, assistance in obtaining appropriate social services and assistance in securing medical and legal services. K.S.A. 39-1401(e); see also K.S.A. 39-1430(h).

5. **Exemption**: No person shall be considered to be abused, neglected, exploited, or in need of protective services for the sole reason that such person relies upon spiritual means through prayer alone for treatment in accordance with the tenets and practices of a recognized church or religious denomination in lieu of medical treatment. K.S.A. 39-1401; see also K.S.A. 39-1430.

C. Reporting Abuse, Neglect or Exploitation

1. Any person who is licensed to practice any branch of the healing arts, a licensed psychologist, a licensed master level psychologist, a licensed clinical psychotherapist, a chief administrative officer of a medical care facility, an adult care home administrator or operator, a licensed social worker, a licensed professional nurse, a licensed practical nurse, a licensed marriage and family therapist, a licensed clinical marriage and family therapist, a licensed professional counselor, a licensed clinical professional counselor, a registered alcohol and drug abuse counselor, a teacher, a bank trust officer and any other officers of financial institutions, a legal representative or a governmental assistance provider who has reasonable cause to believe that a [resident or adult] is being or has been abused, neglected or exploited, or is in a condition which is the result of such abuse, neglect or exploitation or is in need of protective services, shall report immediately such information or cause a report of such information to be made in any reasonable manner. K.S.A. 39-1402; see also K.S.A. 39-1431.
2. Reporting under K.S.A. 39-1401 et seq. is to the Kansas Department of Aging, the Department of Health and Environment, and the Department of Social and Rehabilitation Services, depending on the type of “resident.”

3. Reporting under K.S.A. 39-1430 et seq. is to the Department of Social and Rehabilitation Services.

4. A knowing failure to report is a Class B misdemeanor. K.S.A. 39-1402(e); see also K.S.A. 39-1431(e).

5. The Departments identified above are responsible for investigating and acting on reported abuses under K.S.A. 39-1401 et seq.; see also K.S.A. 39-1430 et seq. Actions could include reporting acts of abuse, neglect or exploitation to the licensed professional’s regulatory agency. K.S.A. 39-1433(b)

D. Immunity for Reporting Personnel

1. Protection from civil liability
   a. No person who participated in the making of a report, follow-up activity concerning the report, or investigation of the allegations contained in the report shall be subject to civil liability on account of the report, investigation, or testimony.
   b. Exception: if the person acted “in bad faith or with malicious purpose,” the person will lose this immunity.

2. Protection from employer retaliation
   a. No employer shall terminate or sanction an employee solely for the reason that the employee:
      i. Made a report of abuse or neglect; or
      ii. Cooperated with such an investigation.
   b. If a court finds that an employer has terminated or sanctioned an employee solely for making a report of abuse or neglect or for cooperating with an investigation, the court may require the employer to pay the attorney fees of the adversely-affected employee.

II. Criminal Statutes

---

6K.S.A. 39-1403(a)-(b); see also K.S.A. 39-1432 (a)-(b).
A. **Who is protected**

1. Protects “dependent adults.”

2. “Dependent adults” includes “an individual 18 years of age or older who is unable to protect the individual’s own interest.”

3. “Dependent adult” includes, but is not limited to, any:
   
   a. Resident of an adult care home including, but not limited to, those facilities defined by K.S.A. 39-923 *et seq.*;
      
      i. Within K.S.A. 39-923, “adult care home” means “any nursing facility, nursing facility for mental health, intermediate care facility for people with intellectual disability, assisted living facility, residential health care facility, home plus, boarding care home, and adult day care facility.”
      
      ii. As used in K.S.A. 39-923, the following terms are specifically defined.\(^7\)
         
         1. Nursing facility;
         2. Nursing facility for mental health;
         3. Intermediate care facility for people with intellectual disability;
         4. Assisted living facility;
         5. Residential health care facility;
         6. Home plus;
         7. Boarding care home;
         8. Adult day care.
   
   b. Adult cared for in a private residence;
   
   c. Individual kept, cared for, treated, boarded, confined, or otherwise accommodated in a medical care facility;
   
   d. Individual with intellectual disability or a developmental disability receiving services through a community facility for people with intellectual disability or residential facility licensed under K.S.A. 75-3307(b) *et seq.*
   
   e. Individual with a developmental disability receiving services provided by a community service provider; or

\(^7\)K.S.A. 39-923(2)-(9).
f. Individual kept, cared for, treated, boarded, confined, or otherwise accommodated in a state psychiatric hospital or state institution for people with intellectual disability.

B. Mistreatment of a Dependent Adult

1. Mistreatment of a dependent adult is knowingly committing one or more of the following acts:
   a. (a)(1): Infliction of physical injury, unreasonable confinement or unreasonable punishment upon a dependent adult;
   b. (a)(2): taking unfair advantage of a dependent adult’s physical or financial resources for another individual’s personal or financial advantage or by use of undue influence, coercion, harassment, duress, deception, false representation, or false pretense; or
   c. (a)(3): Omission or deprivation of treatment, goods or services that are necessary to maintain physical or mental health of a dependent adult.

2. Mistreatment of a dependent adult as defined in:
   a. Subsection (a)(1) is a severity level 5, person felony.
   b. Subsection (a)(2) if the aggregate amount of the value of the resources is:
      i. $1,000,000 or more is a severity level 2, person felony;
      ii. At least $250,000 but less than $1,000,000 is a severity level 3, person felony;
      iii. At least $100,000 but less than $250,000 is a severity level 4, person felony;
      iv. At least $25,000 but less than $100,000 is a severity level 5, person felony;
      v. At least $1,000 but less than $25,000 is a severity level 7, person felony;
      vi. Less than $1,000 is a class A person misdemeanor;
      vii. Less than $1,000 and committed by a person who has, within five (5) years immediately preceding commission of

---

8K.S.A. 21-5417.
the crime, the offender has been convicted of mistreatment of a dependent adult two (2) or more times is a severity level 7, person felony.

c. Subsection (a)(3) is a severity level 8, person felony.


4. Unless specified by the statute, mistreatment of a dependent adult does not require proof that the mistreatment resulted in injury to the victim. *Id.* at 684, 11 P.3d at 58.

5. The state need not establish that the person mistreating the dependent adult is the caregiver of the dependent adult; a person other than the caregiver can mistreat a dependent adult, so long as the victim is unable to protect himself or herself. *State v. Maxon*, 32 Kan. App. 67, 73, 79 P.3d 202, 207 (2003).

6. If the complaint depicts several acts, each of which could support an independent charge of mistreatment, the jury must agree unanimously as to which act constitutes the crime. *Id.* at 74, 79 P.3d at 208.

C. **Exemption**: No dependent adult is considered to be mistreated for the sole reason that such dependent adult relies upon or is being furnished treatment by spiritual means through prayer in lieu of medical treatment in accordance with the tenets and practices of a recognized church or religious denomination of which the dependent adult is a member or adherent. K.S.A. 21-5417(c).

D. **Similarity with Civil Statutes**: Contains a nearly-identical provision indicating that treatment through spiritual means of prayer is not, in itself, actionable neglect. See K.S.A. 21-5417(c) (criminal provision); K.S.A. 39-1401, 39-1430 (civil provisions).

E. **Criminal Statute of Limitations**: Five years – K.S.A. 21-5107(d).

F. **Criminal Burden of Proof**: Beyond a reasonable doubt – K.S.A. 21-5108(a).

III. **Adult Care Home Licensure Act (K.S.A. 39-923 et seq.)**

A. **Purpose**: The purpose of this act is the development, establishment, and enforcement of standards (1) for the care, treatment, health, safety, welfare and comfort of individuals in adult care homes licensed by the secretary of aging and (2) for the construction, general hygiene, maintenance and operation of said adult care homes, which, in the light of advancing knowledge, will promote safe and adequate accommodation, care and treatment of such individuals in adult care homes. K.S.A. 39-924.
B. **Licensure:** It shall be unlawful for any person or persons acting jointly or severally to operate an adult care home within this state except upon license first had and obtained for that purpose from the secretary of aging as the licensing agency upon application made therefor as provided in this act, and compliance with the requirements, standards, rules and regulations, promulgated under its provisions. K.S.A. 39-926.

C. **Unlawful Acts:** It shall be unlawful in any adult care home to house, care for or permit: (a) Any resident to stay in any unapproved room, area, or detached building. (b) Abuse, neglect, or cruel treatment of any resident. (c) The admission to resident status of any person who is known to suffer from any disease or condition for which the home is not authorized to provide care under the provisions of this act or the terms and conditions of its license. K.S.A. 39-939.

D. **Penalties:** The Act provides for both civil and criminal penalties for violations of the Act. See, e.g., K.S.A. 39-943; K.S.A. 39-946.

IV. **Legislation Affecting Statutes**

A. **Pending:** None.

B. **Anticipated:** None.

V. **Private Causes of Action Against an Adult Care Home**

A. “As a general rule, the proprietors of a nursing home are under a duty to exercise reasonable care to avoid injuries to patients, and the reasonableness of such care is to be assessed in the light of the patient's physical and mental condition.” *Juhnke v. Evangelical Lutheran Good Samaritan Soc'y*, 6 Kan. App. 2d 744, 748, 634 P.2d 1132, 1136 (1981).

B. “Whether expert testimony is necessary to prove negligence is dependent on whether, under the facts of a particular case, the trier of fact would be able to understand, absent expert testimony, the nature of the standard of care required of defendant and the alleged deviation therefrom.” *Id.*


D. **Statute of Limitations:** Two years – K.S.A. 60-513(a).

E. **Burden of Proof:** Preponderance of the evidence – PIK (4th ed.) § 106.01.
F. Damages

1. Actual Damages. Non-economic damages are capped at $250,000.00. See K.S.A. 60-19a02.

2. Punitive Damages. See K.S.A. 60-3701 et seq.


G. Does Pain and Suffering of Decedent Survive Death?

1. Yes: The decedent’s causes of action for injury, deceit, or fraud survive death and may be brought by decedent’s estate. K.S.A. 60-1801.

VI. General Negligence

A. Conduct: Kansas law does not provide a civil cause of action for elder abuse under its reporting statutes (see infra). Instead, plaintiffs must proceed under a negligence claim. Plaintiffs may also be able to recover under the Kansas Consumer Protection Act, K.S.A. §§ 50-623 et seq.


D. Damages Available:

1. Medical Expenses

2. Economic Loss

3. Noneconomic Loss
   a. Limitation: Kansas imposes a statutory cap on noneconomic damages of $250,000. K.S.A. § 60-1903 (wrongful death); K.S.A. § 60-19a02 (personal injury). (The cap on non-economic damages in personal injury cases is contingent on the finding of a *quid pro quo* which does not appear to be present except for healthcare providers subject to the Kansas Healthcare Providers Insurance Availability Act) (K.S.A. §§ 40-3401 et seq.).

4. Punitive Damages
   a. **Burden of Proof:** Clear and convincing K.S.A. § 171.44
b. Not available for wrongful death actions

5. Injunctive Relief

6. Statutory costs of suit (generally does not include attorneys’ fees or expenses). K.S.A. § 60-2003

E. Does Pain and Suffering of Decedent/Resident Survive Death:

Yes. Causes of action for injury to the person or for death by wrongful act survive death. K.S.A. § 60-1801.

F. Attorney’s Fees Available: Not generally, except under the Kansas Consumer Protection Act.

VII. Reporting Statute Protecting Dependent Adults or Elders from Neglect or Abuse:

Kansas Statutes Annotated §§ 39-923 et seq., 39-1401 et seq.

A. Conduct

1. K.S.A. § 39-939 makes it unlawful for any adult care home to permit abuse, neglect, or cruel treatment of any resident.

2. K.S.A. §§ 39-1401 et seq. applies to negligence, abuse, or exploitation of residents and adults.

3. Neglect: The failure or omission by one’s self, caretaker or another person with a duty to provide goods or services which are reasonably necessary to ensure safety and well-being and to avoid physical or mental harm or illness. K.S.A. §§ 39-1401, -1430

4. Abuse: Any act or failure to act performed intentionally or recklessly that causes or is likely to cause harm to a resident, including:

   1. Infliction of physical or mental injury;

   2. Any sexual act with a resident when the resident does not consent or when the other person knows or should know that the resident is incapable of resisting or declining consent to the sexual act due to mental deficiency or disease or due to fear of retribution or hardship;

   3. Unreasonable use of a physical restraint, isolation or medication that harms or is likely to harm a resident;

---

9 K.S.A. § 39-1402 applies to the abuse, neglect or exploitation of residents of a care facility, while K.S.A. § 39-1431 applies to the abuse, neglect or exploitation of certain adults. The definitions for abuse, neglect and exploitation are the same.
4. Unreasonable use of a physical or chemical restraint, medication or isolation as punishment, for convenience, in conflict with a physician’s orders or as a substitute for treatment, except where such conduct or physical restraint is in furtherance of the health and safety of the resident or another resident;

5. A threat or menacing conduct directed toward a resident that results or might reasonably be expected to result in fear or emotional or mental distress to a resident;

6. Fiduciary abuse; or

7. Omission or deprivation by a caretaker or another person of goods or services which are necessary to avoid physical or mental harm or illness. K.S.A. § 39-1401

5. **Exploitation**: Misappropriation of resident property or intentionally taking unfair advantage of an adult’s physical or financial resources for another individual’s personal or financial advantage by the use of undue influence, coercion, harassment, duress, deception, false representation or false pretense by a caretaker or another person. K.S.A. §§ 39-1401, -1430

6. **Adult**: An individual 18 years of age or older alleged to be unable to protect their own interest and who is harmed or threatened with harm, whether financial, mental, or physical in nature, through action or inaction by another individual or through their own action or inaction when

   1. such person is residing in such person’s own home, the home of a family member or the home of a friend,

   2. such person resides in an adult family home, or

   3. such person is receiving services through a provider of community services and affiliates thereof operated or funded by the department of social and rehabilitation services or the department on aging or a licensed residential facility. K.S.A. § 39-1430

**B. Persons Not Covered by Statute**

1. No person shall be considered to be abused, neglected or exploited or in need of protective services for the sole reason that such person relies upon spiritual means through prayer alone for treatment in accordance with the tenets and practices of a recognized church or religious denomination in lieu of medical treatment.

---

10 Exploitation will not be addressed in this compendium—instead, only the abuse and/or neglect portions of the statute will be addressed.
C. Reporting Requirements

1. The statutes provide a list of reporters who must immediately make a report to the department when he or she has reasonable cause to believe that a resident or adult is being or has been abused, neglected or exploited, or is in a condition which is the result of such abuse, neglect or exploitation or is in need of protective services. *K.S.A. §§ 39-1402(a), 39-1431(a)*

2. Anyone who participates in the making of a report or who testifies in any administrative or judicial proceeding arising from such report will not be subject to civil liability unless the person acted in bad faith or with malicious purpose. *K.S.A. §§ 39-1403(a), 39-1432(a)*

D. Legislation Affecting Statute

None pending
I. Civil Statute Protecting Dependent Adults or Elders from Neglect or Abuse: Kentucky Revised Statutes § 216.515 (providing a civil remedy for violations of Kentucky’s Rights of Residents statute)

A. Conduct

1. Any resident whose rights as specified in this section are deprived or infringed upon shall have a cause of action against any facility responsible for the violation. These rights include the following:

   (a) All residents shall be free from mental and physical abuse, and free from chemical and physical restraints except in emergencies or except as thoroughly justified in writing by a physician for a specified and limited period of time and documented in the resident's medical record.

   (b) No responsible resident shall be detained against his will.

   (c) Each resident shall be treated with consideration, respect, and full recognition of his dignity and individuality, including privacy in treatment and in care for his personal needs.

   (d) Residents have the right to be suitably dressed at all times and given assistance when needed in maintaining body hygiene and good grooming.

2. The above-stated rights shall apply in all cases unless medically contraindicated and documented by a physician in writing in the resident's medical record.

---

1 KRS § 216.515 (6), (13), (18), (20), (25). This statute includes 26 subsections which outline nursing home residents’ rights. Only the most relevant are included here.

2 KRS § 216.515 (26).
3. **Legal Requirement for the act(s) or omission(s):** “The statute provides civil remedies to those who prove intentional or grossly negligent abuse in the statutory sense rather than to those who may have suffered the results of common law negligence.” *Carole Renfro v. E.P.I. Corp.*, No. 2002-CA-002183-MR, 2004 Ky. App. LEXIS 576, at *12 (Ky. Ct. App. Feb. 6, 2004) (citing KRS 209.020(7) for the definition of abuse, “infliction of physical pain, mental injury, or injury of an adult.”).

B. **Long-Term Care Facility Residents**

1. **Resident:** Any person who is admitted to a long-term-care facility for the purpose of receiving personal care and assistance.

2. **Long-term-care facility:** Health-care facilities in the Commonwealth which are defined by the Cabinet for Health and Family Services to be family-care homes, personal-care homes, intermediate-care facilities, skilled-nursing facilities, nursing facilities as defined in Pub. L. 100-203, nursing homes, and intermediate-care facilities for the intellectually and developmentally disabled.

3. **Civil action for a violation of a resident’s rights may be brought by:**
   
   (a) A resident; or
   
   (b) A resident’s guardian.

C. **Persons/Entities Excluded From Statute**

1. Long-term care facilities which are:
   
   (a) Under the direction and control of the central state government; and


D. **Reporting Requirement for Litigation to State**

None.

E. **Preclusion of Arbitration**

---

3 *KRS § 216.510.*

4 *KRS § 216.515 (26).*
“Like all rights granted to citizens the individual has the right to waive the protection of such rights. Such waiver must be completely voluntary and with the individual's knowledge of the rights being waived.” 1978 Ky. AG LEXIS 157, 2.

F. **Relationship to Medical Malpractice actions**

The statutes and case law do not specify.

G. **Criminal Provision**

Any person who knowingly abuses or neglects an adult is guilty of a Class C felony. Any person who wantonly abuses or neglects an adult is guilty of a Class D felony. Any person who recklessly abuses or neglects an adult is guilty of a Class A misdemeanor. **KRS § 209.990 (2)-(4).**


2. **Interplay with State Civil Statute**

The statutes and case law do not specify.

H. **Statute of Limitations:**

1. 1 year if a personal injury claim is being made. **KRS § 413.140(1).**


I. **Burden of Proof:** The statutes and case law do not specify.

J. **Can Regulations Establish Standard of Care?**

The statutes and case law do not specify.

II. **DAMAGES**

A. **Damages Available**

1. Actual damages

2. Punitive damages

---

5 **KRS § 216.515 (26).**
3. Reasonable attorney's fees
   (a) For prevailing plaintiffs or prevailing defendants
4. Costs of the action
5. Other legal and administrative remedies available to a resident and to the cabinet.

B. Does Pain and Suffering of Decedent/Resident Survive Death?

   Unclear. An action in tort for pain and suffering by deceased, due to defendant's wrong, may be brought by decedent's administrator, *Randolph's Admr v. Snyder*, 139 Ky. 159, 129 S.W. 562 (1910), but the statute does not clarify whether this is possible under this statutory cause of action.

C. Attorney’s Fees Available: Yes. *KRS § 216.515 (26).*
   1. If available, are the attorney’s fees limited?
      Yes. They are limited to what is reasonable.

III. LEGISLATION AFFECTING STATUTE

   A. Pending: None.
   B. Anticipated: None.


   A. Neglect: A situation in which an adult is unable to perform or obtain for himself or herself the goods or services that are necessary to maintain his or her health or welfare, or the deprivation of services by a caretaker that are necessary to maintain the health and welfare of an adult. *KRS § 209.020(16).*
      1. Caretaker: an individual or institution who has been entrusted with or who has the responsibility for the care of the adult as a result of family relationship, or who has assumed the responsibility for the care of the adult person voluntarily or by contract, employment, legal duty, or agreement. *KRS § 209.020(6).*
   B. Abuse: The infliction of injury, sexual abuse, unreasonable confinement, intimidation, or punishment that results in physical pain or injury, including mental injury. *KRS § 209.020(8).*
C. **Exploitation**: Obtaining or using another person's resources, including but not limited to funds, assets, or property, by deception, intimidation, or similar means, with the intent to deprive the person of those resources. *KRS § 209.020(9.)*

D. **Duty to Report**: “Any person, including but not limited to physician, law enforcement officer, nurse, social worker, cabinet personnel, coroner, medical examiner, alternate care facility employee, or caretaker, having reasonable cause to suspect that an adult has suffered abuse, neglect, or exploitation, shall report or cause reports to be made in accordance with the provisions of this chapter. Death of the adult does not relieve one of the responsibility for reporting the circumstances surrounding the death.” *KRS § 209.030(2)*

E. Anyone who violates this provision shall be guilty of a Class B misdemeanor. Each violation shall constitute a separate offense. *KRS § 209.990(1).*

---

6 Exploitation will not be addressed in this compendium – instead, only the abuse and/or neglect portions of the statutes.
I. THE ADULT PROTECTIVE SERVICES ACT

A. Purpose and Intent:

An act to protect adults who cannot physically or mentally protect themselves and who are harmed or threatened with harm through action or inaction by themselves or by those responsible for their care. La. R.S. § 15:1501, et seq.

B. Definitions:

1. Abuse: the infliction of physical or mental injury, or actions which may reasonably be expected to inflict physical injury, on an adult by other parties, including but not limited to such means as sexual abuse, abandonment, isolation, exploitation, or extortion of funds or other things of value. La. R.S. § 15:1503(2).

2. Neglect: the failure, by a caregiver responsible for an adult’s care or by other parties, to provide the proper or necessary support or medical, surgical, or any other care necessary for his well-being. No adult who is being provided treatment in accordance with a recognized religious method of healing in lieu of medical treatment shall for that reason alone be considered to be neglected or abused. La. R.S. § 15:1503(10).

3. Elderly Abuse: this term typically refers to –

(a) The abuse of any person sixty years of age or older; and


C. Mandatory reporting:

1. Anyone, including but not limited to healthcare providers and social service practitioners, having cause to believe that an adult’s physical or mental health or welfare has been or may be affected by abuse, neglect or exploitation. La. R.S. § 15:1504(A).
2. **Exemption:** No cause of action shall exist against any person who in good faith makes a report and/or cooperates in the investigation or prosecution of those who violate this Act. *La. R.S. § 15:1504(B).*

3. **Limitation on exemption:** This exemption does not extend to

   (a) Any alleged principal, conspirator or accessory to an offense involving the abuse or neglect of the adult.

   (b) Any person who makes a report known to be false or with reckless disregard for the truth of the report.

   (c) Any person charged with direct or constructive contempt of court, any act of perjury, or any offense affecting judicial functions.

4. **Penalties:** Any person who knowingly or willfully violates these provisions shall be guilty of a misdemeanor and upon conviction shall be fined not more than $500 and/or imprisoned for not more than six months. *La. R.S. § 14:403.2(A), (B); La. R.S. § 14:93.3(C).*

II. **MISTREATMENT OF THE INFIRM**

A. **Definitions**

1. **Cruelty to the infirm:** the intentional or criminally negligent mistreatment or neglect by any person, including a caregiver, whereby unjustifiable pain, malnourishment, or suffering is caused to the infirmed, a disabled adult, or an aged person, including but not limited to a person who is a resident of a nursing home, mental retardation facility, mental health facility, hospital, or other residential facility. *La. R.S. § 14:93.3(A).*

2. **Exploitation of the infirm:** The intentional expenditure, diminution, or use by any person, including a caregiver, of the property or assets of the infirmed, a disabled adult, or an aged person, including but not limited to a resident of a nursing home, mental retardation facility, mental health facility, hospital, or other residential facility without the express voluntary consent of the resident or the consent of a legally authorized representative of an incompetent resident, or by means of fraudulent conduct, practices, or representations. *La. R.S. § 14:93.4.*

3. **Sexual battery of the infirm:**

   (a) Sexual battery of the infirm is the intentional engaging in any sexual act with another person who is not the spouse of the offender when:

   (i) The offender compels the victim, who is physically incapable of preventing the act because of advanced age or
physical infirmity, to submit by placing the victim in fear of receiving bodily harm.

(ii) The victim is incapable of resisting or of understanding the nature of the act by reason of stupor or abnormal condition of the mind produced by an intoxicating, narcotic, or anesthetic agent administered by or with the privity of the offender.

(iii) The victim has such incapacity, by reason of a stupor or abnormal condition of mind from any cause, and the offender knew or should have known of the victim's incapacity.

(iv) The victim is incapable, through unsoundness of mind, whether temporary or permanent, of understanding the nature of the act, and the offender knew or should have known of the victim's incapacity. La. R.S. § 14.93.5(A).

(b) “Sexual acts” is defined as –

(i) The touching of the anus or genitals of the victim by the offender using any instrumentality or any part of the offender’s body; or

(ii) The touching of the anus or genitals of the offender by the victim using any instrumentality or any part of the body of the victim.

B. Penalties

1. Cruelty to the infirm; Exploitation of the infirm: any person found guilty of violating this provision shall be fined not more than $10,000.00 and/or imprisoned with or without hard labor for not more than ten years. La. R.S. § 14:93.3(E)(1); La. R.S. § 14.14:93.4(B).

2. Sexual battery of the infirm: any person found guilty of violating this provision shall be imprisoned with or without hard labor for not more than ten years. La. R.S. § 14:93.5(D).

III. NURSING HOME OVERSIGHT

A. Residents’ Bill of Rights

1. All nursing homes are required to adopt and publish the Residents’ Bill of Rights to the residents of each facility, and they shall treat such residents in accordance with the provisions of the statement. La. R.S. § 40:2010.8(A).

B. Civil enforcement: Residents shall have a private right of action to enforce the provisions set forth in this section, and the remedies for violations under this section are as follows:

1. Injunctive relief;
2. General and special damages; and

IV. RIGHTS AND REMEDIES

A. Private Right of Action

Louisiana does not permit a prevailing party to recover attorney’s fees unless specifically authorized by statute. With the exception of Nursing Home Oversight, neither the Adult Protective Services Act nor the criminal statutes addressing elder abuse address the civil remedies available for violations of these provisions. Although a claimant may assert a private right of action for violations of these provisions, the aggrieved party would not be able to recover attorney’s fees for any violation other than a Residents’ Bill of Rights violation by a nursing home.

B. Civil Remedies/Penalties

Louisiana also does not permit a prevailing party to recover exemplary damages unless specifically authorized by statute. Since the statutes governing the abuse or neglect of the elderly and infirm do not specifically authorize such damages (other than the award of attorney’s fees in the case of nursing home neglect), the claimant is limited to general and special damages that may be recovered in a civil tort action.

V. PREDATORY LENDING PRACTICES

A. Home Solicitation of Aged Persons

1. Definitions:

   (a) Aged Person is defined as any natural person who is 65 years of age or older. La. R.S. § 9:3541.21(1).

   (b) Disabled Person means a natural person who has a physical or mental impairment which substantially limits one or more major life activities. La. R.S. § 9:3541.21(3).
(c) **Home Solicitation Sale** is the consumer credit sales of goods and/or services where the seller engages in a personal solicitation of the sale at any place other than the seller’s business establishment which the consumer accepts. **La. R.S. § 9:3541.21(5).** Note that although the solicitation must take place outside the seller’s business establishment, no such requirement exists for the consumer’s acceptance.

2. **Prohibited Acts:**

   (a) Louisiana prohibits the solicitation of any consumer where a loan is made encumbering the primary residence of that consumer for the purposes of paying for home improvements if the transaction itself is part of a pattern or practice of mortgage abuses as defined at 15 U.S.C. 1639(h) or (i). **La. R.S. § 9:3541.21(A).**

   (b) A third party holder in due course of the loan is not in violation of this section unless it maintains an agency relationship with the solicitor or it has actual knowledge of or participated in the solicitation. **La. R.S. § 9:3541.22(B).**

B. **Remedies for intentional violations:**

1. If the court finds as a matter of law that the agreement or any clause of the agreement is unconscionable, it may –

   (a) refuse to enforce the agreement;

   (b) enforce the remainder of the agreement without the unconscionable clause; or

   (c) limit the application of any unconscionable clause as to avoid any unconscionable result. **La. R.S. § 9:3551.**

2. If the prohibited act was committed in bad faith, the consumer is entitled to a refund of all loan finance charges or credit service charges and has the right to recover three times the amount of such loan finance charge or credit service charge together with reasonable attorney’s fees. **La. R.S. § 9:3552(A)(1)(a).**

   (a) The right to recover the civil penalty only accrues when the following conditions are met:

   (i) written notice is given to the creditor by certified mail addressed to the creditor’s place of business where the consumer credit transaction arose;
(ii) a copy of the notice is mailed to the creditor’s agent for service of process; and

(iii) the violation is not corrected within thirty days of receiving such notice. La. R.S. § 9:3552(A)(1)(a)(i)-(iii).

(b) The following acts create a rebuttable presumption of bad faith by the creditor:

(i) Failure to return or give credit for an overcharge in the loan finance charge or credit service charge; or

(ii) failure to return a deficiency in the rebate when such overcharge or deficiency exceeds the greater of 10% of the loan finance charge, credit service charge or rebate, or $15. La. R.S. § 9:3552(A)(1)(b).

(c) The maximum penalty for violations of this section is $100. La. R.S. § 9:3552(A)(1)(c).

C. Remedies for unintentional violations

1. If a violation of this chapter is not intentional or is made in good faith on the part of the creditor the court may require the creditor to correct the violation.

2. The consumer is not entitled to the civil remedies granted by this section. La. R.S. § 9:3552(A)(2)(a).

3. If the complaining consumer serves the creditor with written notice of an alleged violation of this chapter, the creditor must respond to the complaint within thirty days of the receipt of written notice. Failure to provide such a response may result in a civil fine of not more than $100. La. R.S. § 9:3552(A)(2)(B).

4. Any civil action under this section must be brought within sixty days of final payment of the consumer credit contract, or in the case of a revolving loan or revolving charge account, within one year of the date of the violation. La. R.S. § 9:3552(A)(2)(E).

VI. LEGISLATION AFFECTING STATUTES

A. Pending: None

B. Anticipated: None
MAINE

Diane C. Fernald RN JD
MORRISON MAHONEY, LLP
1500 Main Street, Suite 2400
Springfield MA 01115
www.morrisonmahoney.com

I. Civil Statute Protecting Dependent Adults and Elders from Neglect or Abuse:
Maine Revised Statutes title 22 ch. 958-A (The Adult Protective Services Act)

A. Conduct

(1) **Abuse**: The infliction of injury, unreasonable confinement, intimidation, or cruel punishment that causes or is likely to cause physical harm, pain, or mental anguish. Abuse also includes sexual abuse, sexual exploitation, the intentional, knowing, or reckless deprivation of essential needs.¹

(2) **Exploitation**: The illegal or improper use of an incapacitated or dependent adult or their resources for another’s benefit.²

(3) **Neglect**: A threat to an adult’s health or welfare by physical or mental injury or impairment, deprivation of essential needs, or for failing to protect from such harm.³

(4) **Sexual Abuse or Sexual Exploitation**: Contact or interaction of a sexual nature involving an incapacitated or dependent adult without their informed consent.⁴

(5) **Serious Harm⁵**: Serious harm is:

(i) Serious physical injury or impairment

(ii) Serious mental injury or impairment that is or will likely be evidenced by serious mental or dysfunctional behavioral disorders

(iii) Sexual abuse or sexual exploitation

(iv) Serious waste or dissipation of resources

¹ *M.R.S. tit. 22, § 3472(1)*
² *M.R.S. tit. 22, at § 3472(9)*
³ *M.R.S. tit. 22, § 3472(11)*
⁴ *M.R.S. tit. 22, § 3472(15)*
⁵ *M.R.S. tit. 22, § 3472(13)*
(6) **Spiritual Treatment Exception:** A dependent adult will not be considered abused when undergoing treatment by spiritual means by an accredited practitioner of a recognized religion.\(^6\)

**B. Dependent Adult:** A person 18 years or older who has a physical or mental condition that substantially impairs their ability to adequately provide for their own daily needs. These persons include:\(^7\)

1. Residents of nursing homes
2. Residents of facilities providing assisted living services
3. A person considered a dependent person under *Title 17-A, section 555*, defined as:
   (i) A dependent person for the purposes of the criminal statute is a person who cannot perform self care as a result of advanced age, or a physical or mental disease, disorder, or defect\(^8\)
4. A person regardless of residence who is wholly or partially dependent on one or more persons for care or support because the person suffers from a significant limitation in mobility, vision, hearing, or emotional or mental functioning.

**C. Persons/Entities Excluded From Liability Under Statute**

1. Any person participating in good faith in an adult protection investigation or has reported abuse is immune from any civil liability that might otherwise result from these actions. In any proceeding involving immunity from liability, there is a rebuttable presumption of good faith.\(^9\)

**D. Reporting Requirement for Litigation to State**

Reports must be made immediately by telephone to the Department of Health and Human Services. A subsequent written report must follow within 48 hours if requested by the department. The report must identify the abused person, the nature of the abuse, and their contact information, as well as any other helpful information.\(^10\) Furthermore, if the person required to report is a member of a law enforcement agency or hospital, and observes visible trauma on an incapacitated person.

---

\(^6\) *M.R.S. tit. 22, § 3476(1)*

\(^7\) *M.R.S. tit. 22, (6)(A-D)*

\(^8\) *M.R.S. tit. 17-A, § 555 (1)(A)*

\(^9\) *M.R.S. tit. 22, § 3479-A(1-2)*

\(^10\) *M.R.S. tit. 22, § 3477(2)*
person, they must make a reasonable effort to document the trauma with color photographs.\textsuperscript{11}

**E. Preclusion of Arbitration**

A valid, final award by arbitration has the same effect as the judgment of a court under res judicata. \textit{Beal v. Allstate Ins. Co., 989 A.2d 733, 739 (Me. 2010)}. Maine has adopted such a policy to prevent continuous litigation under the doctrine of collateral estoppel. \textit{Id.}

**F. Criminal Provision:** Endangering a person includes failing to act when a legal duty to protect the health, safety, and mental welfare of a dependent person.\textsuperscript{12} A person is guilty of endangering a dependent person if:

(1) The person recklessly endangers the health, safety, or mental welfare of a dependent person who is unable to perform self care because of advanced age or a physical or mental disorder or defect. Such a violation is a Class D crime.\textsuperscript{13}

(2) The person intentionally or knowingly endangers the health, safety or mental welfare of a dependent person who is unable to perform self-care due to advanced age or physical or mental malady. Violation of this paragraph is a Class C crime.\textsuperscript{14}

(3) **Interplay With Civil Statute**

For a person to be liable under \textit{M.R.S. tit 17-A, § 555} as a result of an omission, they must have a “positive duty to protect an incompetent person”. \textit{State v. Lamson, 640 A.2d 1076, 1083 (Me. 1994)}. An entity or individual with such a duty would include a caretaker of a dependent person.\textsuperscript{15}

**H. Statute of Limitations:**

Six years – \textit{M.R.S. tit. 14, § 752}

**I. Burden of Proof:**
II. DAMAGES

A. Damages Available

(1) Actual Damages

(2) Special Damages

(3) Punitive Damages

(4) Injunctive Relief

(5) Costs of Suit

B. Does Pain and Suffering of Decedent Survive Death?

Yes. If the individual dies prior to any judgment, they may recover damages for pain and suffering. Pain and suffering damages may be awarded only for the period of time up until the decedent’s death. Phillips v. Eastern Maine Medical Center, 565 A.2d 306, 311 (Me. 1989).

C. Attorney’s Fees Available: Yes. Maine tort law typically does not allow for the recovery of attorney’s fees. However, when a claim is brought under the Maine Human Rights Act, which protects elders and developmentally disabled individuals from various forms of discrimination, the court has the discretion to award attorney’s fees. 16

(1) Limitation of Attorney’s Fees

Attorney’s fees may not be awarded unless the plaintiff establishes that they filed a complaint with the Maine Human Rights Commission, and the commission either: 17

16 M.R.S. tit. 5 § 4614
17 M.R.S. tit. 5 § 4622(A-D)
D. Limitations on Damages

An award of damages against a governmental entity or its employees may not exceed $400,000 for claims arising out of a single event. *M.R.S. tit. 14, § 8105(1)*. Punitive damages and exemplary damages are not allowed against government entities. *Id. at (5).*

III. LEGISLATION AFFECTING STATUTE

A. Pending:

(i) 2011 ME S.P. 664 (NS)

B. Anticipated: None
I. Civil Statute Protecting Vulnerable Adults From Neglect, Abuse, or Exploitation: Maryland Family Law Code Annotated (M.C.A.), Family Law §§ 14-101 to 404

A. Conduct

(1) Abuse\(^1\)

Any cruel, inhumane, or malicious act by a person against a vulnerable adult that results in any physical injury.

(2) Exploitation\(^2\)

Any act that involves the misuse of a vulnerable adult’s funds, property, or person.

(3) Neglect\(^3\)

(1) The willful deprivation of food, clothing, essential medical treatment, habilitative therapy, shelter, or supervision to a vulnerable adult

(2) Nonmedical remedial care for the healing of injury or disease consented to by the vulnerable adult does not qualify as neglect.

(4) Self-neglect\(^4\)

The inability of a vulnerable adult to provide themselves with the services that are necessary for their physical and mental health, and the absence of such care threatens their well-being.

B. Vulnerable Adult\(^5\)

An adult who lacks the physical or mental capacity to provide for their own daily needs.

---

\(^1\) M.C.A., Fam. Law § 14-101(b)  
\(^2\) M.C.A., Fam. Law § 14-101(f)  
\(^3\) M.C.A., Fam. Law § 14-101(l)  
\(^4\) M.C.A., Fam. Law § 14-101(p)  
\(^5\) M.C.A., Fam. Law § 14-101(q)
C. **Persons/Entities Excluded From Statute**⁶

Any person who, in good faith, makes a report or participates in making a report of the abuse of a vulnerable adult, or participates in a judicial proceeding concerning such abuse, is immune from any civil liability that could result.

D. **Reporting Requirement for Litigation to the State**

Any health practitioner, police officer, or human service worker attending to a vulnerable adult and has reason to believe that they have been subject to abuse, exploitation, or neglect, must notify the local Adult Protective Services department. *M.C.A., Fam. Law § 14-302(a),(c)*. If the reporter is a member of a hospital or public entity, they must also immediately provide the requisite information to the head of their institution. *Id.* Such report must be made as soon as possible in person, by phone, or writing. *Id. at (b).* Any other individual may file such a report orally or in writing if they suspect maltreatment of a vulnerable adult. A report must contain:⁷

1. The contact information of the vulnerable adult.
2. The contact information of the caretaker of the vulnerable adult.
3. The location of the vulnerable adult.
4. The nature of the adult’s incapabilities.
5. The nature of the maltreatment.
6. Any information concerning the cause of the malfeasance as well as the identity of the person responsible for such conduct.

E. **Preclusion of Arbitration**⁸

In determining if an arbitration ruling precludes judicial action, Maryland employs a three part test. This test aims to determine how similar to a typical judicial proceeding the arbitration procedure was. If the test is successfully satisfied, the arbitration award precludes subsequent judicial action. The test asks if:

1. The arbitration exceeded judicial capacity;
2. If the issue presented to the court was already presented in arbitration; and

---

⁶ *M.C.A., Cts. & Jud. Proc § 5-622*

⁷ *M.C.A., Fam. Law. § 14-302(d)*

(3) The resolution of a factual issue is necessary to support the conclusions of arbitration.

F. Arbitration Requirement For Medical Malpractice Claims

If the cause of action arises under an injury resulting from a health care provider’s care, or failure to render care, it must be arbitrated. However, before arbitration begins, both parties have the option of waiving arbitration.

G. Relation to Medical Malpractice Actions

A health care practitioner cannot willfully deprive a vulnerable adult of essential medical treatment or therapy under the statute.

H. Criminal Provision

(1) A person caring for a vulnerable adult, or the household or family member of a vulnerable adult, may not abuse or neglect them such that:

(i) The death of the vulnerable adult results.

(ii) It causes serious bodily injury.

(iii) It involves sexual abuse of the adult.

(2) A person who violates this law is guilty of the felony of abusing a vulnerable adult in the first degree and is subject to no more than ten years imprisonment or a fine of not more than $10,000, or both.

(3) If a person engages in the abuse or neglect of a vulnerable person that does not result in death, serious injury, or sexual abuse of the adult, they will be guilty of a misdemeanor for the abuse of a vulnerable person. Those guilty of this crime are subject to no more than five years imprisonment or a fine of not more than $5,000, or both.

I. Statute of Limitations

(1) Three years for civil actions – M.C.A., Cts. & Jud. Proc. § 5-101

(2) For suits against medical providers – M.C.A., Cts. & Jud. Proc. § 5-109

(i) 5 years from when the injury was committed; or

(ii) 3 years from the date when the injury was discovered.

---

9 M.C.A., Cts. & Jud. Proc. §§ 3-2A-01(f)(1) through 3-2A-01(b)
10 M.C.A., Fam. Law §§ 14-101(g), 14-101(d)
11 M.C.A., Crim. Law § 3-604(b-c)

K. **Can Regulations Establish Standard of Care?**

Yes. Regulations may be admissible as evidence to establish the appropriate standard of care. *C & M Builders v. Strub*, 420 Md. 268, 282 (Md. 2011). Maryland has recently employed the four part test of §§ 286 and 288 of the Restatement (Second) of Torts in determining if a regulation can set forth the standard of care. *Paul v. Blackburn Ltd. Partnership*, 211 Md. App. 52, 107 (2013). The test examined if:

1. A class of persons had their interests invaded.
2. An actual interest was invaded.
3. An interest exists against the actual harm that resulted.
4. An interest exists in enforcing the regulation or other precautionary measures established to prevent the harm that resulted.

If this test is satisfied, regulations and other safety standards may be used to establish the standard of care.

II. **DAMAGES**

A. **Damages Available**

1. Actual Damages
2. Special Damages
3. Punitive Damages
4. Injunctive Relief
5. Costs of Suit

B. **Does Pain and Suffering of Decedent Survive Death?**

Yes. However, mental and emotional injury such as fright are not compensable unless there are objective manifestations of such injury. *Beynon v. Montgomery Cable Vision Ltd.*, 351 Md. 460, 505 (1998). To recover for conscious pain and suffering, the plaintiff must prove: 12

1. The defendant’s negligence was the proximate cause of the accident.

---

12 *DRD Pool Service Inc. v. Freed*, 416 Md. 46, 58 (2010)
(2) The deceased lived for a period of time after the accident.

(3) Between the time of the accident and the time of death, the deceased suffered pain.

C. Attorney’s Fees Available

No. Attorney’s fees are generally not awarded. They are only allowed when authorized by statute or contract, when the wrongful conduct of the defendant forces a plaintiff into litigation with a third party, or when a plaintiff is forced to defend against malicious prosecution. *Nova Research, Inc. v. Penske Truck Truck Leasing Co.*, 405 Md. 435, 445 (2008).

D. Limitations on Damages

Noneconomic damages are limited to $500,000 for any action that arises on or after October 1, 1994. For any action that arises on any date after October 1, 1995, noneconomic damages are limited to $500,000 plus $15,000 per year every year after 1995.13

III. LEGISLATION AFFECTING STATUTE

A. Pending: None

B. Anticipated None14

---

13 *M.C.A., Cts. & Jud. Proc.* § 11-108(b)
I. Civil Statute Protecting Elders and Dependant Adults From Neglect or Abuse:  
*Massachusetts General Laws (M.G.L.A.) ch. 19A,-C*

A. Abuse:

1. **Abuse of an Elderly Person**: An act or omission which results in serious physical or emotional injury to an elderly person or financial exploitation of an elderly person; or the failure, inability, or resistance of an elderly person to provide for him one or more of the necessities essential for physical and emotional well-being. No person shall be considered to be abused or neglected for the sole reason that such person is being furnished or relies upon treatment in accordance with the tenets and teachings of a church or religious denomination by a duly accredited practitioner thereof.  
   
   651 Massachusetts Code of Regulations (C.M.R.) 5.02.

   An act(s) or omission(s) include any or all of the following:

   (a) Physical Abuse

   (b) Sexual Abuse

   (c) Emotional Abuse

   (d) Neglect

   (e) Financial Exploitation

   (f) Self Neglect

2. **Single Act and/or Pattern**

   (a) A single act or omission, as well as multiple acts for omissions will qualify for the purposes of abuse.

3. **Legal Requirement for the act(s) or omission(s)**:\n
   (a) Physical Abuse: The non-accidental infliction of serious physical injury to an elder or the threat of serious physical injury in which

---

1 651 C.M.R. 5.02(1)-(6)
the Protective Services Agency has reasonable cause to believe that an individual may have the intent and capacity to carry out the threatened serious physical injury.

(b) Sexual Abuse: Sexual assault, rape, sexual misuse, or sexual exploitation of an elder qualify as sexual abuse. Threats of sexual abuse also qualify where the individual has the intent and capacity to carry out the threatened sexual misconduct.

(c) Emotional Abuse: The non-accidental infliction of serious emotional injury to an elder. To establish emotional abuse, there must be a relationship between the abusive actions and a resulting effect on the emotional state of the elder.

(d) Neglect: The failure or refusal by a caretaker to provide one or more of the necessities essential for physical well-being, such as food, clothing, shelter, personal care, and medical care, which has resulted in or has the substantial immediate potential to result in serious physical harm to an elder.

(e) Financial Exploitation: The non-accidental act or omission by another person without consent of the elder resulting in substantial monetary or property loss to the elder, or substantial monetary or property gain to the other person that would otherwise benefit the elder but for the act of another person.

(f) Self Neglect: The failure or refusal of an elder to provide for himself or herself one or more necessities essential for physical or emotional well-being, including food, clothing, shelter, personal care, supervision, and medical care, and such failure or refusal will immediately result in serious harm.

2. Abuse of a Disabled Person: An act or omission which results in serious physical or emotional injury to a disabled person; provided, however, that no person shall be considered to be abused for the sole reason that such person is being furnished or relies upon treatment in accordance with the tenets and teachings of a church or religious denomination by a duly accredited practitioner thereof. An injury shall not be considered abuse when

(a) It did not result from a caretaker’s negligent act

(b) It did not result from a caretaker’s reckless act

---

\(^2\) M.G.L.A. c. 19C § 1
\(^3\) 118 C.M.R. 2.02
(c) It was caused by a caretaker’s necessary application of force under the circumstances

(d) It was caused by a caretaker’s good faith effort to prevent physical injury, pain, or emotional injury to a disabled person

B. Disabled Person(s)

1. **Definition:** A “disabled person” is someone between the ages of eighteen to fifty-nine, with an intellectual disability, or someone who is otherwise mentally or physically disabled who is wholly or partially dependent on others to meet their daily living needs.

C. Persons/Entities Excluded From Statute

1. Mandated reporters of abuse are not liable in any civil or criminal action. A person who is not a mandated reporter who submits a report will also not be liable for any civil or criminal action, provided the report was made in good faith. No person engaged in abuse shall be free from civil or criminal liability by making such a report.4

(a) **Definition of Mandated Reporters for the Abuse of a Disabled Person:** Any physician, medical intern, hospital personnel engaged in the examination, care or treatment of persons, medical examiner, dentist, psychologist, nurse, chiropractor, podiatrist, osteopath, public or private school teacher, educational administrator, guidance or family counselor, day care worker, probation officer, social worker, foster parent, police officer or person employed by a state agency within the executive office of health and human services, or employed by a private agency providing services to disabled persons who, in his professional capacity shall have reasonable cause to believe that a disabled person is suffering from a reportable condition.5

(i) Mandated reporters for the abuse of disabled persons have no duty to report when they are constrained by professional privilege.

(b) **Mandated Reporters for the Abuse of an Elder:** Any physician, physician assistant, medical intern, dentist, nurse, family counselor, probation officer, social worker, policeman, firefighter, emergency medical technician, licensed psychologist, coroner, registered physical therapist, registered occupational therapist, 6

---

4 M.G.L.A. c. 19C § 10
5 M.G.L.A. c. 19C § 1
6 M.G.L.A. c. 19C § 10
osteopath, podiatrist, director of a council on aging, outreach worker employed by a council on aging, executive director of a licensed home health agency or executive director of a homemaker service agency or manager of an assisted living residence who has reasonable cause to believe that an elderly person is suffering from or has died as a result of abuse.7

(c) **Reasonable Cause:** The reasonable cause standard is interpreted as merely a “threshold function” that is a relatively low standard to meet. *Care and Protection of Robert, 408 Mass. 52, 63 (1990).* The purpose of this standard is to quickly determine if further assessment and intervention is needed. *J.P.B. v. Department of Children & Families, 83 Mass. App. Ct. 1111, 1111 (2013).*

2. **State Employers and Employees**

In civil actions for negligent acts or omissions of state employees, state employers are not subject to punitive damages or for any amount in excess of $100,000, or for the levy of property to satisfy judgment, or for interest prior to judgment. State employees are not liable for negligent acts or omissions while working in the scope of their employment so long as they reasonably cooperate with the public employer in their defense.8

D. **Reporting Requirement for Litigation to State**

1. **Reporting Requirements for Elderly Abuse**

Mandated reporters under *M.G.L.A. c. 19A § 14* who have reasonable cause to believe that an elder is the victim of abuse must immediately make a verbal report to the Department of Elder Affairs. They must also file a written report within forty eight hours of the suspected abuse. Failure to do so will result in a fine of not more than one thousand dollars.9 Also, any other person who is not a mandated reporter may file a report if they have reasonable cause to believe than an elder has been subject to abuse.10

2. **Reporting Requirements for Disabled Persons Abuse**

Mandated reporters under *M.G.L.A. c. 19C § 1* shall immediately notify the Disabled Persons Protection Commission orally of any abuse of a disabled person. If they have reasonable cause to suspect that a disabled person has died from abuse, they shall immediately report the death to the

---

7. *M.G.L.A. c. 19A § 14*
8. *M.G.L.A. c. 258 § 2*
9. *M.G.L.A c 19A § 15(a)*
10. *Id. § 15(c)*
commission, as well as to the district attorney’s office for that county and
to the medical examiner. Failure to make a report as required will result in
a fine of no more than one thousand dollars. Furthermore, any person may
file a report if they have reasonable cause to suspect that a disabled person
has suffered abuse.11

E. Criminal Provision

A caretaker of an elder or person with a disability, who wantonly or recklessly
commits or permits another to commit abuse, neglect, or mistreatment upon such
elder or person with a disability, shall be punished by imprisonment in the state
prison for not more than three years, or imprisonment in the house of correction
for not more than two and one half years, or by a fine of not more than five
thousand dollars, or by both such fine and imprisonment.12

Wanton or reckless conduct is defined as “intentional conduct involving a high
degree of likelihood that substantial harm will result to another”. Com. v.
383, 391 (1944). The risk of harm must be more than a mere probability, and the
harm itself must be one that can result in “an injury causing permanent
disfigurement, protracted loss or impairment of bodily function, limb or organ, or
substantial risk of death.” Id. at 452.

F. Statute of Limitations

Three years – M.G.L.A. ch. 260 § 2A

G. Burden of Proof:

A preponderance of the evidence

H. Can Regulations Establish Standard of Care:

Yes. Regulations, as well as policies and past practices are sufficient to establish
the standard of care. Pelletier v. Main Street Textiles, LP, 470 F.3d 48, 56 (1st
Cir. 2006)

II. DAMAGES

A. Damages Available

1. Actual Damages
2. Special Damages
3. Punitive Damages
4. Injunctive Relief

11 M.G.L.A. c. 19C § 10
12 M.G.L.A c. 265 § 13K(d 1/2)
5. Costs of Suit

B. Does Pain and Suffering of Decedent/Resident Survive Death:

Yes. *M.G.L.A. c. 229 § 6* provides that if the decedent dies before judgement, they are still able to receive damages for pain and suffering. Any sum recovered is “held and disposed of by the executors and administrators as assets of the estate of the deceased.” *Id.*

C. Attorney’s Fees Available:

Possibly. The Massachusetts Civil Rights Act provides that a person who brings action for the interference of their rights under the United States Constitution or of the Commonwealth is entitled to costs and reasonable attorney fees should they prevail in the action.\(^\text{13}\) This includes rights interfered with through actual or attempted threats, intimidation, or coercion.\(^\text{14}\) In order for attorney’s fees to be obtained, the claimant must prevail on a substantial question of law “arising out of the common nucleus of facts that give rise to cause of action under the statute”. *Batchelder v. Allied Stores Corp.*, 393 Mass. 819, 822 (1985).

1. If available, are the attorney’s fees limited?

Yes. Only reasonable attorney fees may be awarded.\(^\text{13}\)

III. LEGISLATION AFFECTING STATUTES

A. Pending:

(1) For *M.G.L.A c.19C § 14-15*

   (i) 2013 MA H.B. 3479 (NS)
       2013 MA S.B. 290 (NS)
       2013 MA H.B. 549 (NS)

B. Anticipated: None

\(^{13}\) *M.G.L.A. c. 12 § 11I*

\(^{14}\) *Id. § 11H*
I. Statute Protecting Dependent Adults or Elders from Neglect or Abuse: *Michigan Compiled Laws 400.11 et seq.*

A. Conduct

1. **Neglect**: Harm to an adult's health or welfare caused by the inability of the adult to respond to a harmful situation or by the conduct of a person who assumes responsibility for a significant aspect of the adult's health or welfare, which includes the failure to provide adequate food, clothing, shelter, or medical care.²

2. **Abuse**: Harm or threatened harm to an adult's health or welfare caused by another person. Abuse includes, but is not limited to, nonaccidental physical or mental injury, sexual abuse, or maltreatment.³

3. **Exploitation**: An action that involves the misuse of an adult's funds, property, or personal dignity by another person.⁴

B. **Endangered Adult⁶**

1. **Types of Impairment:**

   A “vulnerable adult” within the meaning of the Michigan statute is an individual who is unable to protect himself or herself from abuse, neglect, or exploitation because of a mental or physical impairment or because of advanced age and is a person not less than eighteen (18) years of age who is suspected of being or believed to be abused, neglected, or exploited.

---

¹ The authors gratefully acknowledge the assistance of Summer Associate, Mohammad Khaleelullah.

² *MCL 400.11(d).*

³ *MCL 400.11(a).*

⁴ Exploitation will not be addressed in this compendium – instead, only the abuse and/or neglect portions of the statutes.

⁵ *MCL 400.11(c).*

⁶ *MCL 400.11(b) – (f).*
C. Persons Excluded From Statute

A person acting in good faith who makes a report or who assists in the implementation of this act shall be immune from civil liability which might otherwise be incurred by making the report or by assisting in the making of the report. This immunity shall not extend to a negligent act which causes personal injury or death. [emphasis added].7

D. Mandatory Reporting Requirements - The statute does not provide specific notice and process requirements to the state for litigation.

E. Preclusion of Arbitration

A provision in a written contract to settle by arbitration in which it is agreed that a judgment of any circuit court may be rendered upon the award made pursuant to such agreement, shall be valid, enforceable and irrevocable save upon such grounds as exist at law. See MCL 600.5001. Where an arbitration agreement complies with the requirements of the law, that arbitration agreement precludes a civil cause of action. McKain v Moore, 172 Mich. App. 243, 431 N.W.2d 470 (1988). The Michigan statute protecting vulnerable adults does not expressly prohibit arbitration agreements.

F. Relationships to Medical Malpractice Actions

The Michigan statute protecting vulnerable adults does not expressly limit recovery by any other civil remedy including those available for medical malpractice actions.

G. Criminal Provision - Michigan’s criminal code governs the criminal provisions under the vulnerable adult program.8

1. If a caregiver intentionally causes serious physical harm or serious mental harm to a vulnerable adult, the caregiver is guilty of vulnerable adult abuse in the first degree [emphasis added].

2. A caregiver or other person with authority over the vulnerable adult is guilty of vulnerable adult abuse in the second degree if their reckless act or reckless failure to act causes serious physical harm or serious mental harm to a vulnerable adult [emphasis added].

3. A caregiver is guilty of vulnerable adult abuse in the third degree if the caregiver intentionally causes physical harm to a vulnerable adult [emphasis added].

7 MCL 400.11 (c) (1).
8 MCL 750.145n (1) – (4).
4. A caregiver or other person with authority over the vulnerable adult is guilty of vulnerable adult abuse in the **fourth degree** if their reckless act or reckless failure to act causes physical harm to a vulnerable adult [emphasis added].

**H. Statute of Limitations:**

An action for negligence must be brought within six years. *See MCL 600.5813.*

An action for medical malpractice must be commenced within two years after the cause of action accrues. *See MCL 600.5805 (6).*

A cause of action for assault or battery (i.e., abuse) must be brought within two years. *See MCL 600.5805 (2).*

**I. Burden of Proof:**

The burden of proof in Michigan for civil actions is based upon a preponderance of the evidence. The plaintiff must prove by a preponderance of the evidence that the defendant was guilty of negligence, and that negligence was a proximate cause of the injuries that she received. *Knoper v Burton*, 383 Mich. 62, 173 N.W.2d 202 (1970).


**J. Can regulations establish a standard of care?**

**Yes.** Historically, it has been “elementary law in this State that violation of a statute is evidence of negligence per se.” *Hardaway v Consolidated Paper Co*, 366 Mich 190, 196; 114 NW2d 236 (1962). Indeed, violation of a duty imposed by statute is negligence per se. *Douglas v Edgewater Park Co.*, 369 Mich 320, 328; 119 NW2d 567 (1963).

**II. DAMAGES**

**A. Damages Available**

1. Actual Damages
2. Punitive Damages
3. Costs of Suit

---

9 MCL 600.6305.
B. **Does Pain and Suffering of Decedent/Resident Survive Death:**

   Yes. If a person dies before the period of limitations has run or within 30 days after the period of limitations has run, an action that survives by law may be commenced by the personal representative of the deceased person at any time within 2 years after letters of authority are issued although the period of limitations has run.\(^\text{10}\)

C. **Attorney’s Fees available:** No

III. **LEGISLATION AFFECTING STATUTE**

   A. **Pending:** None

   B. **Anticipated:** None

\(^{10}\) MCL 600.5852(1).
MINNESOTA

Octavia Donnelly, Esq.
Carol Romano, Esq.
RENAUD COOK DRURY MESAROS, PA
One North Central Ave., Suite 900
Phoenix, AZ 85004
(602) 307-9900

I. Criminal Statutes Protecting Dependent Adults or Elders from Abuse

A. MINN. STAT. § 609.232 et seq.

1. Minnesota criminalizes maltreatment of vulnerable adults.
   a. Vulnerable adult is any person over the age of 18 who is a resident in an inpatient facility, receives services at or from a facility licensed to serve adults pursuant to MINN. STAT. §§245A.01-245A.15, receives services from a home care provider required to be licensed, regardless of resident –possesses a physical or mental infirmity or other physical or mental or emotional dysfunction.

2. Maltreatment is defined as
   b. Abuse – pursuant to section 609.2325
      1) Abuse is defined in section 602.2325 as physical or mental pain or injury, sexual contact or penetration, aversive or deprivation, unreasonable confinement, or involuntary seclusion.
   c. Neglect – pursuant to section 609.233
      1) Neglect is defined as failing to provide necessary food, shelter, clothing, health care, or supervision.
   d. Financial exploitation – pursuant to 609.2335
      1) Financial exploitation is defined as breaching a fiduciary obligation recognized elsewhere in the law, failing to use real or personal property or other financial resources of the vulnerable adult to provide certain necessities, using managing or taking real or personal property or other financial resources of the vulnerable adult, or depriving either temporarily or permanently a vulnerable adult of his/her real or personal property or other financial resources.
      2) It is financial exploitation if any of the above is committed
without legal authority.

3. This particular statute does not expressly or impliedly permit a civil cause of action.\(^1\)

**B. MINN. STAT. §626.557**

1. This statute requires reporting of suspected maltreatment of vulnerable adults, investigation of the reports and protective and counseling services when appropriate.

2. Subdivision 3 – Timing of the report
   a. A mandated reporter who has reason to believe that a vulnerable adult is being maltreated or has knowledge that a vulnerable adult sustained a physical injury which is not reasonably explained must immediately report the information; a mandated reporter is not required to report suspected maltreatment if it occurred prior to admission. With a few exceptions:
      1) The suspected maltreated adult was admitted to another facility and the reporter has reason to believe the mistreatment happened at the previous facility.
      2) If the reporter has reason to believe the vulnerable adult is one defined in section 672.5572 subdivisions 21, paragraph (a) clause (4):
         a) “regardless of residence or whether any type of service is received, possesses a physical or mental infirmity or other physical, mental, or emotional dysfunction that impairs… the individual’s ability to protect [self] from maltreatment.”

3. Subdivision 3a - Report is not required when:
   a. If federal law prohibits disclosure of identifying patient information unless the vulnerable adult or the vulnerable adult’s guardian has consented to such disclosure.
   b. Verbal or physical aggression between patients, residents, or clients of facility, or self-abusive behavior by the vulnerable adult – the aggressive incidents or self-abusive incidents must be recorded, however.
   c. Accidents – as defined in section 626.5572 subdivision 3.
   d. Events occurring in a facility that result from error in the provision

---

of therapeutic conduct to a vulnerable adult.

e. Financial exploitation solely on the basis of the transfer of money or property by gift or as compensation for services rendered.

4. Subsection 4a governs internal reporting of maltreatment.

5. Subsection 5 provides immunity and protection for those who make reports in good faith from civil or criminal liability.

6. Subdivision 7 provides “a mandated reporter who negligently or intentionally fails to report is liable for damages caused by the failure.” Nothing in this subsection imposes vicarious liability for the acts or omissions of others.

II. Civil Liability for Failure to Report Maltreatment of Vulnerable Adult

A. The Vulnerable Adult Act (see section IB above) creates a civil cause of action for failure to report abuse of a vulnerable adult.2

B. The Minnesota Supreme Court in Wall interpreted “reasonable cause” for reporting abuse of a vulnerable adult to include belief “beyond mere suspicion or foreseeability.”

C. If a plaintiff wants to pursue a medical malpractice claim in addition to a civil claim for failure to report under the VAA, the plaintiff must identify in affidavits of all expert witnesses the substance of the facts and opinions to which the experts will testify, and a summary of the grounds for the experts’ opinions pursuant to M.S.A. §145.682 subd. 4, including standard of care and the defendant’s acts of omissions that led to the alleged violation of the standard of care and causation of the violation to the claimed damages.3


E. The VAA does not confer a private cause of action for failure to conduct a timely investigation on reports of abuse pursuant to the act.4

III. LEGISLATIVE CONSIDERATIONS

A. Minn. Stat. §626.557 subdivision 10 is to be amended by the Minnestora Legislature. Subdivision 10 deals with the duties of the county social service

---

2 Wall v. Fairview Hosp. and Healthcare Services, 584 N.W.2d 395 (Minn. 1998).
3 Id (citations omitted).
4 Hoppe v. Kandiyohi County, 543, N.W.2d 635 (Minn. 1996); Becker v. Mayo Foundation, 737 N.W.2d 200 (Minn. 2007).
agency after a report of abuse is made. The following will be added to subdivision 10 “[t]he county shall use as standardized tool made available by the commissioner. The information entered by the county into the standardized tool must be accessible to the Department of Human Services.”
I. MISSISSIPPI VULNERABLE PERSONS ACT OF 1986

A. Purpose and Intent

The purpose of the Act is to provide for protective services for vulnerable persons in Mississippi who are abused, neglected, or exploited. Mississippi Code of 1972, Title 43. Public Welfare, Chapter 47. Mississippi Vulnerable Persons Act, §43-47-1 et seq.

B. Significant Definitions:

1. “Abuse”- the commission of a willful act, or the willful omission of the performance of a duty, which act or omission contributes, tends to contribute to, or results in the infliction of physical pain, injury or mental anguish on or to a vulnerable person, the unreasonable confinement of a vulnerable person, or the willful deprivation by a caretaker of services which are necessary to maintain the mental or physical health of a vulnerable person. “Abuse” includes sexual abuse, and can be fulfilled by a single act. MS Code §43-47-5 (a).

2. “Exploitation”- the illegal or improper use of a vulnerable person or his resources for another’s profit, advantage or unjust enrichment, with or without the consent of the vulnerable person, and may include actions taken pursuant to a power of attorney. “Exploitation,” like “abuse,” can include a single incident. MS Code §43-47-5(i).

3. “Neglect” means either the inability of a vulnerable person who is living alone to provide for himself the food, clothing, shelter, health care or other services which are necessary to maintain his mental or physical health, or failure of a caretaker to supply the vulnerable person with the food, clothing, shelter, health care, supervision or other services which a reasonably prudent person would do to maintain the vulnerable person’s mental and physical health. “Neglect” can also include a single act. MS Code §43-47-5 (m).
4. “Vulnerable person” means a person, whether a minor or adult, whose ability to perform the normal activities of daily living or to provide for his or her own care or protection from abuse, neglect, exploitation or improper sexual contact is impaired due to a mental, emotional, physical, or developmental disability or dysfunction, or brain damage or the infirmities of aging. The term “vulnerable person” also includes all residents or patients, regardless of age, in a care facility. The Department of Human Services shall not be prohibited from investigating, and shall have the authority and responsibility to fully investigate any allegation of abuse whether it occur in a patient care facility or a private residence. MS Code §43-47-5 (q).

C. Reporting requirements

1. Mandatory Reporting Requirements: Any person who knows or suspects that a vulnerable person has been or is being abused, neglected or exploited shall immediately report such knowledge or suspicion to the Department of Human Services or other human services department in the location of the county where the vulnerable person may reside. The category of persons required to report is expansive and includes attorneys, physicians and any other healthcare providers, mental health professionals, spiritual healers, social workers, criminal justice employees, accountants, financial advisors, insurance agents, etc. MS Code §43-47-7 (1)(a)(i-vii). Employees of a home health agency must report orally or telephonically within twenty-four (24) hours of discovery excluding Saturdays and legal holidays. MS Code §43-47-37 (2)(a). A home health agency must report in writing within seventy-two (72) hours of discovery to the Medicaid Fraud Control Unit. MS Code §43-47-37 (2)(b). All other care facilities must report within twenty-four (24) hours of discovery, orally or telephonically, and in writing within seventy-two (72) hours.

2. Contents of Report: Reports must contain, but need not be limited to:
   a. Name, age, race, sex, physical description and location of the vulnerable person neglected or abused.
   b. Names, addresses and phone numbers of family members of the vulnerable person.
c. Name, address, and telephone number of each alleged perpetrator.

d. Name, address, and telephone number of the caregiver of the vulnerable person.

e. Description of the neglect, exploitation, physical or psychological injuries sustained.

f. Actions taken by the reporting person.

g. Any other information that establishes the cause of the abuse, neglect or exploitation. MS Code §43-47-7 (1)(b)(i-vii).

3. **Limited Immunity:** Anyone making a report under this Act or who testifies or participates in any judicial proceedings arising from the report or who participates in a required investigation or evaluation shall be presumed to be acting in good faith, and shall be immune from criminal or civil liability. Officers or other employees of the Department of Human Services are not liable civilly if they are in “good faith” in the performance of their duties. MS Code §43-47-25. Immunity does not extend to any suspect or perpetrator of any neglect, exploitation or abuse. MS Code §43-47-7 (4). Further, this immunity does not extend to persons found intentionally filing false reports under this Act, who are subject to civil liability for actual damages sustained. MS Code §43-47-7 (5).

4. **Penalties for Failing to Report:**

   a. Any person who knowingly fails to make a report as required or attempts to induce another, by threat or otherwise, to fail to make a report shall be guilty of a misdemeanor and punished by a fine not exceeding $500.00 or imprisoned not more than six (6) months. MS Code §43-47-37 (7).

   b. Any category of persons set forth by MS Code §43-47-7 (1)(a)(i-vii) [Attorneys, physicians, healthcare professionals, social workers, etc.] who fail to comply with the reporting requirements or if the circumstances dictate that a person should have known or “suspected beyond a reasonable doubt” that a vulnerable person suffered from exploitation, abuse, neglect or self-neglect will be guilty of a
misdemeanor punishable by a fine up to $5,000.00 or by imprisonment in county jail for not more than six (6) months. MS Code §43-47-7 (1)(c). However, anyone failing to report under this Act has no additional criminal or civil liability to any person or entity in connection with that failure to report. MS Code §43-47-7 (3).

II. CRIMINAL VIOLATIONS FOR MISTREATMENT OF “VULNERABLE PERSONS”

A. Additional Pertinent Definitions

1. “Illegal Use” means any action defined under the Mississippi law as a criminal act. MS Code §43-47-5 (j).

2. “Sexual Penetration” shall have the meaning as that contained in MS Code 97-3-97, as set forth in the criminal code to include any penetration of the genital or anal openings of another person's body by any part of a person's body, and insertion of any object into the genital or anal openings of another person's body. MS Code §43-47-5 (o).

3. “Undue Means” means the use of deceit, power, or persuasion over a vulnerable person resulting in the vulnerable person being influenced to act otherwise than by his own free will or without adequate attention to the consequences. MS Code §43-47-7 (p).

B. Law Against Abuse, Neglect or Exploitation

1. Prohibition against abuse, neglect, or exploitation- It shall be unlawful for any person to abuse (commit a willful act or omission of a duty resulting in the physical pain, injury or mental anguish of a vulnerable person), neglect (fail to supply a vulnerable person with food, clothing, shelter, healthcare, supervision necessary for physical or mental health), or exploit (illegally use a vulnerable person’s resources for profit) any vulnerable person (person impaired due to mental, emotional, physical or developmental disability or dysfunction or brain damage or due to the infirmities of aging). MS Code §43-47-19 (1).

2. Penalties

   a. Any person who willfully commits an act or willfully omits the performance of any duty which act contributes to or results in neglect, physical
pain, injury, mental anguish, unreasonable confinement or deprivation of services of a vulnerable person shall be punishable by a misdemeanor including a fine of $1,000.00 or imprisonment of one (1) year in county jail, or by both. §43-47-19 (2)(a)

b. Any person who exploits a vulnerable person in an amount less than $250.00 shall be guilty of a misdemeanor punishable by up to $5,000.00 fine and one (1) year in county jail. Where the value of the exploitation is in excess of $250.00, the person shall be guilty of a felony, punishable by up to ten (10) years in the custody of the Department of Corrections. §43-47-19 (2)(b)

c. Any person willingly inflicting physical pain or injury upon a vulnerable person shall be guilty of felonious abuse or battery, or both, and upon conviction can be sentenced up to twenty (20) years in the State Penitentiary. §43-47-19 (3)

d. For any third or subsequent misdemeanor violation of this Act, and if the offenses are committed within a period of five years, such person is then guilty of a felony punishable between one (1) and five (5) years in the custody of the Department of Corrections and shall be fined not less than $2,000.00 nor more than $5,000.00. MS Code §43-47-19 (4).

C. Sexual Battery of the Infirm By Healthcare Employee or Person in Position of Trust or Authority

1. A person who handles, touches, rubs with hands or any part of any vulnerable person’s body for the purposes of gratifying the individual’s “lust” or indulge “depraved licentious sexual desires” or who engages in sexual penetration with a vulnerable person is guilty of sexual battery, if the person is a volunteer at, or an employee of, or contracted to work for, a health care facility in which the vulnerable person is a patient or resident. MS Code §43-47-18 (1)(a) and (2)(a).

2. Persons who also share a position of trust or authority over the vulnerable person are also guilty, and include a teacher, counselor, physician, psychiatrist, psychologist, nurse, minister, priest,
physical therapist, chiropractor, legal guardian, parent, etc. MS Code §43-47-18 (1)(b) and (2)(b).

3. **Penalties**

   a. Persons guilty of lustful and depraved sexual touching shall be guilty of a felony punishable by a fine of $1,000.00 to $5,000.00 and/or be committed to the Department of Corrections from two (2) to fifteen (15) years. MS Code §43-47-18 (2)(a).

   b. Persons guilty of sexual battery (sexual penetration) shall be imprisoned in the custody of the State Department of Corrections for a period of not more than thirty (30) years. A second conviction is punishable for a period of up to forty (40) years. MS Code §43-47-18 (1)(c).

D. **General Crimes’ Enhancement**

   In the case of a misdemeanor or felony which involves a crime of violence, burglary, or breaking and entering the dwelling of another, if the crime is committed against a victim who is sixty-five (65) years of age or older or who is disabled as defined by U.S.C.S. 12102, the sentence or fine may be enhanced by up to twice that authorized by law for the offense committed. MS Code §99-19-351-357.

III. **NURSING HOME OVERSIGHT**

   Nursing homes are regulated by the Mississippi State Department of Health, pursuant to MS Code §43-11-1 through MS Code §43-11-17. Mississippi does not appear to have a Resident’s Bill of Rights separate and apart from that of the Federal Nursing Home Reform Act of 1987. Reporting of abuse is made to the Department of Human Services or to the Medicaid Fraud Control Unit of the Mississippi Attorney General’s Office. MS Code §43-47-37.

IV. **RIGHTS AND REMEDIES**

   A. **Private Right of Action**

      The Vulnerable Persons Act of 1986 does not appear to grant any additional civil remedies not already present and available under general Mississippi tort law, although it does impose additional legal duties upon individuals and persons in authority to report any negligence, abuse or exploitation of vulnerable persons.

   B. **Civil Remedies/Penalties**
Only general civil liability for negligence appears available for the elderly or “vulnerable” persons, other than the criminal prosecution that is available to the state. Exemplary damages or punitive damages are not available to individuals for violations of the Act. Attorney’s fees, costs, etc. are not recoverable.

V. PREDATORY LENDING PRACTICES

Mississippi does not have laws specifically protecting the elderly or infirm as it pertains to predatory lending practices. Fraud against the elderly or the general public would be regulated in the same manner, for example as set forth in the consumer protection laws in MS Code §75-24-1, et seq.

VI. LEGISLATION AFFECTING STATUTES

A. Pending: None

B. Anticipated: None known
I. GENERAL NEGLIGENCE

A. Conduct: Missouri law does not provide a civil cause of action for elder abuse under its reporting statutes (see infra). Instead, plaintiffs must proceed under a negligence claim.

B. Statute of Limitations:

1. Personal injury: Five years – R.S. Mo. § 516.120
2. Wrongful death: Three years – R.S. Mo. § 516.100

C. Burden of Proof:

More likely true than not true – Mo. Approved Jury Instr. (Civil) 3.01 (7th ed. 2012)

D. Damages Available

1. Medical Expenses
2. Economic Loss
3. Noneconomic Loss
   (a) No limitations
4. Punitive Damages
   (a) Burden of Proof: Clear and convincing – Mo. Approved Jury Instr. (Civil) 3.01 (7th ed. 2012)
   (b) In wrongful death cases, the term “punitive damages” is not used. However, where the death is accompanied by aggravating circumstances, the jury may award damages for the aggravating circumstances. R.S. Mo. § 537.090
5. Injunctive Relief
6. Statutory court costs (generally does not include attorneys’ fees or expenses)

E. Does Pain and Suffering of Decedent/Resident Survive Death:

Yes. Causes of action for personal injuries, other than those resulting in death, survive the death of the injured. Additionally, causes of action for death do not abate by reason of death. *R.S. Mo. §§ 537.020, 537.080.*

F. Attorney’s Fees Available: No.

II. Reporting Statute Protecting Adults From Abuse: *Missouri Revised Statutes §§ 660.250 et seq.*

A. Conduct

1. **Abuse:** The infliction of physical, sexual, or emotional injury or harm including financial exploitation by any person, firm or corporation. *R.S. Mo. § 660.250(1)*

2. **Neglect:** The failure to provide services to an eligible adult by any person, firm or corporation with a legal or contractual duty to do so, when such failure presents either an imminent danger to the health, safety, or welfare of the client or a substantial probability that death or serious physical harm would result. *R.S. Mo. § 660.250(14)*

3. **Eligible Adult:** A person sixty years of age or older who is unable to protect his or her own interests or adequately perform or obtain services which are necessary to meet his or her essential human needs or an adult with a disability, as defined in section 660.053, between the ages of eighteen and fifty-nine who is unable to protect his or her own interests or adequately perform or obtain services which are necessary to meet his or her essential human needs. *R.S. Mo. § 660.250(5)*

   (a) **Elderly:** Persons who are sixty years of age or older. *R.S. Mo. § 660.053(5)*

   (b) **Disability:** A mental or physical impairment that substantially limits one or more major life activities, whether the impairment is congenital or acquired by accident, injury or disease, where such impairment is verified by medical findings. *R.S. Mo. § 660.053(6)*

B. Reporting Requirements

1. Any person having reasonable cause to suspect that an eligible adult presents a likelihood of suffering serious physical harm and is in need of protective services shall report such information to the Department of Social Services. *R.S. Mo. § 660.255*
2. Upon receipt of such report, the department shall make a prompt and thorough investigation to determine whether or not an eligible adult is facing a likelihood of serious physical harm and is in need of protective services. *R.S. Mo. § 660.260*

3. Reporting requirements are imposed on mandatory reporters for eligible adults or individuals sixty years or older who are residents of a care facility in *R.S. Mo. § 198.070*.

C. Interference with Services

1. If an eligible adult gives consent to receive protective services and any other person interferes with or prevents the delivery of such services, the director may petition the appropriate court for an order to enjoin the interference with the delivery of the services. *R.S. Mo. § 660.275*

D. Legislation Affecting Statute

1. **Pending:** Missouri House Bill 210 (April 30, 2013); Missouri Senate Bill 253 (Feb. 4, 2013).

III. Criminal Statute Protecting Dependent Adults or Elders from Neglect or Abuse: *Missouri Revised Statutes §§ 565.180 et seq.*

A. Conduct

1. **Abuse and Neglect:** Criminal penalties are classified into three categories:

   (a) **Elder Abuse in the First Degree (felony):** Attempt to kill or knowingly attempt to or cause “serious physical injury” to a person sixty years of age or older or an eligible adult. *R.S. Mo. § 565.180*

   (b) **Elder Abuse in the Second Degree (felony):** Knowingly causes or attempts to cause physical injury by means of a deadly weapon or dangerous instrument, or recklessly or purposely causes “serious physical injury.” *R.S. Mo. § 565.182*

   (c) **Elder Abuse in the Third Degree (misdemeanor):** Includes five categories:

      (i) Knowingly causing or attempting to cause contact that the other person will regard as harmful or provocative,

      (ii) Purposefully and repeatedly engaging in conduct that would cause a reasonable person aged sixty or older or an eligible adult to suffer substantial emotional distress,
(iii) Purposefully or knowingly placing an individual aged sixty or older or an eligible adult in apprehension of immediate physical injury,

(iv) Intentionally failing to provide care, goods, or services to an individual aged sixty or older or an eligible adult, or

(v) Knowingly acting or failing to act in a way that places an individual aged sixty or older or an eligible adult’s life, body, or health at grave risk. \textit{R.S. Mo. § 565.184}

2. \textbf{Exploitation}^1: Knowingly by deception, intimidation, undue influence, or force obtains control over the elderly or disabled person’s property with the intent to permanently deprive the elderly or disabled person of the use, benefit or possession of his or her property thereby benefitting such person or detrimentally affecting the elderly or disabled person. \textit{R.S. Mo. § 570.145(1)}

B. \textbf{Mandatory Reporting}

1. The statute provides a list of reporters who must immediately make a report to the department as provided by the civil statute when he or she has reasonable cause to suspect that the individual has been subjected to abuse or neglect, or observes the person being subjected to conditions or circumstances that would reasonably result in abuse or neglect. \textit{R.S. Mo. § 565.188}

   (a) Knowingly failing to report or purposely filing a false report is a misdemeanor.

2. A mandatory reporter will be immune from any civil or criminal liability for a report made unless the person acted negligently, recklessly, in bad faith, or with malicious purpose. \textit{R.S. Mo. § 565.190}

C. \textbf{Legislation Affecting Statute}

1. \textbf{Pending:} Missouri House Bill 210 (April 30, 2013); Missouri Senate Bill 253 (Feb. 4, 2013).

---

^1 Exploitation will not be addressed in this compendium—instead, only the abuse and/or neglect portions of the statutes will be addressed.
I. Civil Statute Protecting Dependent Adults or Elders from Neglect or Abuse: None

A. Older persons:

"Older person" means a person who is at least 60 years of age. For purposes of prosecution under 52-3-825(2) or (3), the person 60 years of age or older must be unable to provide personal protection from abuse, sexual abuse, neglect, or exploitation because of a mental or physical impairment or because of frailties or dependencies brought about by advanced age. *Mont. Code Anno. § 52-3-803*

B. Persons/Entities Excluded From Statute: None

C. Reporting Requirement for Litigation to State: None

D. Preclusion of Arbitration:

A written agreement to submit any existing or future controversy to arbitration is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of the contract. *Mont. Code Anno. § 27-5-114*

E. Relationship to Medical Malpractice actions:

No civil elder abuse statute exists in Montana, and does not affect medical malpractice actions.

F. Criminal Provision:

A person who purposely or knowingly abuses, sexually abuses, or neglects an older person or a person with a developmental disability is guilty of a felony and shall be imprisoned for a term not to exceed 10 years and be fined an amount not to exceed $10,000, or both. *Mont. Code Anno. § 52-3-825(2)(a)*

(1) Interplay with State Civil Statute: No Civil Statute.

G. Statute of Limitations:


I. Can Regulations Establish Standard of Care: No
II. **DAMAGES**

A. **Damages Available**

1. Actual Damages
2. Special Damages
3. Punitive Damages
4. Injunctive Relief
5. Costs of Suit

B. **Does Pain and Suffering of Decedent/Resident Survive Death:**

*Yes. Mont. Code Anno. §72-3-604.* The damages that may be recovered in a survival action include..... reasonable compensation for **pain and suffering**, and other special damages. *Swanson, 197 Mont. at 515, 646 P.2d at 1169* (citations omitted). The source of the damages recoverable in the survival action are personal to the decedent and do not include damages suffered by the decedent's spouse, children or other heirs. *Id.*

C. **Attorney’s Fees Available:** No.

1. If available, are the attorney’s fees limited?

III. **LEGISLATION AFFECTING STATUTE**

A. **Pending:** None

B. **Anticipated:** None
I. Criminal Statute Protecting Dependent Adults or Elders from Neglect or Abuse: *Nebraska Revised Statutes 28-348, et seq.*

A. Conduct

1. Neglect:

Any knowing or intentional act or omission on the part of a caregiver to provide essential services or the failure of a vulnerable adult, due to physical or mental impairments, to perform self-care or obtain essential services to such an extent that there is actual physical injury to a vulnerable adult or imminent danger of the vulnerable adult suffering physical injury or death.3

2. Abuse:

Any knowing or intentional act on the part of a caregiver or any other person which results in physical injury, unreasonable confinement, cruel punishment, sexual abuse, or sexual exploitation of a vulnerable adult.4

3. Exploitation5:

The taking of property of a vulnerable adult by any person by means of undue influence, breach of a fiduciary relationship, deception, or extortion or by any unlawful means.6

B. Vulnerable Adults

1. Types of Impairment

Any person eighteen years of age or older who has a substantial mental or functional impairment or for whom a guardian has been appointed under the Nebraska Probate Code.7

---

1 The authors gratefully acknowledge the assistance of Summer Associate, Mohammad Khaleelullah.

2 Under the Nebraska Revised Statutes, the APSA program is codified under the state’s criminal code.


5 Exploitation will not be addressed in this compendium – instead, only the abuse and/or neglect portions of the statutes.

C. Persons/Entities Excluded From Statute

Any person participating in an investigation or the making of a report pursuant to the Adult Protective Services Act (the “APSA”) or participating in a judicial proceeding resulting there from shall be immune from any liability except (1) as otherwise provided in the APSA; (2) for malfeasance in office or willful or wanton neglect of duty; or (3) for false statements of fact made with a malicious intent.8

D. Mandatory Reporting of Abuse Requirement - The statute does not provide specific notice and process requirements to the state for litigation.

E. Preclusion of Arbitration

A written agreement to submit any existing controversy to arbitration is valid, enforceable, and irrevocable except upon such grounds as exist at law or in equity for the revocation of any contract.9

F. Relationship to Medical Malpractice Actions

The APSA is not expressly limited by any other civil remedy including those available for medical malpractice actions.

G. Criminal Provisions10

Knowing and intentional abuse, neglect, or exploitation of a vulnerable adult is a Class IIA felony [emphasis added]. A person commits knowing and intentional abuse, neglect, or exploitation of a vulnerable adult if he or she through a knowing and intentional act causes or permits a vulnerable adult to be:

a) Physically injured;
b) Unreasonably confined;c) Sexually abused;d) Exploited;e) Cruelly punished;f) Neglected; or
g) Sexually exploited.

H. Statute of Limitations

Actions for an injury to the rights of plaintiff, not arising on contract, must be brought within four years. See Neb. Rev. Stat. § 25-207. Actions to recover damages based on professional negligence must be brought within two years after injury or one year within reasonable date of discovery but no more than 10 years after injury.\(^\text{11}\)

I. Burden of Proof

In Nebraska, the burden is on plaintiff to prove a right to recover. Thelen v. J. C. Penney Co., 186 Neb. 53, 180 N.W.2d 693 (1970). In personal injury cases, the burden of proof is upon the plaintiff to sustain his claim by a preponderance of the evidence. Parrish v. Karl Kehm & Sons Contractors, 186 Neb. 252, 182 N.W.2d 422 (1970). In criminal cases, the burden of proof is on the State to prove beyond a reasonable doubt all of the material elements of the crime charged. State v. Kipf, 450 NW 2d. 397 (1990).

J. Can Regulations Establish Standard of Care:

No. A violation of a statute in Nebraska is not negligence per se, but only evidence of negligence. Krehnke v. Farmers Union Co-operative Ass’n., 199 Neb. 632, 643 (Neb. 1977).

II. DAMAGES

A. Damages Available

1. Actual damages
2. Costs of suit
3. If judgment be given for the plaintiff, he or she shall recover the damages which he or she shall have sustained.\(^\text{12}\)
4. Whenever damages are recoverable, the plaintiff may claim and recover any rate of damages to which he may be entitled for the cause of action established.\(^\text{13}\)

B. Does Pain and Suffering of Decedent/Resident Survive Death

Yes. An action does not abate by the death or other disability of a party, or by the transfer of any interest therein during its pendency, if the cause of action survives or continues. In the case of the death or other disability of a party, the court may

allow the action to continue by or against his or her representative or successor in interest. \(^\text{14}\)

C. **Attorney’s Fees Available:** Yes

### III. LEGISLATION AFFECTING STATUTE

A. **Pending:** None

B. **Anticipated:** None

I. Statutes Protecting Dependent Adults or Elders from Neglect or Abuse

If an older person or a vulnerable person suffers a personal injury or death that is caused by abuse or neglect or suffers a loss of money or property caused by exploitation, the person who caused the injury, death, or loss is liable to the older person or vulnerable person for two times the actual damages incurred by the older person or vulnerable person. *Nev. Rev. Stat. 41.1395(1)*

A. Conduct

1. **Neglect:** The failure of a person who has assumed legal responsibility or a contractual obligation for caring for an older person or a vulnerable person, or who has voluntarily assumed responsibility for such a person’s care, to provide food, shelter, clothing or services within the scope of the person’s responsibility or obligation, which are necessary to maintain the physical or mental health of the older person or vulnerable person. A person voluntarily assumes responsibility to provide care for an older person only to the extent that the person has expressly acknowledged the person’s responsibility to provide such care. *Nev. Rev. Stat. 41.1395(4)(c)*

2. **Abuse:** Willful and unjustified:
   
   a. Infliction of pain, injury, or mental anguish; or
   
   b. Deprivation of food, shelter, clothing, or services which are necessary to maintain the physical or mental health of an older person or a vulnerable person. *Nev. Rev. Stat. 41.1395(4)(a)(1)-(2)*

3. **Exploitation:** Any act taken by a person who has the trust and confidence of an older person or a vulnerable person or any use of the power of attorney or guardianship of an older person or a vulnerable person to:

   a. Obtain control, through deception, intimidation, or undue influence, over the money, assets, or property of the older person or vulnerable person of the ownership, use, benefit or possession of that person’s money, assets, or property; or
b. Convert money, assets, or property of the older person with the intention of permanently depriving the older person or vulnerable person of the ownership, use, benefit, or possession of that person’s money, assets, or property.

c. “Undue influence” does not include the normal influence that one member of a family has over another.  
   *Nev. Rev. Stat.* 41.1395(b)(1)-(2)

B. Persons Protected

1. **Older Person**: a person who is 60 years of age or older.  
   *Nev. Rev. Stat.* 41.1395(4)(d)

2. **Vulnerable Person – Types of Impairment**

   a. Has a physical or mental impairment that substantially limits one or more of the major life activities of the person; and

   b. Has a medical or psychological record of the impairment or is otherwise regarded as having the impairment.

   c. The term includes, without limitation, a person who has an intellectual disability, a person who has a severe learning disability, a person who suffers from a severe mental or emotional illness or a person who suffers from a terminal or catastrophic illness or injury.  
   *Nev. Rev. Stat.* 41.1395(4)(e)(1)-(2)

C. Persons/Entities Excluded from Statute

1. A person who caused injury, death, or loss to a vulnerable person if the person did not know or have reason to know that the harmed person was a vulnerable person.  
   *Nev. Rev. Stat.* 41.1395(3)

D. Reporting Requirement for Litigation

1. There is no requirement that a person serve notice and a copy of the Summons and Complaint to the state at or before the time of filing the civil action.

E. Preclusion of Arbitration

1. Arbitration is not precluded in elder abuse cases.  
   *See, e.g.*, Manor Health Care Center, Inc. v. Monsour (Nev. 2010) 2013 WL 3341726 (affirming
arbitrator’s award of damages in an elder abuse case against a health care center).

F. Criminal Provision

1. **Abuse/Isolation**: Any person who abuses or isolates an older person or vulnerable person for the first time is guilty of a gross misdemeanor. For any subsequent offense, or if the person has been convicted in another jurisdiction for the same or similar conduct, the person is guilty of a Category B felony. *Nev. Rev. Stat. 200.5099(1)(a)-(b); 200.5099(6)*

2. **Neglect**: Any person who assumes responsibility, legally, voluntarily, or pursuant to a contract, to care for an older person or a vulnerable person, and who neglects the older person or vulnerable person to suffer physical pain or mental suffering, permit or allows the older person or vulnerable person to suffer unjustifiable physical pain or mental suffering, or permits or allows the older person or vulnerable person to be placed in a situation where the older person or vulnerable person may suffer physical pain or mental suffering as a result of abuse or neglect, is guilty of a gross misdemeanor unless a more severe penalty is prescribed by law for the act or omission which brings about the abuse. *Nev. Rev. Stat. 200.5099(2)(a)-(c)*

   a. To permit means permission that a reasonable person would not grant and which amounts to a neglect of responsibility attending the care and custody of an older person or a vulnerable person. *Nev. Rev. Stat. 200-5099(9)(b)*

   b. To allow means to take no action to prevent or stop the abuse or neglect of an older person or a vulnerable person if the person knows or has reason to know that the older person or vulnerable person is being abused or neglected. *Nev. Rev. Stat. 200-5099(9)(a)*

3. **Exploitation**: The severity of the punishment for exploitation depends upon the value of the money, assets, or property obtained. *Nev. Rev. Stat. 200-5099(3)(a)-(c).*

G. **Statute of Limitations**: Two Years *Nev. Rev. Stat. 11.190(4)(e).*


I. **Can Regulations Establish Standard of Care?**

   1. Most likely. Nevada courts have consistently held that a violation of a statute constitutes “negligence per se if the injured party belongs to the
class of persons that the statute was intended to protect, and the injury suffered is the type the statute intended to protect, and the injury suffered is of the type the statute was intended to prevent. *Vega v. Eastern Courtyard Associates* (Nev. 2001) 117 Nev. 436, 440.

II. Damages

A. Damages Available

1. Actual Damages
2. Special Damages
3. Punitive Damages
4. Injunctive Relief
5. Costs of Suit

B. Does Pain and Suffering of Decedent Survive Death? YES

1. When a person who has a cause of action dies before judgment, the damages recoverable by the decedent’s executor or administrator include all losses or damages which the decedent incurred or sustained before the decedent’s death, including . . . damages for pain and suffering. *Nev. Rev. Stat. 41.100(3)*

C. Attorneys’ Fees Available: YES

1. **Limitation:** Upon a showing by a preponderance of the evidence that the person who is liable for damages acted with recklessness, oppression, fraud, or malice, the court shall order the person to pay the attorneys’ fees and costs of the person who initiated the lawsuit. *Nev. Rev. Stat. 41.1395(2)*

III. Legislation Affecting Statute

A. Pending: None

B. Anticipated: None
I. Residential Care and Health Facility Licensing, Patient’s Bill of Rights: *New Hampshire Revised Statutes Annotated (RSA) 151:19 – 151:30*

A. Conduct

1. Any Violation

   (a) “Any person aggrieved by a facility's failure to abide by the provisions of this subdivision may seek equitable relief from the superior court, which shall have original jurisdiction over all proceedings under this subdivision.” *RSA 151:30, I*

2. Abuse, specifically

   (a) “A facility licensee, administrator or employee shall not willfully physically or mentally abuse, mistreat or harmfully neglect or deprive a patient.” *RSA 151:27*

3. Rights and Responsibilities of the Patients, *RSA 151:21, I-XXI*

   (a) *Examples*:  

      Right to family visitation;  

      Freedom to use personal clothing and possessions as space allows;  

      Freedom from emotional, physical and/or sexual abuse;  

      Freedom from chemical or physical restraints, except when authorized by physician or in emergency situations;  

      Patient shall not be required to perform services for the facility;

---

1 Not an exclusive list
Patient shall be entitled to be treated by physician of his/her choice.

C. Persons/Entities Excluded From Statute

1. **RSA 151:13-a** provides a privilege to hospitals for the “records”\(^2\) used in committee meetings for internal evaluation of patient care and treatment as well as committees with the focus of reducing morbidity and mortality (i.e. quality assurance duties). However, this privilege does not prevent such information from being discoverable, so long as it is done from original sources, outside of the scope of the quality assurance committee meeting records.

**RSA 151:13-a, IV,** provides immunity for any employee or committee member from damages or other relief arising from providing information to a hospital committee or in any judicial or administrative committee.

This immunity from suit appears to be qualified, in that the testimony and information provided cannot be the basis for a cause of action under the Patients’ Bill of Rights. However, a person’s conduct that is part of his/her information provided may still be the basis for a cause of action.

F. Relationship to Other Causes of Action

A cause of action, for violation of the Patients’ Bill of Rights, must be specifically sought. A violation of the Act, by a defendant, will not result in liability unless the alleged violation was a part of the pleadings. *See Smith v. HCA Health Servs. of N.H.*, 159 N.H. 158, 162, 977 A.2d 534, 538 (N.H. 2009)

Also, a violation of the statute cannot be used to circumvent evidentiary requirements of other causes of action, by attempting to establish a duty of care for a different cause of action. *Id.*

G. Criminal Provision

“All person who violates the provisions of paragraph I of this section [Abuse, see I A.2 above] shall be guilty of a *misdemeanor for the first offense* or guilty of a *class B felony if serious bodily injury results.*

For a subsequent offense, a natural person shall be guilty of a *class B felony* or *guilty of a class A felony if serious bodily injury results,* or guilty of a felony if any other person.” **RSA 151:27, II** [emphasis added].\(^3\)

H. Statute of Limitations: Three Years– **RSA 508:4**\(^4\)

---

\(^2\) Defined in the statute

\(^3\) Only applies to RSA 151:27, Abuse of Facility Patients
I. Burden of Proof: Unknown, no reported cases and nothing in statute.

J. Can Regulations Establish Standard of Care:

No. “The [Patients’] Bill of Rights does not, however, purport to be a device to regulate professional due care in providing treatment” In re "k", 132 N.H. 4, 16 (N.H. 1989) See also Smith v. HCA Health Servs. of N.H., 159 N.H. 158, 977 A.2d 534 (N.H. 2009).

II. DAMAGES

A. Damages Available

1. $50 per violation, per day or for part of day OR

2. All damages proximately caused by the violations, whichever is greater. RSA 151:30, II

B. Attorney’s Fees Available: Yes.

But only if “a facility is found to be in contempt of a court order issued under this section” RSA 151:30, II

III. LEGISLATION AFFECTING STATUTE

A. Pending: Yes, amendment to current law. See 2013 Bill Text NH S.B. 87, (Home Health Care Clients’ Bill of Rights)

---

4 All personal injuries, except slander and libel, unless provided for by law. There was nothing within the Patients’ Bill of Rights (specifically RSA 151:30) that indicated a different statute of limitations.
NEW JERSEY

William J. Decaire, Esq.
CARTER, CONBOY, CASE, BLACKMORE, MALONEY, & LAIRD, P.C.
20 Corporate Woods Blvd
Albany, NY 12211-2362
Phone: (518) 465-3484
Fax: (518) 465-1843
E-Mail: wdecaire@carterconboy.com

I. New Jersey Nursing Home Responsibilities and Rights of Residents Act, N.J.S.A. 30:13-1 to 30:13-17 (known as the” Nursing Home Bill of Rights”)


1. A person shall have a cause of action against the nursing home for any violation of this act. N.J. Stat. § 30:13-4.2

2. “Any person or resident whose rights as defined herein are violated shall have a cause of action against any person committing such violation.” N.J. Stat. § 30:13-8(a)

B. Legal Requirements to Bring Suit

1. Standing: In order to bring a cause of action under this law, the plaintiff must be:

   1) A resident of a nursing home, as defined by the statute N.J. Stat. § 30:13-2(c) or

   2) A person asserting a resident’s rights in his/her stead, such as a legal guardian


2. Duty: Plaintiffs must establish that a duty is owed to them under the statute. Plaintiff must show that the defendant violated the statute by an act or failure to act. These include but are not limited to the “Rights” ² and “Responsibilities” ³ defined by the act and any other violation of

¹ (holding that a next-of-kin of a resident had no cause of action under the act, where they were not informed of a change in the patient’s medical condition, because purpose of the act is to advance the well-being of the patients)

² N.J. Stat. § 30:13-5 (examples: right to privacy, right to retain and use personal property, right to services of own physician, right to visitation, “not be deprived of any constitutional civil or legal right”)

³ N.J. Stat. § 30:13-3 (examples: responsibility for: maintaining records of funds, property and possessions of residents deposited at nursing home, admitting only as many residents as can adequately be given care, ensuring compliance with State and Federal statutes, rules and regulations)
requirements placed on nursing homes by State or Federal rule, regulation or statute.4

3. **Breach** – Plaintiff must show that this duty was breached by an act or failure to act on the part of the defendant.

C. **Persons/Entities Excluded From Statute**

1. *N.J. Stat. § 30:13-8* states that any resident whose rights have been violated may have a cause of action against “any person committing such violation”. Although the Nursing Home Bill of Rights deals with the responsibilities of nursing homes, anyone can participate and affect the violation of these rights and responsibilities. *See Brehm v. Pine Acres Nursing Home, Inc.*, 190 N.J. Super. 103, 462 A.2d 178, 1983 N.J. Super. LEXIS 878 (App.Div. 1983) (holding that a physician was liable for a violation of a resident’s rights under *N.J. Stat. § 30:13-6*).

2. **Exception:** “Any person who reports suspected abuse or exploitation pursuant to this section or who testifies in any administrative or judicial proceeding arising from such report or testimony shall have immunity from any civil or criminal liability on account of such report or testimony, unless such person has acted in bad faith or with malicious purpose.” *N.J. Stat. § 30:1A-3(e)* (Suspicion of abuse or exploitation of resident of residential health care facility).

D. **Criminal Statute**

1. “A person having a legal duty to care for or who has assumed continuing responsibility for the care of a person 60 years of age or older or a disabled adult,

2. “who abandons the elderly person or disabled adult or unreasonably neglects to do or fails to permit to be done any act necessary for the physical or mental health of the elderly person or disabled adult,”

3. “is guilty of a crime of the third degree. For purposes of this section ‘abandon’ means the willful desertion or forsaking of an elderly person or disabled adult.”

   *N.J. Stat. § 2C:24-8(a)* (numbers not part of statute)

E. **Preclusion of Arbitration**

Agreements to arbitrate in nursing home contracts are enforceable under the FAA (Federal Arbitration Act) because the FAA preempts any State law to the contrary, and it is necessary to enforce federal policy in favor of arbitration.

---

4 *N.J. Stat. § 30:13-3(h)*
F. Relationship to Other Causes of Action

Although this private right of action exists, from the present, reported case law, it appears that such a cause of action is sparingly maintained. However, it appears that plaintiffs make use of the rights and responsibilities conferred onto nursing homes via the statute to establish a duty of care in negligence actions under the common law. See Estate of Burnett v. Water's Edge Convalescent Ctr., 2008 N.J. Super. Unpub. LEXIS 2653, 2008 WL 2841155 (App.Div. July 25, 2008).

G. Statute of Limitations: Two Years

See Lawlor v. Cloverleaf Memorial Park, Inc., 56 N.J. 326, 266 A.2d 569, 1970 N.J. LEXIS 252 (N.J. 1970) (That statute provides that every action for injury to the person caused by the wrongful neglect of another "shall be commenced within 2 years next after the cause of any such action shall have accrued.").


I. Can Regulations Establish Standard of Care:

Yes. This cause of action is based upon statutorily created standards of care, including but not limited the “Rights” and “Responsibilities” outlined in N.J. Stat. § 30:13-3 and N.J. Stat. § 30:13-5.

II. DAMAGES,

A. Damages Available

1. Actual Damages
2. Punitive Damages
3. Attorney’s fees
4. Costs of the action


5. Treble damages,

---

5 Nothing in the statute nor in any of the cases cited thereto states the SOL for the cause of action under the statute.
(a) may be awarded to a plaintiff who prevails in a claim to enforce the provisions of *N.J. Stat. § 30:13-3.1* (provisions relating to Medicare, Medicaid) *N.J. Stat. § 30:13-8(b).*

III. LEGISLATION AFFECTING STATUTE

A. Pending: None

B. Anticipated: None
NEW MEXICO

Al Green, Esq.
BUTT, THORNTON & BAEHR, P.C.
4101 Indian School Road NE, Suite 300S
Albuquerque, New Mexico 87110
(505) 884-0777

I. CIVIL STATUTE PROTECTING DEPENDENT ADULTS OR ELDERS FROM NEGLECT OR ABUSE: NMSA 1978, §§ 27-7-14 through 27-7-31.

A. Conduct

1. **Neglect**: The failure of the caretaker of an adult to provide for the basic needs of the adult, such as clothing, food, shelter, supervision and care for the physical and mental health of that adult; "neglect" includes self-neglect. NMSA 1978, § 27-7-16(N) (1989).

2. **Abuse**:¹
   - (a) knowingly, intentionally or negligently and without justifiable cause inflicting physical pain, injury or mental anguish;
   - (b) the intentional deprivation by a caretaker or other person of services necessary to maintain the mental and physical health of an adult; or
   - (c) sexual abuse, including criminal sexual contact, incest and criminal sexual penetration.

3. **Exploitation**:² An unjust or improper use of an adult's money or property for another person's profit or advantage, pecuniary or otherwise. NMSA 1978, § 27-7-16(I) (1997).

B. Vulnerable Adults

1. **Incapacitated Adult**: Any adult with a mental, physical or developmental condition that substantially impairs the adult's ability to provide adequately for the adult's own care or protection. NMSA 1978, § 27-7-16(L) (1997).

C. Persons/Entities Excluded From Statute

1. **Immunity**: “Any person making a report pursuant to Section 27-7-30 NMSA 1978, testifying in any judicial proceeding arising from the report

¹ NMSA 1978, § 27-7-16(B) (2007).
² Exploitation will not be addressed in this compendium – instead, only the abuse and/or neglect portions of the statutes.
or participating in a required evaluation pursuant to the Adult Protective Services Act or any law enforcement officer carrying out his responsibilities under that act or any person providing records or information as required under that act shall be immune from civil or criminal liability on account of that report, testimony or participation, unless the person acted in bad faith or with a malicious purpose.” NMSA 1978, § 27-7-31 (1997).

D. Reporting Requirement for Litigation to State

Attorneys for the New Mexico Aging and Long-Term Services Department or the district attorney's office shall file all proceedings on behalf of a suspected victim of elder abuse or neglect under the Adult Protective Services Act. NMSA 1978, § 27-7-28 (1989).

E. Preclusion of Arbitration

None.

F. Relationship to Medical Malpractice actions

None.

G. Criminal Provisions

1. **Interference with Investigation:** Willful interference with a state investigation of adult abuse, neglect or exploitation is a misdemeanor. NMSA 1978, § 27-7-19(E) (2007).

2. **Voluntary Protective Services and Protective Placement:** Interference with the provision of protective services or protective placement to an adult who consents to receive those services is a misdemeanor. NMSA 1978, § 27-7-23(B) (2007).

3. **Involuntary Protective Services and Protective Placement:** Interference with the provision of involuntary protective services or protective placement to an adult is a misdemeanor. NMSA 1978, § 27-7-24(D) (2007).

4. **Confidentiality of Records:** Intentional and unlawful release or other unlawful use of information or records closed to the public pursuant to the Adult Protective Services Act is a misdemeanor. NMSA 1978, § 27-7-29(D) (2007).

5. **Duty to Report:** Failure or refusal to report elder abuse, or the obstructing or impeding of any investigation into elder abuse, is a misdemeanor. NMSA 1978, § 27-7-30(C) (2007).

H. **Statute of Limitations:** Statute Is Silent. Two possibilities:

2. **Unspecified Actions:** Four years. NMSA 1978, § 37-1-4 (1953).

I. **Burden of Proof:** Statute Is Silent.

J. **Can Regulations Establish Standard of Care:**

   **Unclear.** In New Mexico, to receive a negligence *per se* instruction, a party must meet a four-part test:

   (1) *There must be a statute which prescribes certain actions or defines a standard of conduct, either explicitly or implicitly,* (2) the defendant must violate the statute, (3) the plaintiff must be in the class of persons sought to be protected by the statute, and (4) the harm or injury to the plaintiff must generally be of the type the legislature through the statute sought to prevent.


II. **DAMAGES**

   A. **Damages Available**

      1. Actual Damages
      2. Special Damages
      3. Punitive Damages
      4. Injunctive Relief

   B. **Does Pain and Suffering of Decedent/Resident Survive Death:**

      **Yes.** Although New Mexico’s Adult Protective Services Act does not speak to the issue, the statutory beneficiaries of a wrongful death action may recover for the pain and suffering experienced by the decedent between the time of injury and death. UJI 13-1830 NMRA (2008).

   C. **Attorney’s Fees Available:** No.

III. **LEGISLATION AFFECTING STATUTE**

   A. **Pending:** None.

   B. **Anticipated:** None

A. Elements

1. “Deprivation of any right or benefit”

   (a) Definition “right or benefit”:

   (i) any right or benefit created or established for the well-being of the patient by the terms of any contract, by any state statute, code, rule or regulation or by any applicable federal statute, code, rule or regulation.

   (ii) where noncompliance by said facility with such statute, code, rule or regulation has not been expressly authorized by the appropriate governmental authority. NY CLS Pub Health § 2801-d(1) (emphasis added).

Note: NY CLS Pub Health § 2803-c (3) provides a list of “rights and responsibilities” that must be contained in a statement to be posted in a public place in the facility and must also be given to patients and employees. However, because of some confusion within the case law, NY CLS Pub Health § 2801-d(4) was amended in 2009 to include the language “A violation of subdivision three of section twenty-eight hundred three-c (§ 23803-c) of this article is not a prerequisite for a claim under this section.” Contra, Begandy v. Richardson, 134 Misc. 2d 357, 510 N.Y.S.2d 984, (N.Y. Sup. Ct. 1987).

2. Injury:

   (a) Definition: For the purposes of this section, "injury" shall include, but not be limited to:

   (i) physical harm to a patient;

---

1 NY CLS Pub Health § 2803-c (1),(4)-(5).
(ii) emotional harm to a patient;
(iii) death of patient;
(iv) financial loss of patient.

NY CLS Pub Health § 2801-d(1)

B. Persons/Entities Excluded From Statute

(1) Any person who reports an incident of abuse, mistreatment or neglect pursuant to NY CLS Pub Health § 2803-d, is immune from any liability, civil or criminal, for having made such report. However, if a report has been filed, there is nothing to stop the patient from filing suit against the residential home for the same conduct.

C. Class Action

Patients may collectively bring claims under this article, in the form of a class action, pursuant to NYS CLS CPLR Article 9.

D. Relationship to Other Causes of Action

Although there is conflicting case-law from various departments, the more recent cases hold that NY CLS Pub Health § 2801-d is a separate and distinct cause of action from negligence and medical malpractice. Earlier cases held that a cause of action under §2801-d could only be maintained when a cause of action in tort was unavailable under the facts. However the issue has never come to the Court of Appeals, so the Goldberg ruling has never been affirmatively overturned, but the more recent case law appears to prevail.

E. Statute of Limitations: Three Years


2 NY CLS Pub Health § 2803-d is a reporting statute that requires operators and employees of residential health care facilities to report incidents of abuse, mistreatment and neglect. If someone makes such a report, it is believed that they cannot be held liable if the conduct contained in said report is then used by the patient to form a cause of action under NY CLS Pub Health § 2801-d.

3 NY CLS Pub Health § 2801-d(2).


F. Burden of Proof:

(1) The Plaintiff must make a prima facie showing of a deprivation of a right or benefit.

(2) Once achieved, the burden of proof shifts to the defendant facility to prove as an affirmative defense that the facility “exercised all care reasonably necessary to prevent and limit the deprivation and injury of which liability is asserted.”


G. Can Regulations Establish Standard of Care:

Yes. This cause of action is based upon statutorily created standards of care, including but not limited to the requirements outlined in _NY CLS Pub Health § 2803-c. NY CLS Pub Health § 2801-d(2)_ defines “right or benefit” as those create by contract, statute, code rule or regulation.

II. DAMAGES, _See NY CLS Pub Health §2801-d(2), (3)_

A. Damages Available

1. Compensatory, with a minimum$^6$

2. Punitive Damages, where the deprivation of any such right or benefit is found to be willful or reckless$^7$

3. Any other type of relief, including injunctive and declaratory relief, permitted by law.$^8$

B. Attorney’s Fees Available: Yes.

1. Upon the discretion of the court. _NY CLS Pub Health § 2801-d(6)_

III. LEGISLATION AFFECTING STATUTE


a. amending _NY CLS Pub Health § 2801-d(4)_ and creation of “§2801-d(4a)”, to affirmatively allow legal representatives and estate administrators to assert claims under this section.

---

$^6$ “…in no event less than twenty-five percent of the daily per-patient rate of payment established for the residential health care facility under section twenty-eight hundred seven of this article or, in the case of a residential health care facility not having such an established rate, the average daily total charges per patient for said facility, for each day that such injury exists.” _NY CLS Pub Health §2801-d(2)_

$^7$ _NY CLS Pub Health §2801-d(2)._

$^8$ _NY CLS Pub Health §2801-d(3)._
I. CIVIL STATUTE PROTECTING DEPENDENT ADULTS OR ELDERS FROM NEGLECT, ABUSE OR EXPLOITATION

A. Conduct

(1) **Neglect:** The failure of a caregiver to provide essential services necessary to maintain the physical and mental health of a vulnerable adult, or the inability or lack of desire of the vulnerable adult to provide essential services necessary to maintain or safeguard the vulnerable adult’s own physical and mental health. *NDCC §50-25.2-01(11)*

(a) **Essential Services:** Those services necessary to maintain and safeguard the physical and mental health of a vulnerable adult which include sufficient and appropriate food and clothing, temperate and sanitary shelter, treatment for mental or physical needs, appropriate treatment for medical needs as determined by a physician or other health care provider, and proper supervision. *NDCC §50-25.2-01(6)*

(2) **Abuse:** Any willful act or omission of a caregiver or any other person which results in physical injury, mental anguish, unreasonable confinement, sexual abuse or exploitation, or financial exploitation to or of a vulnerable adult. *NDCC §50-25.2-01(1)*

(a) **Physical Injury:** Damage to bodily tissue caused by nontherapeutic conduct, which includes fractures, bruises, lacerations, internal injuries, dislocations, physical pain, illness, or impairment of physical function. *NDCC §50-25.2-01(12)*

(b) **Mental Anguish:** Psychological or emotional damage that requires medical treatment or care or is characterized by behavioral change or physical symptoms. *NDCC §50-25.2-01(10)*

(3) **Exploitation:** The taking or misuse of property or resources of a vulnerable adult by means of undue influence, breach of a fiduciary relationship, deception, harassment, criminal coercion, theft, or other unlawful or improper means. *NDCC §50-25.2-01(7)*

II. CRIMINAL STATUTE PROTECTING DEPENDENT ADULTS OR ELDERS FROM NEGLECT, ABUSE OR EXPLOITATION
A. Conduct

A caregiver who knowingly performs an act that causes a disabled adult’s or vulnerable elderly adult’s life to be endangered, health to be injured, or preexisting physical or mental condition to deteriorate, or a caregiver who fails to perform acts that the caregiver knows are necessary to maintain or preserve the life or health of the disabled adult or vulnerable elderly adult and the failure causes the disabled adult’s or vulnerable elderly adult’s life to be endangered, health to be injured, or preexisting physical or mental condition to deteriorate, is guilty of a class B felony. *NDCC §12.1-31-07(1)*

(1) **Disabled Adult:** A person eighteen years of age or older who suffers from a condition of physical or mental incapacitation due to a developmental disability or organic brain damage or mental illness or who has one or more physical or mental limitations that restrict the person’s ability to perform the normal activities of daily living. *NDCC §12.1-31-07(1)(b)*

(2) **Vulnerable Elderly Adult:** A person sixty years of age or older who is suffering from a disease or infirmity associated with advanced age and manifested by physical, mental, or emotional dysfunctioning to the extent that the person is incapable of adequately providing for the person’s own health or personal care. *NDCC §12.1-31-07(1)(c)*

B. Applicability

A caregiver is a person who is responsible for the care of a disabled adult or vulnerable elderly adult as a result of a familiar or legal relationship, or a person who has assumed responsibility for the care of a disabled adult or vulnerable elderly adult. The term does not include a licensed health care provider who is acting within the provider’s legal scope of practice in providing appropriate care or assistance to a disabled adult or vulnerable elderly adult who is the patient or client of the licensed health care provider. *NDCC §12.1-31-07(1)(a)*

C. Exploitation¹

A person is guilty of exploitation of a disabled adult or vulnerable elderly adult if:

(a) The person stands in a position of trust and confidence or has a business relationship with the disabled adult or vulnerable elderly adult and knowingly, by deception or intimidation, obtains or uses, or attempts to obtain or use, the disabled adult’s or vulnerable elderly adult’s funds, assets, or property with the intent to temporarily or permanently deprive the disabled adult or vulnerable elderly adult of the use, benefit, or possession of the

¹ *NDCC §12.1–31–07.1*
property, for the benefit of someone other than the disabled adult or vulnerable elderly adult; or

(b) The person knows that the disabled adult or vulnerable elderly adult lacks the capacity to consent, and obtains or uses, or attempts to obtain or use, or assists another in obtaining or using or attempting to obtain or use, the disabled adult’s or vulnerable elderly adult’s funds, assets, or property with the intent to temporarily or permanently deprive the disabled adult or vulnerable elderly adult of the use, benefit, or possession of the property for the benefit of someone other than the disabled adult or vulnerable elderly adult.

1. **Criminal Penalties:** Exploitation of a disabled adult or vulnerable elderly adult is:

   (a) A class A felony if the value of the exploited funds, assets, or property exceeds one hundred thousand dollars.

   (b) A class B felony if the value of the exploited funds, assets, or property exceeds twenty thousand dollars but does not exceed one hundred thousand dollars.

   (c) A class C felony if the value of the exploited funds, assets, or property is in excess of one thousand dollars but does not exceed twenty thousand dollars.

2. **Defenses:** It is not a defense to a prosecution of a violation of this section that the accused did not know the age of the victim.

3. **Applicability:** This section does not impose criminal liability on a person who has:

   (a) Managed the disabled adult’s or vulnerable elderly adult’s funds, assets, or property in a manner that clearly gives primacy to the needs and welfare of that person or is consistent with any explicit written authorization; or

   (b) Made a good-faith effort to assist in the management of the disabled adult’s or vulnerable elderly adult’s funds, assets, or property.

D. **Length of Proceedings**

In a criminal proceeding in which a disabled adult or vulnerable elderly adult is a victim, the court and state’s attorney shall take appropriate action to ensure a speedy trial to minimize the length of time the disabled adult or vulnerable elderly adult must endure the stress of involvement in the proceedings. In ruling on any motion or other request for a delay or a continuance of proceedings, the court
shall consider and give weight to any adverse impact the delay or continuance may have on the well-being of the disabled adult or vulnerable elderly adult.

**NDCC §12.1-31-07.2**

### III. LEGISLATION AFFECTING CRIMINAL STATUTE

#### A. Criminal Penalties:

Exploitation of a disabled adult or vulnerable elderly adult is:

a. A class A felony if the value of the exploited funds, assets, or property exceeds fifty thousand dollars.

b. A class B felony if the value of the exploited funds, assets, or property exceeds ten thousand dollars but does not exceed fifty thousand dollars.

c. A class C felony if the value of the exploited funds, assets, or property is in excess of one thousand dollars but does not exceed ten thousand dollars.

d. A class A misdemeanor if the value of the exploited funds, assets, or property does not exceed one thousand dollars.

---

I. CIVIL STATUTE PROTECTING DEPENDENT ADULTS OR ELDERS FROM NEGLECT, ABUSE OR EXPLOITATION

A. Conduct

(1) **Neglect**: The failure of a caregiver to provide essential services necessary to maintain the physical and mental health of a vulnerable adult, or the inability or lack of desire of the vulnerable adult to provide essential services necessary to maintain or safeguard the vulnerable adult’s own physical and mental health. *NDCC §50-25.2-01(11)*

(a) **Essential Services**: Those services necessary to maintain and safeguard the physical and mental health of a vulnerable adult which include sufficient and appropriate food and clothing, temperate and sanitary shelter, treatment for mental or physical needs, appropriate treatment for medical needs as determined by a physician or other health care provider, and proper supervision. *NDCC §50-25.2-01(6)*

(2) **Abuse**: Any willful act or omission of a caregiver or any other person which results in physical injury, mental anguish, unreasonable confinement, sexual abuse or exploitation, or financial exploitation to or of a vulnerable adult. *NDCC §50-25.2-01(1)*

(a) **Physical Injury**: Damage to bodily tissue caused by nontherapeutic conduct, which includes fractures, bruises, lacerations, internal injuries, dislocations, physical pain, illness, or impairment of physical function. *NDCC §50-25.2-01(12)*

(b) **Mental Anguish**: Psychological or emotional damage that requires medical treatment or care or is characterized by behavioral change or physical symptoms. *NDCC §50-25.2-01(10)*

(3) **Exploitation**: The taking or misuse of property or resources of a vulnerable adult by means of undue influence, breach of a fiduciary relationship, deception, harassment, criminal coercion, theft, or other unlawful of improper means. *NDCC §50-25.2-01(7)*

II. CRIMINAL STATUTE PROTECTING DEPENDENT ADULTS OR ELDERS FROM NEGLECT, ABUSE OR EXPLOITATION
A. Conduct

A caregiver who knowingly performs an act that causes a disabled adult’s or vulnerable elderly adult’s life to be endangered, health to be injured, or preexisting physical or mental condition to deteriorate, or a caregiver who fails to perform acts that the caregiver knows are necessary to maintain or preserve the life or health of the disabled adult or vulnerable elderly adult and the failure causes the disabled adult’s or vulnerable elderly adult’s life to be endangered, health to be injured, or preexisting physical or mental condition to deteriorate, is guilty of a class B felony. *NDCC §12.1-31-07(1)*

(1) **Disabled Adult:** A person eighteen years of age or older who suffers from a condition of physical or mental incapacitation due to a developmental disability or organic brain damage or mental illness or who has one or more physical or mental limitations that restrict the person’s ability to perform the normal activities of daily living. *NDCC §12.1-31-07(1)(b)*

(2) **Vulnerable Elderly Adult:** A person sixty years of age or older who is suffering from a disease or infirmity associated with advanced age and manifested by physical, mental, or emotional dysfunctioning to the extent that the person is incapable of adequately providing for the person’s own health or personal care. *NDCC §12.1-31-07(1)(c)*

B. Applicability

A caregiver is a person who is responsible for the care of a disabled adult or vulnerable elderly adult as a result of a familiar or legal relationship, or a person who has assumed responsibility for the care of a disabled adult or vulnerable elderly adult. The term does not include a licensed health care provider who is acting within the provider’s legal scope of practice in providing appropriate care or assistance to a disabled adult or vulnerable elderly adult who is the patient or client of the licensed health care provider. *NDCC §12.1-31-07(1)(a)*

C. Exploitation1

A person is guilty of exploitation of a disabled adult or vulnerable elderly adult if:

(a) The person stands in a position of trust and confidence or has a business relationship with the disabled adult or vulnerable elderly adult and knowingly, by deception or intimidation, obtains or uses, or attempts to obtain or use, the disabled adult’s or vulnerable elderly adult’s funds, assets, or property with the intent to temporarily or permanently deprive the disabled adult or vulnerable elderly adult of the use, benefit, or possession of the

---

1 *NDCC §12.1–31–07.1*
property, for the benefit of someone other than the disabled adult or vulnerable elderly adult; or

(b) The person knows that the disabled adult or vulnerable elderly adult lacks the capacity to consent, and obtains or uses, or attempts to obtain or use, or assists another in obtaining or using or attempting to obtain or use, the disabled adult’s or vulnerable elderly adult’s funds, assets, or property with the intent to temporarily or permanently deprive the disabled adult or vulnerable elderly adult of the use, benefit, or possession of the property for the benefit of someone other than the disabled adult or vulnerable elderly adult.

1. **Criminal Penalties:** Exploitation of a disabled adult or vulnerable elderly adult is:
   
   (a) A class A felony if the value of the exploited funds, assets, or property exceeds one hundred thousand dollars.

   (b) A class B felony if the value of the exploited funds, assets, or property exceeds twenty thousand dollars but does not exceed one hundred thousand dollars.

   (c) A class C felony if the value of the exploited funds, assets, or property is in excess of one thousand dollars but does not exceed twenty thousand dollars.

2. **Defenses:** It is not a defense to a prosecution of a violation of this section that the accused did not know the age of the victim.

3. **Applicability:** This section does not impose criminal liability on a person who has:

   (a) Managed the disabled adult’s or vulnerable elderly adult’s funds, assets, or property in a manner that clearly gives primacy to the needs and welfare of that person or is consistent with any explicit written authorization; or

   (b) Made a good-faith effort to assist in the management of the disabled adult’s or vulnerable elderly adult’s funds, assets, or property.

D. **Length of Proceedings**

   In a criminal proceeding in which a disabled adult or vulnerable elderly adult is a victim, the court and state’s attorney shall take appropriate action to ensure a speedy trial to minimize the length of time the disabled adult or vulnerable elderly adult must endure the stress of involvement in the proceedings. In ruling on any motion or other request for a delay or a continuance of proceedings, the court
shall consider and give weight to any adverse impact the delay or continuance may have on the well-being of the disabled adult or vulnerable elderly adult.

NDCC §12.1-31-07.2

III. LEGISLATION AFFECTING CRIMINAL STATUTE

A. Criminal Penalties: Exploitation of a disabled adult or vulnerable elderly adult is:
   a. A class A felony if the value of the exploited funds, assets, or property exceeds fifty thousand dollars.
   b. A class B felony if the value of the exploited funds, assets, or property exceeds ten thousand dollars but does not exceed fifty thousand dollars.
   c. A class C felony if the value of the exploited funds, assets, or property is in excess of one thousand dollars but does not exceed ten thousand dollars.
   d. A class A misdemeanor if the value of the exploited funds, assets, or property does not exceed one thousand dollars.

---

I. Civil Statute Protecting Dependent Adults or Elders from Neglect or Abuse:

Ohio Revised Code 3721.10, et seq. (providing a civil remedy for violations of Ohio’s Nursing Home Residents’ Bill of Rights)

A. Conduct

1. Any resident whose rights under the Nursing Home Residents’ Bill of Rights are violated has a cause of action against any person or home committing the violation.\(^1\) The residents’ rights include, but are not limited to, the following\(^2\):

   (a) The right to a safe and clean living environment

   (b) The right to be free from physical, verbal, mental, and emotional abuse and to be treated at all times with courtesy, respect, and full recognition of dignity and individuality

   (c) The right to adequate and appropriate medical treatment and nursing care

   (d) The right to have all reasonable requests and inquiries responded to promptly

   (e) The right to have clothes and bed sheets changed

   (f) The right to be free from physical or chemical restraints or prolonged isolation except to the minimum extent necessary to protect the resident from injury to self, others, or to property and except as authorized in writing by the attending physician for a specified and limited period of time and documented in the resident’s medical record

---

\(^1\) R.C. 3721.17(I)(1)(a).
\(^2\) R.C. 3721.13(A)(1)-(5), (13), (27)(a). This statute includes 32 subsections which outline nursing home residents’ rights. Only the most relevant are included here.
(g) The right to be free from financial exploitation

B. Nursing Home Residents

1. Resident: A resident or a patient of a home.

2. Home: Means all of the following:
   (a) An institution, residence, or facility that provides, for a period of more than twenty-four hours, whether for a consideration or not, accommodations to three or more unrelated individuals who are dependent upon the services of others, including a nursing home, residential care facility, home for the aging, and a veterans' home.
   (b) Any facility or part of a facility that does not meet the definition above that is certified:
      (i) As a skilled nursing facility under Title XVIII of the "Social Security Act;" or
      (ii) As a nursing facility as defined in section 5111.20 of the Revised Code;
   (c) A county home or district home operated pursuant to Chapter 5155 of the Revised Code.

3. Civil action for a violation of a resident’s rights may be brought by:
   (a) A resident; or
   (b) A resident’s sponsor: An adult relative, friend, or guardian of a resident who has an interest or responsibility in the resident's welfare.

C. Persons/Entities Excluded From Statute

1. Employees of a County Nursing Home
   (a) Unless an employee was manifestly outside the scope of the employee's employment or official responsibilities or the

---

3 Exploitation will not be addressed in this compendium – instead, only the abuse and/or neglect portion of the statutes.
4 R.C. 3721.01; 3721.10(A, (B).
6 “A facility or a distinct part of a facility that is certified as a nursing facility by the director of health in accordance with Title XIX and is not an intermediate care facility for the mentally retarded. "Nursing facility" includes a facility, or a distinct part of a facility, that is certified as a nursing facility by the director of health in accordance with Title XIX and is certified as a skilled nursing facility by the director in accordance with Title XVIII.” R.C. 5111.20.
7 R.C. 3721.10(D); 3721.17(I)(1).
employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner, employees of a county nursing home are immune from liability. See *Cramer v. Auglaize Acres*, 113 Ohio St. 3d 266, 2007-Ohio-1946, 865 N.E.2d 9, ¶ 32 (citing R.C. 2744.03(A)(6)) (stating that “R.C. 3721.17(I)(1) does not expressly impose liability on the employees of the county nursing home” within the meaning of the immunity statute.)

D. Reporting Requirement for Litigation to State

Plaintiff must notify the department of job and family services within thirty days after the filing of a complaint if the department has a right of recovery against the liability of the home for the cost of medical services and care arising out of injury, disease, or disability of the resident. *R.C. 3721.17(I)(1)(e)(4).*

E. Preclusion of Arbitration

Arbitration is not precluded.

1. An arbitration agreement is not rendered procedurally unconscionable solely by virtue of the resident's age. *Hayes v. Oakridge Home*, 122 Ohio St. 3d 63, 2009-Ohio-2054, 908 N.E.2d 408, paragraph one of the syllabus.

2. “An arbitration agreement voluntarily executed by a nursing-home resident and not as a precondition to admission that waives the right to trial and the right to seek punitive damages and attorney fees is not substantively unconscionable.” *Hayes v. Oakridge Home*, 122 Ohio St. 3d 63, 2009-Ohio-2054, 908 N.E.2d 408, paragraph two of the syllabus.

F. Relationship to Medical Malpractice actions


No person who owns, operates, or administers, or who is an agent or employee of, a care facility shall do any of the following:

1. Commit abuse against a resident or patient of the facility;

---

8 However, “Former R.C. 3721.17(I)(1) specifically abrogates governmental immunity and grants a cause of action to residents of unlicensed county nursing homes against a political subdivision for violations of the Ohio Nursing Home Patients’ Bill of Rights.” *Cramer v. Auglaize Acres*, 113 Ohio St. 3d 266, 2007-Ohio-1946, 865 N.E.2d 9, syllabus.
(a) **Abuse:** Knowingly causing physical harm or recklessly causing serious physical harm to a person by physical contact with the person or by the inappropriate use of a physical or chemical restraint, medication, or isolation on the person.

(b) A violator of this provision is guilty of patient abuse, a fourth degree felony.

2. Commit gross neglect against a resident or patient of the facility;

   (a) **Gross neglect:** Knowingly failing to provide a person with any treatment, care, goods, or service that is necessary to maintain the health or safety of the person when the failure results in physical harm or serious physical harm to the person.

   (b) A violator of this provision is guilty of gross patient neglect, a first degree misdemeanor.

3. Commit neglect against a resident or patient of the facility.

   (a) **Neglect:** Recklessly failing to provide a person with any treatment, care, goods, or service that is necessary to maintain the health or safety of the person when the failure results in serious physical harm to the person.

   (b) A violator of this provision is guilty of patient neglect, a second degree misdemeanor.

4. **Care facility:** Includes any “home” as defined in R.C. 3721.10.9

5. **Interplay with State Civil Statute**

   The statutes and case law do not specify.

### H. Statute of Limitations:

1. 1 year if based on a “medical claim.” *R.C. § 2305.113(A).*

   (a) **Medical Claim:** Any claim that is asserted in any civil action against a physician, podiatrist, hospital, home, or residential facility and that arises out of the medical diagnosis, care, or treatment of any person. *R.C. § 2305.113(E)(3); Estate of Stevic v. Bio-Medical Application of Ohio, Inc.*, 121 Ohio St.3d 488, 2009-Ohio-1525, 905 N.E.2d 635, ¶ 19.

   (b) Includes derivative claims for relief that arise from the medical diagnosis, care, or treatment of a person. *R.C. 2305.113(E)(3)(a).*

### I. Burden of Proof: Preponderance of the evidence – *R.C. 3721.17(I)(2)(a).*

---

9 *R.C. 2903.33.* The definition of “care facility” also includes other types of facilities.
J. Can Regulations Establish Standard of Care?

Yes. The director of the department of health may adopt, amend, and repeal substantive rules under Chapter 119 of the Revised Code defining with reasonable specificity acts that violate the Nursing Home Patients’ Bill of Rights. R.C. 3721.11(b).10

II. DAMAGES

A. Damages Available11:

1. Injunctive relief
2. Compensatory Damages
3. Punitive or Exemplary Damages
   (a) Punitive damages may not be awarded against a political subdivision (i.e. county-operated nursing home). See Cramer v. Auglaize Acres, 113 Ohio St. 3d 266, 2007-Ohio-1946, 865 N.E.2d 9, ¶31.

B. Does Pain and Suffering of Decedent/Resident Survive Death?

No. Residents' rights did not exist at common law, so a cause of action under the residents' rights statutes will survive the death of a resident if the cause of action is one for mesne profits, injuries to person or property, or deceit or fraud only. Richards v. Broadview Heights Harborside Healthcare, 150 Ohio App. 3d 537, 2002-Ohio-6491, 782 N.E.2d 609, ¶40 (8th Dist.) (citing R.C. § 2305.21).


1. If available, are the attorney’s fees limited?

   Yes. They may be granted in a case in which only injunctive relief is granted, and they are limited to the work reasonably performed.

III. LEGISLATION AFFECTING STATUTE

A. Pending: 2013 OH H.B. 59

1. Written notice of civil action must go to Medicaid, not the Department of Job and Family Services.

B. Anticipated: None.

---

10 Chapter 3701 of the Ohio Administrative Code contains such regulations.

11 R.C. 3721.17(I)(2).
IV. Civil Statute Imposing Duty to Report Neglect or Abuse of the Elderly: *Ohio Rev. Code § 5101.60*

A. **Neglect**: The failure of an adult to provide for self the goods or services necessary to avoid physical harm, mental anguish, or mental illness or the failure of a caretaker to provide such goods or services. *R.C. 5101.60(K).*

1. **Caretaker**: The person assuming the responsibility for the care of an adult on a voluntary basis, by contract, through receipt of payment for care, as a result of a family relationship, or by order of a court of competent jurisdiction. *R.C. 5101.60(C).*

B. **Abuse**: The infliction upon an adult by self or others of injury, unreasonable confinement, intimidation, or cruel punishment with resulting physical harm, pain, or mental anguish. *R.C. 5101.60(A).*

C. **Exploitation**: The unlawful or improper act of a caretaker using an adult or an adult's resources for monetary or personal benefit, profit, or gain. *R.C. 5101.60(G).*

D. **Adults for Whom There is a Statutory Duty to Report**:

1. Any person sixty years of age or older;
2. Within this state;
3. Who is handicapped by the infirmities of aging or who has a physical or mental impairment which prevents the person from providing for the person's own care or protection; and
4. Who resides in an independent living arrangement:
   (i) A domicile of a person's own choosing, including, but not limited to, a private home, apartment, trailer, or rooming house;
   (ii) Including a residential facility licensed under section 5119.22 of the Revised Code that provides accommodations, supervision, and personal care services for three to sixteen unrelated adults, but does not include other institutions or facilities licensed by the state or facilities in which a person resides as a result of voluntary, civil, or criminal commitment.

---

12 Exploitation will not be addressed in this compendium – instead, only the abuse and/or neglect portion of the statutes.
13 *R.C. 5101.60(B).*
E. **Persons required to report**\(^{14}\):

1. Any attorney, physician, osteopath, podiatrist, chiropractor, dentist, psychologist, any employee of a hospital,\(^{15}\) any nurse,\(^{16}\) any employee of an ambulatory health facility, any employee of a home health agency, any employee of a residential facility\(^{17}\) that provides accommodations, supervision, and personal care services for three to sixteen unrelated adults, any employee of a nursing home, residential care facility, or home for the aging,\(^{18}\) any senior service provider, any peace officer, coroner, member of the clergy, any employee of a community mental health facility, and any person engaged in social work or counseling;

2. Who has reasonable cause to believe that an adult is being abused, neglected, or exploited, or is in a condition which is the result of abuse, neglect, or exploitation

F. **Penalty:** Fine of not more than five hundred dollars. **R.C. 5101.99.**

---

\(^{14}\) *R.C. 5101.61.*

\(^{15}\) This section does not apply to employees of any hospital or public hospital as defined in section 5122.01 of the Revised Code (those that are licensed by or tax supported and under the jurisdiction of the department of mental health).

\(^{16}\) This section applies to nurses licensed under Chapter 4723 of the Revised Code.

\(^{17}\) This section applies to employees of residential facilities licensed under section 5119.22 of the Revised Code.

\(^{18}\) This section applies to homes for the aging as the term is defined in section 3721.01 of the Revised Code.
OKLAHOMA

Diane C. Fernald RN JD
MORRISON MAHONEY, LLP
1500 Main Street, Suite 2400
Springfield MA 01115

I. Civil Statute Protecting Dependent Adults or Elders from Neglect or Abuse: 
_Oklahoma Vulnerable Adults Act, 43A Oklahoma Statutes Annotated (O.S.A) § 10-101_

A. Conduct

1. Abuse\(^1\)
   
   (a) Defined as causing or permitting
      
      (i) The infliction of physical pain, injury, sexual abuse, sexual
          exploitation, unreasonable restraint or confinement, mental
          anguish, or
      
      (ii) The deprivation of nutrition, clothing, shelter, health care,
          or other care or services without which serious physical or mental
          injury is likely to occur to a vulnerable adult by a caretaker or
          other person providing services to a vulnerable adult.

2. Exploitation\(^2\)
   
   The unjust or improper use of the resources of a vulnerable adult for profit
   or advantage through the use of undue influence, coercion, harassment,
   duress, deception, false representation or false pretense.

3. Financial Neglect\(^3\)
   
   The repeated failure of a caretaker or other person who has assumed the
   financial management role for a vulnerable adult to use the resources
   available to them to restore or maintain the health of a vulnerable adult
   and ensure their well being.

4. Neglect\(^4\)
   
   (a) Definition
      
      (i) The failure to provide protection for a vulnerable adult who
          is unable to protect their own interests,

---

\(^1\) 43A O.S.A. § 10-103(8)
\(^2\) Id. § 10-103(9)
\(^3\) Id. § 10-103(10)
\(^4\) Id. § 10-103(11)
(ii) The failure to provide a vulnerable adult with adequate shelter, nutrition, health care, or clothing, or

(iii) Negligent acts or omissions that result in harm or the unreasonable risk of harm to a vulnerable adult through the action, inaction, or lack of supervision by a caretaker providing direct services.

5. Sexual abuse

(a) Definition

(i) The oral, anal, or vaginal penetration of a vulnerable adult or through the union with the sexual organ of a person providing services to the vulnerable adult,

(ii) The touching, feeling, or observation of the body or private parts of the vulnerable adult by a person providing services for sexual gratification, or

(iii) Indecent exposure by a person providing services to a vulnerable adult.

6. Indecent Exposure

Forcing a vulnerable adult to observe the body or private parts of another, watch sexual acts, or touch or feel the body or private parts of another.

7. Self Neglect

The act or omission of a vulnerable adult to take the necessary steps to meet the essential requirements for physical or mental health and safety.

8. Sexual Exploitation

A caretakers causing, permitting, or encouragement of a vulnerable adult to engage in prostitution or the lewd, obscene, pornographic photographing, filming, or depiction of the vulnerable adult.

9. Verbal Abuse

The use of words, sounds, or other communication by a person providing services to the vulnerable adult that are likely to cause a reasonable person to experience humiliation, fear, intimidation, shame, or degradation.

5 Id. § 10-103(12)
6 Id. § 10-103(13)
7 Id. § 10-103(14)
8 Id. § 10-103(15)
10. **Single Act and/or Pattern**

A single act or omission will qualify under the statute. See 43A O.S.A. § 10-103.

**B. Vulnerable Adult**

An individual who is an incapacitated person, or who, because of physical or mental disability, is substantially impaired in their ability to provide adequately for their own care, manage their property and finances, care for their mental and physical wellbeing, or to protect themselves from abuse without the help of others.

**C. Incapacitated Adult**

1. Any person over the age of eighteen who
   
   (i) Is impaired by a mental or physical illness or disability, dementia, mental retardation, developmental disability, or other cause, and
   
   (ii) Whose ability to evaluate and understand information and communicate is impaired to such an extent that the person lacks the capacity to care for their finances or their own well being without assistance from others.

**D. Persons/Entities Excluded From Statute**

Any person who in good faith makes or participates in a report of the abuse of a vulnerable adult shall have immunity from civil and criminal liability. This immunity is also applied to former employers of the negligent caretaker who have made past reports of the employee’s abuse in good faith.

**E. Reporting Requirement for Litigation to State**

Any person suspecting that a vulnerable adult has been subject to abuse, neglect, or exploitation shall make a report to either the Department of Human Services, the office of the district attorney of their county, or the local police or sheriff’s department. Persons who are required to make such a report are physicians, emergency response personnel, social workers and mental health professionals, law enforcement officials, staff of domestic abuse programs, and long term care facility staff. The report must contain the contact information of the vulnerable

---

9 Id. § 10-103(5)
10 Id. § 10-103(4)
11 Id. § 10-104(E)(2)
12 Id. § 10-104(A)(1)
13 Id. § 10-104(B)
adult and their caretaker, the vulnerable adult’s current condition, and the details of the alleged abuse, neglect, or exploitation.14

**F. Preclusion of Arbitration**

An arbitration decision has the same force and effect as a judgment of a court as long as the elements of preclusion are met. *Carris v. John R. Thomas and Associates, P.C.*, 896 P.2d 522. 527 (1995). The elements are:

1. An identity of the subject matter, of the parties or their privies, of the capacity of the parties and of the cause of action;

2. The court which heard the original action must have been one of competent jurisdiction; and

3. The judgment rendered must have been a judgment on the merits of the case and not upon purely technical grounds.

**G. Relationship to Medical Malpractice Actions**

Acts of medical malpractice against a vulnerable adult can also provide a basis for an action under the Oklahoma Vulnerable Adults Act. See 43A O.S.A. § 10-103.

**H. Criminal Provisions**

1. Any person who knowingly or willfully fails to promptly report the abuse, neglect, or exploitation of a vulnerable adult shall be guilty of a misdemeanor punishable by imprisonment not exceeding one year, a fine not more than $1,000, or both.15

2. Any person who engages in abuse, sexual abuse, or exploitation of a vulnerable adult shall be guilty of a felony. They shall be fined not more than $10,000, be imprisoned for not more than two years, or both.16

3. A caretaker or other person responsible for a vulnerable adult who purposefully, knowingly, or recklessly neglects the vulnerable adult shall be guilty of a felony. They shall be fined no more than $10,000, be imprisoned for not more than two years, or both.17

4. **Interplay with Civil Statute**

   The court will consider any provision of the Oklahoma Vulnerable Adult Act when the victim is elderly or incapacitated.18

---

14 Id. § 10-104(C)
15 Id. § 10-104(E)
16 21 Okl.St.Ann. § 843.3(A)
17 Id. § 843.3(B)
18 Id. § 843.3(C)
I. Statute of Limitations: Two Years – 12 O.S.A. § 95(3)


K. Can Regulations Establish Standard of Care?

Yes. Regulations can be used to establish the standard of care and support a negligence per se claim for their violation. *Howard v. Zimmer, Inc.*, 299 P.3d 463, 473 (2013).

II. DAMAGES

A. Damages Available

   (1) Actual Damages
   (2) Special Damages
   (3) Punitive Damages
   (4) Injunctive Relief
   (5) Costs of Suit

B. Does Pain and Suffering of Decedent/Resident Survive Death:

Yes. The personal representative of the decedent may maintain an action, and the pain and suffering endured by a decedent shall be distributed to their spouse, children, and kin.19

C. Attorney’s Fees Available: No.

III. LEGISLATION AFFECTING STATUTE

A. Pending: None

B. Anticipated: None

---

19 12 O.S.A. §§ 1053(A-B)
I. Civil Statute Protecting Dependent Adults or Elders from Neglect or Abuse: Oregon Revised Statutes Chapter 124

A. Conduct

(1) **Neglect:** Failure to provide the care, supervision or services necessary to maintain the physical and mental health of an elderly person that may result in physical harm or significant emotional harm to the elderly person; or the failure of a caregiver to make a reasonable effort to protect an elderly person from abuse.2

(2) **Abuse:**

(a) **Definition:**

(i) Any physical injury caused by other than accidental means, or that appears to be at variance with the explanation given of the injury;

(ii) Neglect that leads to physical harm through withholding of services necessary to maintain health and well-being;

(iii) Abandonment, including desertion or willful forsaking of an elderly person or a person with a disability or the withdrawal or neglect of duties and obligations owed an elderly person or a person with a disability by a caregiver or other person;

(iv) Willful infliction of physical pain or injury;

(v) Use of derogatory or inappropriate names, phrases or

---

1 Please note that authors are not licensed to practice in the State of Oregon.
profanity, ridicule, harassment, coercion, threats, cursing, intimidation or inappropriate sexual comments or conduct of such a nature as to threaten significant physical or emotional harm to the elderly person or person with a disability;

(vi) Causing any sweepstakes promotion to be mailed to an elderly person or a person with a disability who had received sweepstakes promotional material in the United States mail, spent more than $500 in the preceding year on any sweepstakes promotions, or any combination of sweepstakes promotions from the same service, regardless of the identities of the originators of the sweepstakes promotion and who represented to the court that the person felt the need for the court’s assistance to prevent the person from incurring further expense;

(vii) Wrongfully taking or appropriating money or property, or knowingly subjecting an elderly person or person with a disability to alarm by conveying a threat to wrongfully take or appropriate money or property, which threat reasonably would be expected to cause the elderly person or person with a disability to believe that the threat will be carried out; or

(viii) Sexual contact with a non-consenting elderly person or person with a disability or with an elderly person or person with a disability considered incapable of consenting to a sexual act. ³

(b) Single Act and/or Pattern: Unknown.

(c) Legal Requirement for the act(s) or omission(s):

(i) An action may be brought under Or. Rev. Stat. 124.100 for physical abuse if the defendant engaged in conduct against a vulnerable person that would constitute any of the following:

Assault, menacing, recklessly endangering another person, criminal mistreatment, rape, sodomy, unlawful sexual penetration, sexual abuse, or strangulation.

(ii) An action may be brought for physical abuse if the defendant used any unreasonable physical constraint on the vulnerable person or subjected the vulnerable person to prolonged or continued deprivation of food or water.

(iii) An action may be brought for physical abuse if the defendant used a physical or chemical restraint, or psychotropic medication on the vulnerable person without an order from a physician licensed in the State of Oregon or under any of the following conditions:

(a) For the purpose of punishing the vulnerable person;

(b) For any purpose not consistent with the purposes authorized by a physician; or

(c) For a period significantly beyond that for which the restraint or medication was authorized by a physician.4

(3) Sexual Abuse:

(a) Sexual contact with an elderly person who does not consent or is considered incapable of consenting to a sexual act;

(b) Sexual harassment, sexual exploitation or inappropriate exposure to sexually explicit material or language;

(c) Any sexual contact between an employee of a facility or paid caregiver and an elderly person served by the facility or caregiver;

(d) Any sexual contact between an elderly person and a relative of the elderly person other than a spouse; or

(e) Any sexual contact that is achieved through force, trickery, threat or coercion.  

(4) **Verbal Abuse:** Means to threaten significant physical or emotional harm to an elderly person or a person with a disability through the use of:

(a) Derogatory or inappropriate names, insults, verbal assaults, profanity or ridicule; or

(b) Harassment, coercion, threats, intimidation, humiliation, mental cruelty or inappropriate sexual comments.  

(5) **Exploitation:**

(a) Wrongfully taking the assets, funds or property belonging to or intended for the use of an elderly person or a person with a disability;

(b) Alarming an elderly person or a person with a disability by conveying a threat to wrongfully take or appropriate money or property of the person if the person would reasonably believe that the threat conveyed would be carried out;

(c) Misappropriating, misusing or transferring without authorization any money from any account held jointly or singly by an elderly person or a person with a disability; or

(d) Failing to use the income or assets of an elderly person or a person with a disability effectively for the support and maintenance of the person.  

**B. Vulnerable Adults**

(1) **Elderly Person:** Any person 65 years of age or older.  

---

7 Exploitation will not be addressed in this compendium – instead, only the abuse and/or neglect portions of the statutes.
(2) **Person with a Disability:** A person with a physical or mental impairment that substantially limits one or more major life activities.\(^{10}\)

(3) **Vulnerable person:**

   (a) An elderly person;

   (b) A financially incapable person;

   (c) An incapacitated person; or

   (d) A person with a disability who is susceptible to force, threat, duress, coercion, persuasion or physical or emotional injury because of the person’s physical or mental impairment.\(^{11}\)

C. **Persons/Entities Excluded From Statute**

(1) An elderly person who in good faith is voluntarily under treatment solely by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination by a duly accredited practitioner thereof shall, for this reason alone, not be considered subjected to abuse by reason of neglect.\(^{12}\)

(2) “Sexual abuse” does not mean consensual sexual contact between an elderly person and a paid caregiver who is the spouse of the elderly person.\(^{13}\)

(3) Except as provided by subsection (4) of this section, an action may not be brought against:

   (i) Financial institutions;

   (ii) A health care facility;

   (iii) Any facility licensed or registered under Or. Rev. Stat. Chapter 443; or

---

(iv) Broker-dealers.\(^{14}\)

(4) An action may be brought against a person listed in subsection (3) of this section if:

(i) The person is convicted of a crime constituting physical abuse; or

(ii) The person engages in conduct constituting financial abuse and the person is convicted of a crime by reason of the conduct.\(^{15}\)

D. Reporting Requirement for Litigation to State

(1) A person commencing an action must serve a copy of the complaint on the Attorney General within 30 days after the action is commenced.\(^{16}\)

E. Mandatory Reporting Requirement

(1) Any public or private official having reasonable cause to believe that any person 65 years of age or older with whom the official comes in contact, while acting in an official capacity, has suffered abuse, or that any person with whom the official comes in contact while acting in an official capacity has abused a person 65 years of age or older shall report or cause a report to be made in the manner required in subsection (2). A psychiatrist or psychologist is not required to report such information communicated by a person if the communication is privileged.\(^{17}\)

(2) (i) When a report is required under subsection (1), an oral report shall be made immediately by telephone or otherwise to the local office of the Department of Human Services or to a law enforcement agency within the county.

(ii) When a report of a possible crime is received by the department under subsection (1), the department or the designee of the department shall notify the law enforcement agency having jurisdiction within the county where the report was made.


(iii) If the department or the designee of the department determines that there is reason to believe a crime has been committed, the department or the designee of the department shall immediately notify the law enforcement agency having jurisdiction within the county where the report was made.

(iv) When a report is received by a law enforcement agency, the agency shall immediately notify the law enforcement agency having jurisdiction if the receiving agency does not. The receiving agency shall also immediately notify the local office of the department in the county where the report was made.

F. Preclusion of Arbitration: Unknown.

G. Relationship to Medical Malpractice Actions: Unknown.

H. Criminal Provision

(1) The court may restrain and remedy the abusive conduct by issuing appropriate orders including but not limited to:

(a) A judgment for the remedies provided by ORS 124.100;

(b) Restraining orders, temporary injunctions or other actions as the court deems proper, including the acceptance of satisfactory performance bonds, the creation of receiverships, the appointment of qualified receivers and the enforcement of constructive trusts;

(c) Ordering any person to divest direct or indirect interest or contact with any person or enterprise; or

(d) Imposing reasonable restrictions, including permanent injunctions on the future activities or investments of any person, including prohibiting any person from engaging in the same type of endeavor or conduct to the extent permitted by the Constitution of the United States and this state.\(^{18}\)

---

A person who violates one of the elder abuse statutes described commits a Class A violation.\(^{19}\)

I. Statute of Limitations

An action must be commenced within seven years after discovery of the conduct that gives rise to a cause of action.\(^{20}\)

J. Burden of Proof

Preponderance of the evidence.\(^{21}\)

K. Can Regulations Establish Standard of Care: Unknown.

II. DAMAGES

A. Damages Available

(1) A vulnerable person who suffers injury, damage or death by reason of physical abuse or financial abuse may bring an action against any person who has caused the physical or financial abuse or who has permitted another person to engage in physical or financial abuse. The court shall award the following to a plaintiff who prevails in an action under this section:

(a) An amount equal to three times all economic damages resulting from the physical or financial abuse, or $500, whichever amount is greater;

(b) An amount equal to three times all noneconomic damages, resulting from the physical or financial abuse;

(c) Reasonable attorney fees incurred by the plaintiff; and/or

\(^{19}\) Or. Rev. Stat. § 124.990.


(d) Reasonable fees for the services of a conservator or guardian ad litem incurred by reason of the litigation of a claim brought under this section.\(^\text{22}\)

B. Does Pain and Suffering of Decedent/Resident Survive Death

Yes.\(^\text{23}\)

C. Attorney’s Fees Available

Yes. Reasonable attorney fees incurred by the plaintiff are available.\(^\text{24}\)

III. LEGISLATION AFFECTING STATUTE

A. Pending: None known.

B. Anticipated: None known.

I. Older Adult Protective Services Act\(^1\), 35 P.S. § 10225.101 et seq.

An Act providing for protection of abused, neglected, exploited or abandoned adults; establishing a uniform Statewide reporting and investigative system for suspected abuse, neglect, exploitation or abandonment of adults; providing for protective services; and prescribing penalties. Applies to adults over the age of 60.\(^2\)

A. Conduct

1. **Neglect**: The failure to provide for oneself or the failure of a caretaker to provide goods or services essential to avoid a clear and serious threat to physical or mental health. No older adult who does not consent to the provision of protective services shall be found to be neglected solely on the grounds of environmental factors which are beyond the control of the older adult or the caretaker, such as inadequate housing, furnishings, income, clothing or medical care. \(^{35 \text{ P.S. } 10225.103}\)

2. **Abuse\(^3\)** – the occurrence of one or more of the following acts

   (a) The infliction of injury, unreasonable confinement, intimidation or punishment with resulting physical harm, pain or mental anguish.

   (b) The willful deprivation by a caretaker of goods or services which are necessary to maintain physical or mental health.

   (c) Sexual harassment, rape or abuse as defined in the October 7, 1976 (P.L. 1090, No. 218), known as the Protection from Abuse Act.

No older adult shall be found to be abused solely on the grounds of environmental factors which are beyond the control of the older adult or the caretaker, such as inadequate housing, furnishings, income, clothing, or medical care.

---

\(^1\) Hereinafter, OAPSA.

\(^2\) A separate statute exists protecting the same class of adults who are between the ages of 18 and 59. This is known as the Adult Protective Services Act and is cited as 35 P.S. 10210.101 et seq.

\(^3\) 35 P.S. § 10225.103
3. **Exploitation**: An act or course of conduct by a caretaker or other person against an older adult or an older adult's resources, without the informed consent of the older adult or with consent obtained through misrepresentation, coercion or threats of force, that results in monetary, personal or other benefit, gain or profit for the perpetrator or monetary or personal loss to the older adult.

4. **Abandonment**: The desertion of an older adult by a caretaker.

**B. Vulnerable Adults**

1. **Older Adult in Need of Protective Services**

   An incapacitated older adult who is unable to perform or obtain services that are necessary to maintain physical or mental health, for whom there is no responsible caretaker and who is at imminent risk of danger to his person or property. *35 P.S. 10225.103*

**C. Persons/Entities Excluded From Statute**

1. Any person participating in the making of a report or who provides testimony in any administrative or judicial proceeding arising out of a report shall be immune from any civil or criminal liability on account of the report or testimony unless the person acted in bad faith or with malicious purpose. This immunity shall not extend to liability for acts of abuse, neglect, exploitation or abandonment, even if such acts are the subject of the report or testimony. *35 P.S. 10225.302(d)*

2. In the absence of willful misconduct or gross negligence, the agency, the director, employees of the agency, protective services workers or employees of the department shall not be civilly or criminally liable for any decision or action or resulting consequence of decisions or action when acting under and according to the provisions of this chapter. *35 P.S. 10225.305, See Collins v. Christie*, 2007 U.S. Dist. LEXIS 61579, 2007 WL 2407105 (E.D. Pa. Aug. 22, 2007).

3. An administrator or a facility shall not be held civilly liable for any action directly related to good faith compliance with this chapter. *35 P.S. 10225.707*

---

4 Exploitation will not be addressed in this compendium – instead, only the abuse and/or neglect portions of the statutes.

5 Abandonment will not be addressed in this compendium – instead, only the abuse and/or neglect portions of the statutes.

6 Chapter 7: Reporting Suspected Abuse By Employees
D. Criminal History for Employees

1. A facility shall require all applicants to submit with their applications:
   
   (a) Pursuant to 18 Pa.C.S. Ch. 91 (relating to criminal history record information), a report of criminal history record information from the State Police or a statement from the State Police that their central repository contains no such information relating to that person.
   
   (b) Where the applicant is not and for the two years immediately preceding the date of application has not been a resident of this Commonwealth, administration shall require the applicant to submit with the application for employment a report of Federal criminal history record information pursuant to the Federal Bureau of Investigation's appropriation under the Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriation Act, 1973 (Public Law 92-544, 86 Stat. 1109).

2. In no case shall a facility hire an applicant or retain an employee required to submit information pursuant to section 502(a) if the applicant's or employee's criminal history record information indicates the applicant or employee has been convicted of any of the following offenses:
   
   (a) An offense designated as a felony under the act of April 14, 1972 (P.L. 233, No. 64), known as The Controlled Substance, Drug, Device and Cosmetic Act.
   
   (b) An offense under one or more of the provisions of 18 Pa.C.S. (relating to crimes and offenses).

E. Reporting Requirements for Employees

1. Mandatory Reporting to Agency

   (a) An employee or an administrator who has reasonable cause to suspect that a recipient is a victim of abuse shall immediately make an oral report to the agency.

   (b) Within 48 hours of making the oral report, the employee or administrator shall make a written report to the agency.

2. Mandatory Reporting to Law Enforcement

---

7 35 P.S. 10225.502(a)(1-2)
8 35 P.S. 10225.503(a)(1-2)
9 In 1997, the General Assembly added a mandatory reporting chapter to the OAPSA, requiring that employees and administrators in covered facilities report suspected abuse of patients to area agencies, as well as to law enforcement officials in cases of sexual abuse, serious bodily injury, or a suspicious death. See Nixon v. Dep't of Pub. Welfare, 576 Pa. 385, 839 A.2d 277, 2003 Pa. LEXIS 2604 (Pa. 2003).
(a) An employee or an administrator who has reasonable cause to suspect that a recipient is the victim of sexual abuse, serious physical injury or serious bodily injury or that a death is suspicious shall, in addition to contacting the agency and the department, immediately contact law enforcement officials to make an oral report.

(b) Within 48 hours of making the oral report, the employee and an administrator shall make a written report to appropriate law enforcement officials.

F. **Criminal Provision**

An administrator or facility owner who intentionally or willfully fails to comply or obstructs compliance with this chapter commits a misdemeanor of the third degree and shall, upon conviction, be sentenced to pay a fine of $2,500 or to imprisonment for not more than one year, or both. 35 P.S. 10225.706(b)(1-2).

G. **Statute of Limitations**: Two Years – 42 Pa C.S. §5524


I. **Can Regulations Establish Standard of Care**: Yes. Courts in Pennsylvania have recognized that the absence of a private cause of action in a statutory scheme is an indicator that the statute did not contemplate enforcement of an individual harm. However, it is just an indicator or a factor to consider and does not necessarily preclude the statute's use as a basis of a claim of negligence per se. A statute may still be used as a basis for a negligence per se claim when it is clear that, despite the absence of a private right of action, the policy of the statute will be furthered by such a claim because its purpose is to protect a particular group of individuals. Frantz v. HCR Manor Care, Inc., 2003 Pa. Dist. & Cnty. Dec. LEXIS 169, 64 Pa. D. & C. 4th 457 (Pa. County Ct. 2003).

II. **DAMAGES**

A. **Damages Available**

1. Compensatory Damages
2. Treble Compensatory Damages
3. Punitive Damages
4. Special Damages (when death is the result)

B. **Does Pain and Suffering of Decedent/Resident Survive Death:**

C. **Attorney’s Fees Available:** Yes

   1. Attorney’s fees in Pennsylvania are limited to a specific set of criteria and in those circumstances; fees must be "reasonable." 42 Pa.C.S. §2503

III. **LEGISLATION AFFECTING STATUTE**

   A. **Pending:**

      1. House Bill 130: Further defining the term “exploitation.”

      2. House Resolution 343: Designating June 15 Elder Abuse Awareness Day in Pennsylvania

         (a) Senate Bill 71: Further defining the term “facility” and providing information related to prospective facility personnel.

         (b) Senate Bill 821: Providing for background checks for both applicants and recipients of OAPSA.
I. Civil Statute Protecting Dependent Individuals from Neglect, Abuse, or Mistreatment: Abuse in Health Care Facilities: Rhode Island General Laws §23-17.8-1 et seq.¹

A. Conduct

1. **Neglect**: means the willful failure by a caregiver or other person with a duty of care to provide goods or services necessary to avoid physical harm, mental harm or mental illness to an elderly person, including, but not limited to, "abandonment" (withdrawal of necessary assistance) and denial of food or health related services. **RI Gen Laws §23-17.8-1(f)**

2. **Abuse**:²

   i. Any assault, including, but not limited to, hitting, kicking, pinching, slapping, or the pulling of hair; provided, however, unless it is required as an element of the offense charged, it shall not be necessary to prove that the patient or resident was injured by the assault;

   ii. Any assault as defined in chapter 37 of title 11 (sexual assault);

   iii. Any offense under chapter 10 of title 11(abominable and detestable crimes against nature);

   iv. Any conduct which harms or is likely to physically harm the patient or resident except where the conduct is a part of the care and treatment, and in furtherance of the health and safety of the patient or resident; or

   v. Intentionally engaging in a pattern of harassing conduct which causes or is likely to cause emotional or psychological harm to the patient or resident, including but not limited to, ridiculing or demeaning a patient or resident, making derogatory remarks to a

¹ This statute applies to any resident or patient of a facility as defined by the statute. R.I. Gen Laws § 42-66 et seq. is a separate provision applying to those 60 years and older, but is not specific to health care or long-term care facilities. Rather, this statute protects the elderly residing in the general community.

² R.I. Gen Laws § 23-17.8-1(a)
patient or resident or cursing directed towards a patient or resident, or threatening to inflict physical or emotional harm on a patient or resident.

3. **Mistreatment**: means the inappropriate use of medications, isolation, or use of physical or chemical restraints:
   
i. As punishment;
   
ii. For staff convenience;
   
iii. As a substitute for treatment or care;
   
iv. In conflict with a physician's order; or
   
v. In quantities which inhibit effective care or treatment, or which harms or is likely to harm the patient or resident

**B. Notice**

A notice of the reporting requirements and of the penalty imposed for failure to report shall be conspicuously posted on each floor of any facility required to be licensed. *R.I. Gen. Laws §23-17.8-7*

Any facility that fails to post, after written notice, the requirements of this chapter pursuant to § 23-17.8-7 shall be fined not more than five hundred ($ 500) dollars per day of the occurrence. *R.I. Gen. Laws §23-17.8-7.1*

**C. Persons Excluded From Statute / Immunity: R.I. Gen Laws §23-17.8-4a,b*

1. Any person who in good faith makes an oral or written report, excluding any perpetrator or conspirator of the patient abuse, mistreatment, or neglect, shall have immunity from any liability, civil or criminal, that might be incurred as a result of having made the report.

2. No facility shall discharge or in any manner discriminate or retaliate against any person who in good faith makes a report, testifies, or is about to testify in any proceeding about the abuse, mistreatment, or neglect of patients or residents in the facilities.

3. No facility shall discharge, threaten, or in any manner discriminate or retaliate against any employee regarding the employee's compensation, terms, conditions, location, duration, or privileges of employment because:
   
i. The employee, or a person acting on behalf of the employee, reports or is about to report to a public body, verbally or in writing,

---

*R.I. Gen Laws § 23-17.8-1(e)*
or who, in good faith, makes a report, testifies, or is about to testify in any proceeding, about the abuse, mistreatment, or neglect of patients or residents in the facility, unless the employee knows or has reason to know that the report is false; or

ii. An employee is requested by a public body to testify or participate in an investigation, hearing, or inquiry held by that public body, or a court action.

D. Retaliation Remedies

1. A person who alleges retaliation or discrimination for making a report may bring a civil action for appropriate injunctive relief, damages, or both within three (3) years after the occurrence of the alleged violation of § 23-17.8-4. R.I. Gen. Laws §23-17.8-5(a)

2. A facility which discharges, discriminates, or retaliates against a person who is about to make a report, makes a report, testifies, or is about to testify in any proceeding shall be liable to the person so discharged, discriminated, or retaliated against, for treble damages, costs, and attorneys' fees. Where a facility discharges, demotes, or retaliates by any other means against a person after he or she has made a report, testified, or was subpoenaed to testify as a result of a report required by this chapter, there shall be a rebuttable presumption that the facility discharged, demoted, or retaliated against that person as a result of his or her report or testimony. R.I. Gen. Laws §23-17.8-5(b)

3. An employee shall show by clear and convincing evidence that he or she or a person acting on his or her behalf was about to report, reported, was about to testify, or testified, verbally or in writing, about a violation. R.I. Gen Laws §23-17.8-5(d)

4. A court may order reinstatement of the employee, the payment of back wages, full reinstatement of fringe benefits and seniority rights, treble damages, or any combination of these remedies. A court shall also award the complainant the costs of litigation, including attorneys' fees. R.I. Gen. Laws §23-17.8-5(e)
E. Reporting Requirements

1. Any physician, medical intern, registered nurse, licensed practical nurse, nurse's aide, orderly, certified nursing assistant, medical examiner, dentist, optometrist, optician, chiropractor, podiatrist, coroner, police officer, emergency medical technician, fire-fighter, speech pathologist, audiologist, social worker, pharmacist, physical or occupational therapist, or health officer, or any person, within the scope of their employment at a facility or in their professional capacity,

2. Who has knowledge of or reasonable cause to believe that a patient or resident in a facility has been abused, mistreated, or neglected,

3. Shall make within twenty-four (24) hours or by the end of the next business day, a telephone report to the appropriate authority (the director of the department of health, the office of the state long-term care ombudsman, or the director of the department of behavioral healthcare).

4. In addition to those persons required to report pursuant to this section, any other person may make a report if that person has reasonable cause to believe that a patient or resident of a facility has been abused, mistreated, or neglected.

5. The report shall contain:
   i. The name, address, telephone number, occupation, and employer's address and the phone number of the person reporting;
   ii. The name and address of the patient or resident who is believed to be the victim of the abuse, mistreatment, or neglect;
   iii. The details, observations, and beliefs concerning the incident(s);
   iv. Any statements regarding the incident made by the patient or resident and to whom they were made;
   v. The date, time, and place of the incident;
   vi. The name of any individual(s) believed to have knowledge of the incident;
   vii. The name of any individual(s) believed to have been responsible for the incident.

6. Any person required to make a report shall be deemed to have complied with these requirements if a report is made to a high managerial agent of the facility in which the alleged incident occurred. Once notified, the high

---

4 R.I. Gen Laws § 23-17.8-2(a-d)
managerial agent shall be required to meet all reporting requirements of this section within the time frames specified by this chapter.

7. Telephone reports made (see three (3) above) shall be followed-up within three (3) business days with a written report.


1. Any person required to make a report that fails to do so, shall be guilty of a misdemeanor and be punished by a fine of not more than five hundred dollars ($ 500).

2. Any person who alters or changes without authorization or destroys or renders unavailable a report made by another shall be deemed guilty of a misdemeanor and be fined not more than five hundred dollars ($ 500).

3. Any person who attempts to induce another to fail to report an incident of abuse, mistreatment, or neglect shall be deemed guilty of a misdemeanor and be punished by a fine of not more than one thousand dollars ($1,000), or imprisoned not more than one year, or both.

4. Any person being a high managerial agent who fails to report an incident of abuse, mistreatment, or neglect after another has reported an incident of abuse, neglect or mistreatment to an appropriate agent shall be guilty of a misdemeanor and shall be fined not more than one thousand dollars ($1,000), or imprisoned for more than one year, or both.

G. Penalties for Committing Abuse, Mistreatment, or Neglect

1. Any person who knowingly commits any act of abuse, mistreatment, or neglect (types i – iv.) against a patient or resident of a facility shall be fined not more than three thousand dollars ($ 3,000) or imprisoned not more than three (3) years, or both.

2. Any person who commits any act of abuse (type v) against a patient or resident of a facility shall be fined not more than five hundred dollars ($ 500) or imprisoned not more than one year, or both.

3. If at the time of the alleged patient abuse, neglect, or mistreatment, the person committing the act was employed by a facility which either condoned or attempted to conceal the act or acts, that facility upon conviction shall be fined not more than five thousand dollars ($ 5,000).

4. Any member of the board of directors or a high managerial agent of a facility who condones or conceals any acts of abuse, neglect or

---

5 R.I. Gen. Laws §23-17.8-10(a-d)
mistreatment of patients or residents of the facility shall be fined not more than three thousand dollars ($3,000) or imprisoned not more than three (3) years, or both.

5. Any person who is convicted of a violation, except the posting requirement, shall forfeit any professional license or certification.  

H. Statute of Limitations:

For injury, medical malpractice, and wrongful death, the statute of limitations is three (3) years from the time of incident, or, if the incident was not immediately discoverable, three (3) years from the time the incident was reasonably discoverable in the exercise of reasonable diligence. *R.I. Gen. Laws §9-1-14, §9-1-14.1, §10-7-2*

I. Burden of Proof: Preponderance of the Evidence - *R.I. Gen. Laws § 9, 10* (various parts)

J. Can Regulations Establish Standard of Care: Not on its own.

There is no question that the violation of a statute or an ordinance is not negligence per se but is to be used by the trier of the facts merely as an aid in determining that issue on consideration of all the evidence. *Kurczy v. St. Joseph Veterans Ass'n*, 820 A.2d 929, 2003 R.I. LEXIS 96 (R.I. 2003)

II. DAMAGES

A. Damages Available

1. Compensatory/Pecuniary

2. Special Damages (when death results)

3. Punitive Damages (for intentional and atrocious behavior, not wrongful death)

4. Costs of Suit

B. Does Pain and Suffering of Decedent/Resident Survive Death:

Yes. When the death of a person is caused by the wrongful act, neglect, or default of another, and if death had not ensued, would have entitled the party injured to maintain an action and recover damages, the person who, or the corporation which, would have been liable if death had not ensued shall be liable to an action for damages. Damages include hospital, medical, and other expenses incurred, loss of wages until time of death and recovery for pain and suffering. *R.I. Gen.*

---

6 R.I. Gen. Laws §23-17.8-10.1

C. Attorney’s Fees Available: Possibly, but limited to specific exceptions.

It is well settled in Rhode Island that a request for legal fees is governed by the "American Rule." As a result, litigants are generally required to pay their own attorney's fees, absent statutory authority or contractual liability. This rule, however, is subject to several exceptions. Pursuant to the "common fund exception," a court may award attorney's fees to a party whose litigation efforts directly benefited others. A court may also assess attorney's fees as a sanction for willful disobedience of a court order. Lastly, a court may award attorney's fees when a party has acted in bad faith or for oppressive reasons. Flanders v. Moreau, 2011 R.I. Super. LEXIS 100 (R.I. Super. Ct. 2011)

III. LEGISLATION AFFECTING STATUTE

A. Pending: None

B. Anticipated: None
I. Civil Statute Protecting Dependent Adults or Elders from Neglect or Abuse: South Carolina Omnibus Adult Protection Act (S.C. Code Ann. § 43-35-5, et seq.)

A. Civil Actions


B. Conduct

1. **Neglect**: failure or omission of a caregiver to provide the care, goods, or services necessary to maintain the health or safety of a vulnerable adult including, but not limited to, food, clothing, medicine, shelter, supervision, and medical services and the failure or omission has caused, or presents a substantial risk of causing, physical or mental injury to the vulnerable adult. Noncompliance with regulatory standards alone does not constitute neglect. Neglect includes the inability of a vulnerable adult, in the absence of a caretaker, to provide for his or her own health or safety which produces or could reasonably be expected to produce serious physical or psychological harm or substantial risk of death. *S.C. Code Ann. § 43-35-10*.

2. **Abuse**¹

   (a) **Definition**

   “Abuse” means physical abuse or psychological abuse.

   (i) **Physical abuse**: intentionally inflicting or allowing to be inflicted physical injury on a vulnerable adult by an act or failure to act. Physical abuse includes, but is not limited to, slapping, hitting, kicking, biting, choking, pinching, burning, actual or attempted sexual battery, use of medication outside the standards of reasonable medical practice for the purpose of controlling behavior, and

---
¹ *S.C. Code Ann. § 43-35-10*
unreasonable confinement. Physical abuse also includes the use of a restrictive or physically intrusive procedure to control behavior for the purpose of punishment except that a therapeutic procedure prescribed by a licensed physician or other qualified professional or that is part of a written plan of care by a licensed physician or other qualified professional is not considered physical abuse. Physical abuse does not include altercations or acts of assault between vulnerable adults.

(ii) **Psychological abuse**: deliberately subjecting a vulnerable adult to threats or harassment or other forms of intimidating behavior causing fear, humiliation, degradation, agitation, confusion, or other forms of serious emotional distress.

3. **Exploitation**

   (a) causing or requiring a vulnerable adult to engage in activity or labor which is improper, unlawful, or against the reasonable and rational wishes of the vulnerable adult. Exploitation does not include requiring a vulnerable adult to participate in an activity or labor which is a part of a written plan of care or which is prescribed or authorized by a licensed physician attending the patient;

   (b) an improper, unlawful, or unauthorized use of the funds, assets, property, power of attorney, guardianship, or conservatorship of a vulnerable adult by a person for the profit or advantage of that person or another person; or

   (c) causing a vulnerable adult to purchase goods or services for the profit or advantage of the seller or another person through: (i) undue influence, (ii) harassment, (iii) duress, (iv) force, (v) coercion, or (vi) swindling by overreaching, cheating, or defrauding the vulnerable adult through cunning arts or devices that delude the vulnerable adult and cause him to lose money or other property.

C. **Caregiver**

A person who provides care to a vulnerable adult, with or without compensation, on a temporary or permanent or full or part-time basis and includes, but is not

---

2 Exploitation will not be addressed in this compendium – instead, only the abuse and/or neglect portions of the statutes.


limited to, a relative, household member, day care personnel, adult foster home sponsor, and personnel of a public or private institution or facility.

D. Vulnerable Adult:

A person eighteen years of age or older who has a physical or mental condition which substantially impairs the person from adequately providing for his or her own care or protection. This includes a person who is impaired in the ability to adequately provide for the person's own care or protection because of the infirmities of aging including, but not limited to, organic brain damage, advanced age, and physical, mental, or emotional dysfunction. A resident of a facility is a vulnerable adult.

E. Persons/Entities Excluded From Statute

None apparent.

F. Mandated Reporting

(a) Mandated Reporters

The Act imposes a duty on certain individuals to report if they have “reason to believe that a vulnerable adult has been or is likely to be abused, neglected, or exploited.” S.C. Code Ann. § 43-35-25(A).

Individuals designated as “mandated reporters” under the Act include: physicians, nurses, dentists, optometrists, medical examiners, coroners, and other medical, mental health or allied health professionals, Christian Science practitioners, religious healers, school teachers, counselors, psychologists, mental health or mental retardation specialists, social or public assistance workers, caregivers, staff or volunteers of an adult day care center or facilities, and law enforcement officers. The Act also requires reporting by “any other person who has actual knowledge that a vulnerable adult has been abused, neglected, or exploited.” S.C. Code Ann. § 43-35-25(A).

(b) Time Required to Report

Reporting the suspected conduct within twenty-four hours or the following working day is the reporter's individual responsibility. S.C. Code Ann. § 43-35-25(C)-(D); Williams v. Watkins, 379 S.C. 530, 535, 665 S.E.2d 243, 246 (Ct. App. 2008).

(c) Report Receivers and Investigative Agencies/Entities

(i) South Carolina Law Enforcement Division: investigates or refers to local law enforcement abuse, neglect, or exploitation in a

---

residential facility contracted with or operated by the SC Department of Disabilities and Special Needs or the SC Department of Mental Health.

(ii) **SC Long Term Care Ombudsman’s Office:** investigates other residential facilities, such as private nursing homes and most community residential care facilities.

(iii) **SC Department of Social Services:** investigates abuse, neglect, or exploitation of vulnerable adults in private or foster homes. Reports should be made to county DSS offices.

(iv) **SC Attorney General’s Medicaid Fraud Control Unit:** investigates misuse of Medicaid funds, including financial exploitation of Medicaid recipients.

(v) Provided the Act's mandatory reporting requirements are met, the reporter may additionally report suspected abuse, neglect, or exploitation directly to law enforcement; “and in cases of emergency, serious injury, or suspected sexual assault, law enforcement must be contacted immediately.” *S.C. Code Ann. § 43-35-25(G).*

(d) **Immunity of Person Making Report or Participating in Investigation in Good Faith**

A person who, acting in good faith, reports pursuant to this chapter or who participates in an investigation or judicial proceeding resulting from a report is immune from civil and criminal liability which may otherwise result by reason of this action. In a civil or criminal proceeding good faith is a rebuttable presumption. *S.C. Code Ann. § 43-35-75(A).*

G. **Preclusion of Arbitration**


H. **Relationship to Medical Malpractice actions**

I. Criminal Penalties:

(a) **Failure to Report:** mandated reporter who knowingly and wilfully fails to report abuse, neglect, or exploitation is guilty of a misdemeanor and, upon conviction, must be fined not more than twenty-five hundred dollars ($25,000) or imprisoned not more than one (1) year.

(b) **Persons Guilty of Abuse:** Except as otherwise provided in subsections (e) and (f), a person who knowingly and wilfully abuses a vulnerable adult is guilty of a felony and, upon conviction, must be imprisoned not more than five (5) years.

(c) **Persons Guilty of Neglect:** Except as otherwise provided in subsections (e) and (f), a person who knowingly and wilfully neglects a vulnerable adult is guilty of a felony and, upon conviction, must be imprisoned not more than five (5) years.

(d) **Persons Guilty of Exploitation:** A person who knowingly and wilfully exploits a vulnerable adult is guilty of a felony and, upon conviction, must be fined not more than five thousand dollars or imprisoned not more than five (5) years, or both, and may be required by the court to make restitution.

(e) **Persons Guilty of Neglect or Abuse Resulting in Great Bodily Injury:** A person who knowingly and wilfully abuses or neglects a vulnerable adult resulting in great bodily injury is guilty of a felony and, upon conviction, must be imprisoned not more than fifteen (15) years.

(f) **Persons Guilty of Neglect or Abuse Resulting in Death:** A person who knowingly and wilfully abuses or neglects a vulnerable adult resulting in death is guilty of a felony and, upon conviction, must be imprisoned not more than thirty (30) years.

J. Civil Penalties:

(a) Notwithstanding any regulatory or administrative penalty that may be assessed and in addition to a private civil cause of action that may be brought against a person or facility based on an action or failure to act that otherwise constitutes abuse, neglect, or exploitation under this chapter, the Attorney General, upon referral from the Long Term Care Ombudsman Program or the Vulnerable Adults Investigations Unit, may bring an action

---


7 Defined as bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ. *S.C. Code Ann. § 43-35-85(I)*.

against a person who fails through pattern or practice to exercise reasonable care in hiring, training, or supervising facility personnel or in staffing or operating a facility, and this failure results in the commission of abuse, neglect, exploitation, or any other crime against a vulnerable adult in a facility. A person or facility which verifies good standing of the employee with the appropriate licensure or accrediting entity is rebuttably presumed to have acted reasonably regarding the hiring.

(b) In granting relief under this section, the court may assess a civil fine of not more than thirty thousand dollars or order injunctive relief, or both, and may order other relief as the court considers appropriate.

K. Statute of Limitations:


I. Burden of Proof:

Preponderance of the Evidence

J. Can Regulations Establish Standard of Care:


II. DAMAGES

A. Damages Available

1. Actual Damages
2. Special Damages
3. Punitive Damages
4. Injunctive Relief
5. Costs of Suit

B. Does Pain and Suffering of Decedent/Resident Survive Death:

C. **Attorney’s Fees Available:**

The general rule is that attorney's fees are not recoverable unless authorized by contract or statute. *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 493, 427 S.E.2d 659, 660 (1993)

III. **LEGISLATION AFFECTING STATUTE**

A. **Pending:**

1. **2013 SC S.B. 764 (NS)**
   
   (i) A bill to create the Vulnerable Adult Guardian ad Litem Program in the Office on Aging to serve as a statewide system to recruit, train, and supervise volunteers to serve as court-appointed guardians ad litem for vulnerable adults in abuse, neglect, and exploitation proceedings within the family court.

2. **2013 SC H.B. 3142 (NS)**
   
   (ii) A bill to provide that a facility considering the admittance of a person as a resident shall determine whether such person is a registered sex offender by following certain procedures, and if the facility determines the person is a registered sex offender it must provide notice to residents or their legal guardians, and that failure to comply with either of these requirements constitutes a knowing and wilful neglect of the safety of vulnerable adults residing in the facility.

B. **Anticipated:** None
I. Civil Statute Protecting Disabled Adults or Elders from Neglect, Abuse or Exploitation

South Dakota does not presently have a civil statue regarding the neglect, abuse or exploitation of disabled adults or elders.

II. Criminal Statute Protecting Disabled Adults or Elders from Neglect, Abuse or Exploitation

A. Conduct

Any person who abuses or neglects an elder or a disabled adult in a manner which does not constitute aggravated assault is guilty of a Class 6 felony. *SDCL §22-46-2*

1. **Abuse:** Physical harm, bodily injury, or attempt to cause physical harm or injury, or the infliction of fear of imminent physical harm or bodily injury on an elder or a disabled adult. *SDCL §22-46-1*

2. **Adult With A Disability:** A person eighteen years of age or older who suffers from a condition of intellectual disability, infirmities of aging as manifested by organic brain damage, advanced age, or other physical dysfunctioning to the extent that the person is unable to protect himself or herself or provide for his or her own care. *SDCL §22-46-1*

3. **Elder:** A person sixty-five years of age or older. *SDCL §22-46-1*

4. **Exploitation:** The wrongful taking or exercising of control over property of an elder or a disabled adult with intent to defraud the elder or disabled adult. *SDCL §22-46-1*

5. **Neglect:** Harm to an elder’s or a disabled adult’s health or welfare, without reasonable medical justification, caused by the conduct of a person responsible for the elder’s or disabled adult’s health or welfare, within the means available for the elder or disabled adult, including the failure to provide adequate food, clothing, shelter, or medical care. *SDCL §22-46-1*
B. Exclusions

The term, “neglect,” does not include a decision that is made to not seek medical care for an elder or disabled adult based upon the expressed desire of the elder or disabled adult; a decision to not seek medical care for an elder or disabled adult based upon a previously executed declaration, do-not-resuscitate order, or a power of attorney for health care; a decision to not seek medical care for an elder or disabled adult if otherwise authorized by law; or the failure to provide goods and services outside the means available for the elder or disabled adult.  **SDCL §22-46-1.1**

C. Exploitation

Any person who, having assumed the duty by written contract, by receipt of payment for care, or by order of a court to provide for the support of an elder or a disabled adult, and having been entrusted with the property of that elder or disabled adult, with intent to defraud, appropriates such property to a use or purpose not in the due and lawful execution of that person’s trust, is guilty of theft by exploitation. Theft by exploitation is punishable as theft pursuant to chapter 22-30A.  **SDCL §22-46-3**
I. Civil Statute Protecting Dependent Adults or Elders from Neglect or Abuse: Tennessee Adult Protection Act (“TAPA”), Tennessee Code Annotated § 71-6-101, et seq.

A. Conduct

1. Abuse or Neglect:

   (a) Definition

      (i) The infliction of physical pain, injury, or mental anguish, or the deprivation of services by a caretaker that are necessary to maintain the health and welfare of an adult or a situation in which an adult is unable to provide or obtain the services that are necessary to maintain that person’s health or welfare. T.C.A. § 71-6-102(1)(a)

      (ii) Transporting an adult and knowingly abandoning, leaving or failing to provide additional planned transportation for the adult if the adult’s caretaker knows or should know that the adult is unable to protect or care for himself or herself without assistance and the caretaker’s conduct results in physical pain, injury, mental anguish, or deprivation of services. T.C.A. § 71-6-102(1)(b)

   (b) Exclusions

      Notably, Tennessee excludes certain acts specifically from the definition of abuse or neglect, to include:

      (i) Where the adult relies on or is being furnished treatment by spiritual means through prayer alone in accordance with a recognized religious method of healing in lieu of medical treatment. T.C.A. § 71-6-102(1)(a)

      (ii) The provision of medical care to any terminally ill person if such person has executed an unrevoked living will and if the provision of such medical care would conflict with the terms of such living will. T.C.A. § 71-6-102(1)(A)

2. Sexual Abuse

   (a) Definition
(i) When a dependent adult or elderly person is forced, tricked, threatened or otherwise coerced by a person into sexual activity, involuntary exposure to sexually explicit material or language, or sexual contact against such adult’s will. Sexual abuse also occurs when an adult is unable to give consent to such sexual activities or contact and is engaged in such activities or contact with another person. T.C.A. § 71-6-102(1)(b)

3. Exploitation: The improper use by a caretaker of funds that have been paid by a governmental agency to an adult or to the caretaker for the use or care of the adult. T.C.A. § 71-6-102(8)

B. Vulnerable Adults

State Action

1. Types of Impairment

An “adult” for purposes of TAPA means a person eighteen years of age or older who because of mental or physical dysfunctioning or advanced age, defined as age 60 or older, is unable to manage such person’s own resources, carry out the activities of daily living, or protect such person from neglect, hazardous or abusive situations without assistance from others and who has no available, willing, and responsibly able person for assistance and who may be in need of protective services. T.C.A. § 71-6-102(2)

Persons aged eighteen years or older who are mentally impaired but still competent are likewise deemed to be a person with mental dysfunction for purposes of TAPA. T.C.A. § 71-6-102(2)

Private Action

2. Types of Impairment

Disabled Adult: A person who is eighteen years of age or older and who meets one of the following criteria T.C.A. § 71-60-120(A)(2)

(a) Has some impairment of body or mind that makes the person unfit to work at any substantially remunerative employment;

(b) Lacks the capacity to consent;

(c) Has been certified as permanently and totally disabled by an agency of this state or the United States that has the function of so classifying purposes; or

(d) Has been found to be incompetent by a court of proper jurisdiction.
**Elderly Person or Elder:** A person who is 60 years of age or older who has some mental or physical dysfunctioning, including any resulting from age. **T.C.A. § 71-60-120(A)(3)**

C. **Persons/Entities Subject to Statute**

TAPA specifically imposes liability on a caretaker, which is defined as

(i) An individual or institution who has assumed the duty to provide for the care of the adult by contract or agreement;

(ii) Includes a parent, spouse, adult child or other relative, both biological or by marriage, who resides with or in the same building with or regularly visits the adult; knows or reasonably should know of the adult’s mental or physical dysfunction or advanced age; and knows or reasonably should know that the adult is unable to adequately provide for the adult’s own care. **T.C.A. § 71-6-102(5)**

Financial institutions are specifically excluded as a caretaker of funds or assets held by the adult unless such institution has entered into an agreement to act as a trustee of such property or has been appointed by a court to act as trustee. **T.C.A. § 71-6-102(5)**

(iii) With regard to the private cause of action under TAPA, there is no limitation against whom an action may be taken. **T.C.A. § 71-6-120**

D. **Reporting Requirement for Litigation to State**

Tennessee employs mandatory reporting requirements for incidents of abuse or neglect or sexual abuse of a protected adult. **T.C.A. § 71-6-103.** However, the private right of action that arises under TAPA does not trigger a notice requirement to State officials. To that end, the statute specifically provides that nothing shall be construed as requiring the Department of Human Services to initiate any proceedings or to act on behalf of any elderly person or disabled adult pursuant to the statute. **T.C.A. § 71-6-120(f)**

E. **Preclusion of Arbitration**

Nothing in the Tennessee Adult Protective Act precludes arbitration for any private right of action that may arise under the statute. Tennessee recognizes the enforceability of arbitration agreements with healthcare providers, including long-term care facilities, subject to ordinary contract defenses.

F. **Relationship to Medical Malpractice actions**

Actions arising from the Tennessee Healthcare Liability Act are specifically exempted from the statute. **T.C.A. § 71-6-120(g).** Notably, the Tennessee Healthcare Liability Act includes the rendition of custodial or basic care, as
utilized in a long-term care setting, regardless of the theory of liability asserted on behalf of the patient. T.C.A. § 29-26-101(a)(1); (b).

G. Criminal Provision

It is a Class E felony for any person to knowingly, other than by accidental means, abuse, neglect or exploit any adult under the Tennessee Adult Protection Act. T.C.A. § 71-6-117.

It is also a Class C felony to knowingly, other than by accidental means, physically abuse or grossly neglect an impaired adult if the abuse or neglect results in serious mental or physical harm. T.C.A. § 71-6-119.

H. Statute of Limitations: A private right of action under the Tennessee Adult Protection Act has a one-year statute. T.C.A. § 28-3-104. Tennessee recognizes the tolling of statute of limitations for impaired or for incapacitated adults, until such time that the incapacity is removed. T.C.A. § 28-1-106. Moreover, the Tennessee Adult Protection Act specifically provides that a private right of action will not abate or be extinguished by the death of an elderly person or disabled adult but shall pass on to their respective next of kin or personal representative. T.C.A. § 71-6-120(b).

I. Burden of Proof: Preponderance of the Evidence

II. DAMAGES

A. Damages Available

Compensatory damages and costs, to include reasonable expenses. Upon a heightened showing of clear and convincing evidence of abuse or neglect or sexual abuse, which resulted from intentional, fraudulent or malicious conduct on the part of a defendant, the claimant is also entitled to cover reasonable attorney fees and/or punitive damages. T.C.A. § 71-6-120(d). Injunctive relief is available to the State in order to carry out actions to protect adults under the Tennessee Adult Protection Act. T.C.A. § 71-6-104. Otherwise, a relative of the adult may petition for an order of protection. T.C.A. § 71-6-124.

B. Does Cause of Action Survive Death:

Yes. A right of action against a wrongdoer shall not abate or be extinguished by the death of the elderly person or disabled adult. T.C.A. § 71-6-120(b).

C. Attorney’s Fees Available:

Potentially. Upon a showing of clear and convincing evidence that the abuse or neglect resulted from intentional, fraudulent or malicious conduct by the defendant then the claimant is entitled to recover reasonable attorney fees. T.C.A. § 71-6-120(d)
III. LEGISLATION AFFECTING STATUTE

A. Pending: None

B. Anticipated: None
I. Civil Statute Protecting Dependent Adults or Elders from Neglect or Abuse: *Texas Human Resources Code, Chapter 48*

A. Conduct

1. **Neglect**: “Neglect” means the failure to provide for one’s self the goods or services, including medical services, which are necessary to avoid physical or emotional harm or pain or the failure of a caretaker to provide such goods or services. Tex. Human Res. Code §48.002(a)(4).

2. **Abuse**

   (a) **Definition**

   (i) the negligent or wilful infliction of injury, unreasonable confinement, intimidation, or cruel punishment with resulting physical or emotional harm or pain to an elderly or disabled person by the person’s caretaker, family member, or other individual who has an ongoing relationship with the person; or

   (ii) sexual abuse of an elderly or disabled person, including any involuntary or nonconsensual sexual conduct that would constitute an offense under Section 21.08, Penal Code (indecent exposure) or Chapter 22, Penal Code (assaultive offenses), committed by the person’s caretaker, family member, or other individual who has an ongoing relationship with the person.


   (b) **Single Act and/or Pattern**

   Texas Human Resources Code, Chapter 48, does not distinguish between a single negligent act or omission, or series of acts or omissions.
(c)  **Legal Requirement for the act(s) or omission(s):**

“Abuse” as defined in Chapter 48 relates to actions by the “person’s caretaker, family member, or other individual who has an ongoing relationship with the person.” Tex. Human Res. Code §48.002(a)(2).

3. **Exploitation:** “Exploitation” means the illegal or improper act or process of a caretaker, family member, or other individual who has an ongoing relationship with an elderly or disabled person that involves using, or attempting to use, the resources of the elderly or disabled person, including the person’s social security number or other identifying information, for monetary or personal benefit, profit, or gain without the informed consent of the elderly or disabled person. Tex. Human Res. Code §48.002(a)(3).

B. **Vulnerable Adults**

“Disabled person” means a person with a mental, physical, or developmental disability that substantially impairs the person’s ability to provide adequately for the person’s care or protection and who is:

(A) 18 years of age or older; or

(B) under 18 years of age and who has had the disabilities of minority removed.


However, note that when considering whether to appoint a guardian over an incapacitated person, “[i]f the person is not a minor, the court may not use age as the sole factor in determining whether to appoint a guardian for the person.” Tex. Prob. Code §602.

C. **Persons/Entities Excluded From Statute**

1. A person filing a report under this chapter or testifying or otherwise participating in any judicial proceeding arising from a petition, report, or investigation is immune from civil or criminal liability on account of his or her petition, report, testimony, or participation, unless the person acted in bad faith or with a malicious purpose.

2. A person, including an authorized department volunteer, medical personnel, or law enforcement officer, who at the request of the department participates in an investigation required by this chapter or in an action that results from that investigation is immune from civil or criminal liability for any act or omission relating to that participation if the person acted in good faith and, if applicable, in the course and scope of the person’s assigned responsibilities or duties.
3. A person who reports the person’s own abuse, neglect, or exploitation of another person or who acts in bad faith or with malicious purpose in reporting alleged abuse, neglect, or exploitation is not immune from civil or criminal liability.

4. An employer whose employee acts under Subsection (a) or (b) is immune from civil or criminal liability on account of an employee’s report, testimony, or participation in any judicial proceedings arising from a petition, report, or investigation. This subsection does not apply to an employer who is the subject of an investigation.


D. Reporting Requirement for Litigation to State

1. Except as prescribed by Subsection (b), a person having cause to believe that an elderly or disabled person is in the state of abuse, neglect, or exploitation, including a disabled person receiving services as described by Section 48.252, shall report the information required by Subsection (d) immediately to the department.

2. If a person has cause to believe that an elderly or disabled person, other than a disabled person receiving services as described by Section 48.252, has been abused, neglected, or exploited in a facility operated, licensed, certified, or registered by a state agency, the person shall report the information to the state agency that operates, licenses, certifies, or registers the facility for investigation by that agency.

3. The duty imposed by Subsections (a) and (b) applies without exception to a person whose knowledge concerning possible abuse, neglect, or exploitation is obtained during the scope of the person’s employment or whose professional communications are generally confidential, including an attorney, clergy member, medical practitioner, social worker, and mental health professional.


E. Preclusion of Arbitration

In health care liability claims against health care providers as defined in Texas Civil Practice & Remedies Code, Chapter 74, the following applies:

§ 74.451. Arbitration Agreements

(a) No physician, professional association of physicians, or other health care provider shall request or require a patient or prospective patient to execute an agreement to arbitrate a health care liability claim unless the form of agreement delivered to the patient contains a written notice in 10-point boldface type clearly and conspicuously stating:
UNDER TEXAS LAW, THIS AGREEMENT IS INVALID AND OF NO LEGAL EFFECT UNLESS IT IS ALSO SIGNED BY AN ATTORNEY OF YOUR OWN CHOOSING. THIS AGREEMENT CONTAINS A WAIVER OF IMPORTANT LEGAL RIGHTS, INCLUDING YOUR RIGHT TO A JURY. YOU SHOULD NOT SIGN THIS AGREEMENT WITHOUT FIRST CONSULTING WITH AN ATTORNEY.

(b) A violation of this section by a physician or professional association of physicians constitutes a violation of Subtitle B, Title 3, Occupations Code, and shall be subject to the enforcement provisions and sanctions contained in that subtitle.

(c) A violation of this section by a health care provider other than a physician shall constitute a false, misleading, or deceptive act or practice in the conduct of trade or commerce within the meaning of Section 17.46 of the Deceptive Trade Practices-Consumer Protection Act (Subchapter E, Chapter 17, Business & Commerce Code), and shall be subject to an enforcement action by the consumer protection division under that act and subject to the penalties and remedies contained in Section 17.47, Business & Commerce Code, notwithstanding Section 74.004 or any other law.

(d) Notwithstanding any other provision of this section, a person who is found to be in violation of this section for the first time shall be subject only to injunctive relief or other appropriate order requiring the person to cease and desist from such violation, and not to any other penalty or sanction.


F. Relationship to Medical Malpractice actions

The Texas medical liability statute limits civil remedies in health care liability claims against health care providers as defined in Texas Civil Practice & Remedies Code, Chapter 74:

Conflict with Other Law and Rules of Civil Procedure:

(a) In the event of a conflict between this chapter and another law, including a rule of procedure or evidence or court rule, this chapter controls to the extent of the conflict.

(b) Notwithstanding Subsection (a), in the event of a conflict between this chapter and Section 101.023, 102.003, or 108.002, those sections of this code control to the extent of the conflict.

(c) The district courts and statutory county courts in a county may not adopt local rules in conflict with this chapter.
G. **Criminal Provision**

The Texas Penal Code provides as follows:

(a) A person commits an offense if he intentionally, knowingly, recklessly, or with criminal negligence, by act or intentionally, knowingly, or recklessly by omission, causes to a child, elderly individual, or disabled individual:

1. serious bodily injury;
2. serious mental deficiency, impairment, or injury; or
3. bodily injury.

(a-1) A person commits an offense if the person is an owner, operator, or employee of a group home, nursing facility, assisted living facility, intermediate care facility for persons with mental retardation, or other institutional care facility and the person intentionally, knowingly, recklessly, or with criminal negligence by omission causes to a child, elderly individual, or disabled individual who is a resident of that group home or facility:

1. serious bodily injury;
2. serious mental deficiency, impairment, or injury;
3. bodily injury; or
4. exploitation

(b) An omission that causes a condition described by Subsection (a)(1), (2), or (3) or (a-1)(1), (2), (3), or (4) is conduct constituting an offense under this section if:

1. the actor has a legal or statutory duty to act; or
2. the actor has assumed care, custody, or control of a child, elderly individual, or disabled individual.

(d) For purposes of an omission that causes a condition described by Subsection (a)(1), (2), or (3), the actor has assumed care, custody, or control if he has by act, words, or course of conduct acted so as to cause a reasonable person to conclude that he has accepted responsibility for protection, food, shelter, and medical care for a child, elderly individual, or disabled individual. For purposes of an omission that causes a condition described by Subsection (a-1)(1), (2), (3), or (4), the actor acting during the actor’s capacity as owner, operator, or employee of a group home or facility described by Subsection (a-1) is considered to have accepted responsibility for protection, food, shelter, and medical care for the child, elderly individual, or disabled individual who is a resident of the group home or facility.
(e) An offense under Subsection (a)(1) or (2) or (a-1)(1) or (2) is a felony of the first degree when the conduct is committed intentionally or knowingly. When the conduct is engaged in recklessly, the offense is a felony of the second degree.

(f) An offense under Subsection (a)(3) or (a-1)(3) or (4) is a felony of the third degree when the conduct is committed intentionally or knowingly. When the conduct is engaged in recklessly, the offense is a state jail felony.

(g) An offense under Subsection (a) is a state jail felony when the person acts with criminal negligence. An offense under Subsection (a-1) is a state jail felony when the person, with criminal negligence and by omission, causes a condition described by Subsection (a-1)(1), (2), (3), or (4).

Tex. Pen. Code §22.04(a), (a-1), (b), (d)-(g).

H. Statute of Limitations:


A health care liability claim must be filed “within two years from the occurrence of the breach or tort or from the date the medical or health care treatment that is the subject of the claim or the hospitalization for which the claim is made is completed.” Tex. Civ. Prac. & Rem. Code §74.251(a).

I. Burden of Proof:


J. Can Regulations Establish Standard of Care:

Regulations can be used as evidence to help establish the standard of care, but all health care liability claims against health care providers are subject to Texas Civil Practice & Remedies Code, Chapter 74, and negligence must be established through expert opinion. Tex. Laurel Ridge Hosp., L.P. v. Almazon, 374 S.W.3d 601, 605 (Tex. App. – San Antonio 2012, no pet.).

II. DAMAGES

A. Damages Available

1. **Actual economic damages**
Medical bills and expenses are limited to the amount actually paid or incurred rather than the total amount billed. Tex. Civ. Prac. & Rem. Code §41.0105.

2. **Non-economic damages**

Non-economic damages in a health care liability claim subject to Tex. Civ. Prac. & Rem. Code, Chapter 74, are limited to $250,000, total as to any and all physician defendants. Tex. Civ. Prac. & Rem. Code §74.301(a). A claimant can recover an additional $250,000 for non-economic damages against a health care institution. Tex. Civ. Prac. & Rem. Code §74.301(b) and (c) respectively.

3. **Punitive Damages**

A plaintiff may recover exemplary damages if they can show by clear and convincing evidence that the incident was caused by fraud, malice, or gross negligence. Tex. Civ. Prac. & Rem. Code §41.003(a). The elements for exemplary damages must be shown by clear and convincing evidence, and a jury finding regarding exemplary damages must be unanimous. Tex. Civ. Prac. & Rem. Code §41.003(d). Exemplary damages are limited to the greater of: 1) two times the amount of economic damages plus an amount equal to any noneconomic damages found by the jury, not exceeding $750,000; or 2) $200,000. Note this limitation does not apply if certain criminal conduct can be proven.

4. **Court costs**

B. **Does Pain and Suffering of Decedent/Resident Survive Death**: Yes.

C. **Attorney’s Fees Available**: Not in a personal injury suit.

1. If available, are the attorney’s fees limited?

III. **LEGISLATION AFFECTING STATUTE**

A. **Pending**: None

B. **Anticipated**: None
I. Civil Statute Protecting Dependent Adults or Elders from Neglect or Abuse: *Abuse, Neglect, or Exploitation of a Vulnerable Adult*, Utah Code Ann. §§ 62A-3-301, et seq.¹

A. Conduct

1. Neglect²

   (a) Failure of a caretaker to provide necessary care, including nutrition, clothing, shelter, supervision, personal care, or dental, medical, or other health care for a vulnerable adult, unless the vulnerable adult is able to provide or obtain the necessary care without assistance; or failure of a caretaker to provide protection from health and safety hazards or maltreatment;

   (b) Failure of a caretaker to provide care to a vulnerable adult in a timely manner and with the degree of care that a reasonable person in a like position would exercise;

   (c) A pattern of conduct by a caretaker, without the vulnerable adult's informed consent, resulting in deprivation of food, water, medication, health care, shelter, cooling, heating, or other services necessary to maintain the vulnerable adult's well being;

   (d) Knowing or intentional failure by a caretaker to carry out a prescribed treatment plan that causes or is likely to cause harm to the vulnerable adult;

   (e) Self-neglect by the vulnerable adult; or

   (f) Abandonment by a caretaker.

¹ Many other states have enacted specific “Elder Abuse Acts” that codify claims that may be raised thereunder for protection against the neglect and abuse of the elderly, and that set forth a variety of equitable and legal remedies for the same. At the present time, Utah has no such legislation.

² U.C.A. § 62A-3-301(20)(a).

In addition to the abuse statute, there are three other statutes governing elder abuse: (1) Utah’s statute providing for criminal penalties, which parallels the civil statute. (U.C.A. § 76-5-111, et seq.); (2) the Utah Health Care Malpractice Act (U.C.A. § 78B-3-401, et seq.); and (3) the Governmental Immunity Act of Utah (U.C.A. § 63G-7-101 et seq.). Depending upon the identity of the defendant in a particular case, a claim for elder abuse may be subject to one or more of these statutes and their procedural requirements and limitation periods.
2. **Abuse**: The term “abuse” includes many acts that cause harm to a vulnerable adult.

   (a) **Civil definition**

   (i) Knowingly or intentionally: attempting to cause harm, causing harm, or placing another in fear of harm;

   (ii) Unreasonable or inappropriate use of physical restraint, medication, or isolation that causes or is likely to cause harm to a vulnerable adult;

   (iii) Emotional or psychological abuse;

   (iv) A sexual offense as described in Title 76, Chapter 5, Offenses Against the Person; or

   (v) Deprivation of life sustaining treatment, or medical or mental health treatment (except as provided in the Advance Health Care Directive Act or when informed consent has been obtained)

   (b) **Criminal definition**

   (i) Attempting to cause harm, intentionally or knowingly causing harm, or intentionally or knowingly placing another in fear of imminent harm;

   (ii) Causing physical injury by knowing or intentional acts or omissions;

   (iii) Unreasonable or inappropriate use of physical restraint, medication, or isolation that causes or is likely to cause harm to a vulnerable adult that is in conflict with a physician's orders or used as an unauthorized substitute for treatment, unless that conduct furthers the health and safety of the adult; or

   (iv) Deprivation of life sustaining treatment, or medical or mental health treatment (except as provided in the Advance Health Care Directive Act or when informed consent has been obtained)

3. **Single Act or Pattern**

   (a) A single negligent act or omission, or a series of acts or omissions will qualify. (See, e.g., U.C.A. § 62A-3-301(20)(a)(iii).)

---

3 U.C.A. § 62A-3-301(2)
4 U.C.A. § 76-5-111(1)(b)
4. Legal Requirement for the act(s) or omission(s): Performed by a person or entity acting as a caretaker

(a) “Caretaker” means each person, entity, corporation, or public institution that assumes the responsibility to provide a vulnerable adult with care, food, shelter, clothing, supervision, medical or other health care, resource management, or other necessities. (U.C.A. § 62A-3-301(7).)

5. Exploitation: An offense described in U.C.A. § 76-5-111(4) (Abuse, Neglect, or Exploitation of a Vulnerable Adult) or U.C.A. § 76-5b-202 (Sexual Exploitation of a Vulnerable Adult)

B. Vulnerable Adults

1. A senior adult, 65 years or older; or

2. An adult 18 years or older who has a mental or physical impairment that substantially affects the adult’s ability to:

(a) provide personal protection,

(b) provide necessities such as food, shelter, clothing, or health care;

(c) obtain services necessary for health, safety, or welfare;

(d) carry out the activities of daily living;

(e) manage the adult’s resources; or

(f) comprehend the nature and consequences of remaining in a situation of abuse, neglect, or exploitation.

C. Persons/Entities Excluded from Statute

1. State, per Governmental Immunity Act (U.C.A. § 63G-7-101 et seq.)

2. Claims against governmental entities and their employees are also governed by the Utah Governmental Immunity Act.

3. Physicians employed by a hospital and responding to in-hospital emergency situations are entitled to immunity under the Good Samaritan Statute if they have no preexisting duty to do so. (**Hirpa v. IHC Hospitals, Inc.** (Utah 1997) 948 P.2d 785, 788.) Thus, health care professionals have

---

5 Exploitation will not be addressed in this compendium – instead, only the abuse and neglect portions of the statutes.
immunity from liability for care provided gratuitously at the scene of an emergency, unless they have a legal duty to respond.

D. Reporting Requirement for Litigation to State

1. Malpractice Act: plaintiff must file a Notice of Intent to Commence Action and a Request for Pre-litigation Panel Review Hearing prior to filing a malpractice action. The plaintiff must give at least 90 days prior notice of intent to commence action. (U.C.A. § 78B-3-412)

2. Governmental Immunity Act: plaintiff must file a Notice of Claim before filing suit. (U.C.A. § 63G-7-4021)

E. Preclusion of Arbitration

1. In 1999, the Utah Healthcare Malpractice Act was amended to include a section on arbitration, U.C.A. § 78B-3-421, which was an attempt by the Utah Legislature to approve arbitration based on the decision, Sosa v. Paulos (Utah 1996) 924 P.2d 357, which was favorable of arbitration. For a binding arbitration agreement between a patient and a healthcare provider to be validly executed, the act requires that the patient be given in writing certain information, such as “the requirement that the patient must arbitrate a claim instead of having the claim heard by a judge or jury.”

2. Arbitration agreements between a physician and a decedent are not enforceable in wrongful death actions brought by a non-signatory family member of the decedent. (Bybee v. Abdulla (Utah 2008) 189 P.3d 40.)

F. Relationship to Medical Malpractice Actions

1. “Malpractice action against a health care provider” means any action against a health care provider, whether in contract, tort, breach of warranty, wrongful death, or otherwise, based upon alleged personal injuries relating to or arising out of health care rendered or which should have been rendered by the health care provider. (U.C.A., § 78B-3-403(17)).

2. The Utah Health Care Malpractice Act (U.C.A. § 78B-3-401 et seq.) does not prohibit other civil remedies. Generally, however, if the claim is against a convalescent facility or some other type of health care facility where health care services are provided, the claim is subject to the Malpractice Act and must comply with the requirements therein, including the requirement of filing a Notice of Intent to Commence Action (§ 78B-3-412), requesting and satisfying the requirements for prelitigation review, and being subject to a two-year limitations period (U.C.A., § 78B-3-404).
3. The Malpractice Act also applies to malpractice actions against health care providers that are brought under the Utah Governmental Immunity Act.

G. Criminal Provision

1. Utah’s definition of criminal offenses incorporates several criteria for classifying the severity of the crime of abuse, neglect, or exploitation of a vulnerable adult.

(a) Under any circumstances likely to produce death or serious physical injury, any person, including a caretaker, is guilty of the offense of aggravated abuse of a vulnerable adult as follows:

   (i) if done intentionally or knowingly, second degree felony;

   (ii) if done recklessly, third degree felony; and

   (iii) if done with criminal negligence, class A misdemeanor.

(b) Under circumstances other than those likely to produce death or serious physical injury:

   (i) intentionally or knowingly, class A misdemeanor;

   (ii) recklessly, class B misdemeanor; and

   (iii) criminal negligence, class C misdemeanor.

2. Moreover, a person who willfully fails to report suspected abuse, neglect, or exploitation of a vulnerable adult is guilty of a class B misdemeanor. (U.C.A. § 62A-3-305(4)(a))

H. Statute of Limitations: Depends on the claims made.

1. One year—Claim against a State facility. (Utah Governmental Immunity Act, U.C.A. § 63G-7-101 et seq.)

2. Two years—Claim against convalescent facility or other type of health care where health care services are provided. (Utah Health Care Malpractice Act, U.C.A. § 78B-3-401 et seq.; see also U.C.A. § 78B-2-114.)

3. Four years—Negligence claim against a family member or individual. (U.C.A. § 78B-2-307(3).)

4. Four years—Catchall provision (U.C.A. § 78B-2-307(3).)

---

6 U.C.A., § 76-5-111(2), (3)
I. Burden of Proof

1. Preponderance of evidence (U.C.A. § 62A-3-311.5(5)): At the hearing, “the division has the burden of proving, by a preponderance of the evidence, that the alleged perpetrator committed abuse, neglect, or exploitation of a vulnerable adult.”


1. The Utah Supreme Court has held that the violation of a statute does not necessarily constitute negligence per se and may be considered only as evidence of negligence. (*Intermountain Farmers Association v. Fitzgerald* (1978) 574 P.2d 1162, 1164.) Violation of a safety standard set by statute may be regarded as prima facie evidence of negligence, but is subject to justification or excuse if the evidence is such that it reasonably could be found. (*Id.* at pp. 1164–65; see also *Child v. Gonda* (1998) 972 P.2d 425, 432.)


II. DAMAGES

A. Damages Available

1. Actual damages
2. Special damages
3. Punitive damages
4. Injunctive relief
5. Cost of suit

B. Does Pain and Suffering of Decedent/Resident Survive Death: Yes

1. In a case arising out of a wrongful death, a cause of action for the personal injuries inflicted upon the decedent prior to her or her death survives the decedent and may be brought pursuant to U.C.A. § 62A-3-314. This enables the heirs of the decedent to recover both special and general damages for the personal injuries, if any, inflicted upon the decedent prior to death.

C. Attorney’s Fees Available: Yes (§ 62A-3-314(3), (4))

---

7 In a medical malpractice action, non-economic damages are capped. (U.C.A.§ 78B-3-410.)
1. If the plaintiff prevails in an action, the court may order that the defendant pay the costs and reasonable attorney fees of the plaintiff;

2. If the defendant prevails in an action, the court may order that the plaintiff pay the costs and reasonable attorney fees of the defendant, if the court finds that the action was frivolous, unreasonable, or taken in bad faith.

III. LEGISLATION AFFECTING STATUTE

A. Pending: None

B. Anticipated: None
I. Civil Statute Protecting Dependent Adults and Elders from Neglect or Abuse:  
*Vermont Statutes Annotated (V.S.A.) tit. 33 §§ 6901-6914*

A. Conduct

1. Abuse:\(^1\)
   
   (a) Any treatment of a vulnerable adult which places life, health, or welfare in jeopardy or which is likely to result in impairment of health;
   
   (b) Any conduct committed with an intent or reckless disregard that such conduct is likely to cause unnecessary harm, unnecessary pain, or unnecessary suffering to a vulnerable adult;
   
   (c) Unnecessary or unlawful confinement or unnecessary or unlawful restraint of a vulnerable adult;
   
   (d) Any sexual activity with a vulnerable adult by a caregiver who volunteers for or is paid by a caregiving facility or program. This definition shall not apply to a consensual relationship between a vulnerable adult and a spouse, nor to a consensual relationship between a vulnerable adult and a caregiver hired, supervised, and directed by the vulnerable adult;
   
   (e) Intentionally subjecting a vulnerable adult to behavior which should reasonably be expected to result in intimidation, fear, humiliation, degradation, agitation, disorientation, or other forms of serious emotional distress; or
   
   (f) Administration, or threatened administration, of a drug, substance, or preparation to a vulnerable adult for a purpose other than legitimate and lawful medical or therapeutic treatment.

2. Exploitation:\(^2\)

---

\(^1\) 33 V.S.A. § 6902(1)  
\(^2\) 33 V.S.A § 6902(6)
(a) Willfully using, withholding, transferring, or disposing of funds or property of a vulnerable adult unlawfully for the wrongful profit or advantage of another.

(b) Acquiring possession or control of or an interest in funds or property of a vulnerable adult through the use of undue influence, harassment, duress, or fraud.

(c) The act of forcing or compelling a vulnerable adult against their will to perform services for the profit or advantage of another.

(d) Any sexual activity with a vulnerable adult when the vulnerable adult does not consent or when the actor knows or should know that the vulnerable adult is incapable of resisting or declining consent to the sexual activity due to age, disability, fear of retribution, or hardship.

3. Neglect: Purposeful or reckless failure or omission by a caregiver to:

(a) Provide care necessary to maintain the health or safety of a vulnerable adult;

(b) Make a reasonable effort to protect a vulnerable adult from abuse, neglect, or exploitation by others;

(c) Carry out a plan of care for a vulnerable adult when such failure results in or could reasonably be expected to result in physical or psychological harm or a substantial risk of death to the vulnerable adult, unless the caregiver is acting pursuant to the wishes of the vulnerable adult or their representative; or

(d) Report significant changes in the health status of a vulnerable adult to a physician, nurse, or supervisor.

(e) Neglect may be repeated conduct or constitute a single incident.

B. Vulnerable Adult

1. Definition: Any person 18 years or older who:

(a) Is a resident of a licensed nursing home;

(b) Is a resident of a psychiatric hospital unit or facility;

(c) Has been receiving personal care services for more than one month from a home health agency certified by the Vermont department of

---

3 33 V.S.A § 6902(7)
4 33 V.S.A § 6902(14)
health or from a person or organization that offers, provides, or arranges for personal care; or

(d) Regardless of residence or whether any type of service is received, is impaired due to brain damage, infirmities of aging, or a physical, mental, or developmental disability.

C. Persons/Entities Excluded From Statute

A person who makes a report in good faith alleging abuse, neglect, or exploitation of a vulnerable adult is immune from both civil and criminal liability. However, any person making such a report who is suspected of abusing, neglecting, or exploiting a vulnerable adult is not entitled to civil or criminal immunity.5

D. Reporting Requirement for Litigation to State

A report must be made orally or in writing to the commissioner of disabilities, aging, and independent living no later than 48 hours after the discovery of abuse. If made orally, it must be followed by a written report within one week. A report must contain the contact information of the reporter, the vulnerable person, and, if known, the person responsible for their care. Furthermore, a report must contain, if available, the vulnerable adults name, the nature of their disability, the nature of the abuse, any evidence of abuse, as well as any information that may be helpful. If such abuse is caused by anyone from the department of disabilities, aging, and independent living, then the reports should instead be sent to the secretary of the agency of human services.6

E. Preclusion of Arbitration

Voluntary arbitration is preclusive when the parties “were afforded full and fair opportunity to litigate”. Agway, Inc. vs. Gray, 167 Vt. 313, 317 (Vt. 1997). This opportunity is characterized by the ability to present evidence and progress through arbitration much in the way of typical judicial proceedings. Id.

F. Relation to Medical Malpractice Actions

33 V.S.A § 6902(1)(D) specifically protects vulnerable adults from sexual exploitation by caregivers. Caregivers include anybody providing medical care to a vulnerable adult. Id., § 6902(2). If sexual abuse claims against medical practitioners are not covered by their malpractice insurance policy, the victim of such conduct may not recover damages from the insurance agency. ProSelect Ins. Co. v. Levy, 190 Vt. 632, 635 (Vt. 2011) (Finding that a vulnerable adult’s allegations of malpractice and sexual abuse by a psychiatrist were not covered under the express terms of the malpractice insurance contract).

G. Criminal Provision

5 33 V.S.A. § 6908
6 33 V.S.A. § 6904
1. **Abuse**

   (a) A person who engages in conduct intentionally or recklessly that is likely to result in unnecessary harm to a vulnerable adult will be imprisoned not more than one year and/or fined not more than $1,000.

   (b) A person who commits an assault with actual or constructive knowledge that the victim is a vulnerable adult shall be imprisoned for not more than two years, or fined not more than $2,000, or both.

   (c) A person who commits an aggravated assault with actual or constructive knowledge that the victim is a vulnerable adult shall be imprisoned up to 20 years, or fined not more than $10,000, or both.

2. **Abuse by Unlawful Restraint and Unlawful Confinement**

   (a) A person shall not knowingly or recklessly cause or threaten to unlawfully confine or restrain a vulnerable person. Furthermore, they shall not threaten or actually unlawfully administer a drug or electroconvulsive therapy to a vulnerable adult. This does not apply to legitimate and lawful medical procedures necessary for the best interests of the vulnerable adult.

   (b) Any person who violates part (a) shall:

      (i) Be imprisoned for up to two years, or fined not more than $10,000, or both.

      (ii) Be imprisoned up to three years, or fined not more than $10,000, or both, when the violation results in bodily injury.

      (iii) In the event of serious bodily injury resulting from the violation, be imprisoned up to 15 years, or fined not more than $10,000, or both.

3. **Neglect**

   (a) A caregiver who intentionally or recklessly neglects a vulnerable adult shall be imprisoned up to 18 months, or fined not more than $10,000, or both.

---

7 13 V.S.A. § 1376
8 13 V.S.A. § 1377
9 13 V.S.A. § 1378
(b) A caregiver who violates (a), and as a result causes serious bodily injury to the vulnerable adult, shall be imprisoned up to 15 years, or fined not more than $10,000, or both.

4. Sexual Abuse

(a) A person who volunteers for or is paid by a caregiving facility or program shall not engage in any sexual activity with a vulnerable adult. A person in violation of this shall receive imprisonment for up to two years, or fined not more than $10,000, or both.

(b) No person regardless of having knowledge of the vulnerable status of the person shall engage in sexual activity with the vulnerable adult without the consent of the vulnerable adult, or if the person knows or has reason to know that the vulnerable adult is incapable of consenting to the sexual activity due to their vulnerability.

(i) Any person in violation of this will be imprisoned for not more than five years, or fined not more than $10,000, or both, if the sexual activity involved lewd and lascivious conduct.

(ii) Any person in violation of (b) due to sexual activity that is a sexual act shall receive up to 20 years imprisonment, or fined not more than $10,000, or both.

(iii) A caregiver in violation of (b) for lewd and lascivious conduct shall receive no more than seven years imprisonment, or a fine of no more than $10,000, or both. For a sexual act, the caregiver shall be imprisoned up to 25 years, or fined no more than $10,000, or both.

5. Financial Exploitation

(a) No person shall willfully use, withhold, transfer, or dispose of funds or property of a vulnerable adult for wrongful profit or advantage.

(b) No person shall willfully acquire possession, control of, or an interest in the funds or property of a vulnerable adult through undue influence, harassment, duress, or fraud.

(c) Any person who exploits assets valued $500 or less shall be imprisoned up to 18 months, or fined not more than $10,000, or both. In the event of exploitation of an amount worth over $500, the person shall be imprisoned for up to 10 years, or fined not more than $10,000, or both.

---

10 13 V.S.A. § 1379
11 13 V.S.A. § 1380
6. **Exploitation of Services**¹²
   
   (a) Any person who willfully forces or compels a vulnerable adult against his or her will to perform services for the profit or advantage of another shall be imprisoned not more than two years, or fined not more than $10,000, or both.

7. **Interplay With Civil Statute**
   
   The attorney general may bring suit for damages on behalf of the state against the person who abused, unlawfully restrained, neglected, financially exploited, or exploited the services of a vulnerable person. The defendant has a right to trial by jury. Furthermore, a mere good faith report of the alleged abuse does not qualify as sufficient evidence of acting in reckless disregard.¹³

H. **Statute of Limitations:** Six years – 12 V.S.A § 511


J. **Can Regulations Establish Standard of Care?**
   
   Yes. In Vermont, regulations are admissible into evidence to establish the relevant standard of conduct that a person should have engaged in. Ball v. Melsur Corp, 161 Vt. 35, 43 (1993).

II. **DAMAGES**

A. **Damages Available**
   
   1. Actual Damages
   2. Special Damages
   3. Punitive Damages
   4. Injunctive Relief
   5. Costs of Suit

B. **Does Pain and Suffering of Decedent Survive Death**
   
   Yes. In an action to recover damages for bodily hurt or injury, if either party dies during litigation, the action will survive to reach final judgment. 14 V.S.A. § 1452.

C. **Attorney’s Fees Available:**

¹² 13 V.S.A. § 1381
¹³ 13 V.S.A. § 1384
Yes. Vermont typically adheres to the “American Rule” for attorney’s fees, but it does award such fees when allowed for by statute. *Perez v. Travelers Ins. ex rel. Ames Dep’t Stores, Inc.*, 2006 VT 123, 181 Vt. 45, 50, 915 A.2d 750, 754 (2006). For cases involving vulnerable persons specifically, Vermont awarded attorney’s fees in the case of *Howard v. Dep’t of Soc. Welfare*, 163 Vt. 109 (1994) because the claim was brought under the Americans with Disabilities Act. *Id.* at 122-23.

D. **Limitations on Damages**

A vulnerable adult’s ability to recover damages against an insurance company under a medical practitioners malpractice insurance policy is limited by the express wording of the contract. *ProSelect Ins. Co. v. Levy*, 190 Vt. 632, 635 (Vt. 2011).

**III. LEGISLATION AFFECTING STATUTE**

A. **Pending:**

1. 2013 Bill Text VT H.B. 373
2. 2013 Bill Text VT S.B. 27

B. **Anticipated:** None.
I. Civil Statute Protecting Dependent Adults or Elders from Neglect or Abuse:

Virginia does not provide a specific civil action to protect dependent adults from neglect or abuse. The State does provide protective services for dependent adults as part of the state’s social services. Virginia has mandatory reporting requirements when neglect or abuse is suspected. Also, the state has criminalized abuse and neglect of dependent adults. Va. Code Ann. § 63.2-100, et seq.

However, a civil cause of action would be based in common law negligence. If an action was brought against a health care provider it would fall under Virginia’s Medical Malpractice Act.


Actions for injuries inflicted by health care providers are usually brought as negligence actions. In large part, actions for negligent medical malpractice are governed by the common-law principles which are applicable in other types of negligence actions. Therefore, in such malpractice actions, as in other negligence actions, the plaintiff must establish:

1. Duty,
2. Breach of Duty,
3. Causation, and
4. Damages.

A. Conduct

1. Neglect:

An adult is living under such circumstances that he is not able to provide for himself or is not being provided services necessary to maintain his physical and mental health and that the failure to receive such necessary services impairs or threatens to impair his well-being. However, no adult shall be considered neglected solely on the basis that such adult is receiving religious nonmedical treatment or religious nonmedical nursing
care in lieu of medical care, provided that such treatment or care is performed in good faith and in accordance with the religious practices of the adult and there is a written or oral expression of consent by that adult. VA Code Ann. § 63.2-100

2. **Abuse**
   
   (a) **Definition**
   
   The willful infliction of physical pain, injury or mental anguish or unreasonable confinement of an adult. VA Code Ann. § 63.2-100
   
   (b) **Single Act and/or Pattern**
   
   (i) Not applicable to Adult Protection Statute
   
   (c) **Legal Requirement for the act(s) or Omission(s):**
   
   (ii) Not Applicable to Adult Protection Statute

3. **Exploitation:** Adult exploitation” means the illegal use of an incapacitated adult or his resources for another's profit or advantage. VA Code Ann. § 63.2-100

**B. Vulnerable Adults**

1. **Types of Impairment**

   An “Incapacitated person” means any adult who is impaired by reason of mental illness, intellectual disability, physical illness or disability, advanced age or other causes to the extent that the adult lacks sufficient understanding or capacity to make, communicate or carry out responsible decisions concerning his or her well-being. VA Code Ann. § 63.2-1603

**C. Persons Entities Excluded**

1. Not Applicable to Adult Protection Statute

**D. Reporting Requirement for litigation to state**

1. Not Applicable to Adult Protection Statute

2. **Medical Malpractice**

   (a) In the case of a medical malpractice claim against the Commonwealth, a failure to give the notice required by Va. Code § 8.01-195.6 may bar the action.

**E. Preclusion of Arbitration**

1. Not Applicable to Adult Protection Statute

F. Relationship to Medical Malpractice actions
   1. Not Applicable to Adult Protection Statute

G. Criminal Provision
   1. § 18.2-369. Abuse and neglect of incapacitated adults; penalty
      (a) It shall be unlawful for any responsible person to abuse or neglect any incapacitated adult as defined in this section. Any responsible person who abuses or neglects an incapacitated adult in violation of this section and the abuse or neglect does not result in serious bodily injury or disease to the incapacitated adult is guilty of a Class 1 misdemeanor. Any responsible person who is convicted of a second or subsequent offense under this subsection is guilty of a Class 6 felony.
      (b) Any responsible person who abuses or neglects an incapacitated adult in violation of this section and the abuse or neglect results in serious bodily injury or disease to the incapacitated adult is guilty of a Class 4 felony. Any responsible person who abuses or neglects an incapacitated adult in violation of this section and the abuse or neglect results in the death of the incapacitated adult is guilty of a Class 3 felony.

H. Statute of Limitations
   1. Not Applicable to Adult Protection Statute
   2. Medical Malpractice
      (a) Personal injury actions based upon medical malpractice must normally be brought within two years after the cause of action accrues, as provided in Virginia Code § 8.01-243.9 Wrongful death actions are subject to the provisions of § 8.01-244.10
      (b) The limitations period is extended in actions for malpractice against health care providers in cases involving foreign objects left in the body, and in cases involving fraud, concealment, and intentional misrepresentation. In such instances, the limitations period is one year from the date that the object or injury is discovered or reasonably should have been discovered. Virginia Code § 8.01-243(c)

I. Burden of Proof
1. Not Applicable to Adult Protection Statute


J. Can Regulations establish standard of care

1. In medical malpractice action the standard of care may be established by expert testimony. Indeed, expert testimony is ordinarily necessary to establish the appropriate standard of care.

II. Damages

A. Damages Available

1. Adult Protection Statute
   (a) Injunctive Relief

2. Medical Malpractice Action
   (a) Actual Damages
   (b) Punitive Damages

The damages which may be recovered in medical malpractice actions generally are those which are available in any personal injury action, e.g., out-of-pocket expenses, pain and suffering, loss of income, etc. Damages for mental distress are also recoverable in medical malpractice actions, if the mental distress is accompanied by physical injury.

As amended in 1999, the Medical Malpractice Act provides in § 8.01-581.15 that in actions for injury to or death of a patient, the total amount recoverable against the health care provider for any such injury or death shall not exceed $1.5 million. In 2011, the General Assembly increased these limits: July 1, 2012, through June 30, 2013 $2.05 million; July 1, 2013, through June 30, 2014 $2.10 million; July 1, 2014, through June 30, 2015 $2.15 million.

VA Code Ann. § 8.01-581.15.

B. Does Pain and Suffering of Decedent/Resident Survive Death

1. Not Applicable to Adult Protection Statute

C. Attorney’s Fees Available: Yes

1. If Available, are the attorney’s fees limited: No

III. Legislation Affecting Statute

A. Pending: Yes, effective July 1, 2013.
B. Anticipated: Unknown
I. Civil Statute Protecting Dependent Adults or Elders from Neglect or Abuse:

A. Conduct

1. Neglect

Neglect refers to:

   a. A pattern of either conduct or inaction by a person or entity with a duty of care that fails to avoid or prevent mental or physical harm or pain to a vulnerable adult, or fails to provide the goods and services that maintain the mental or physical health of a vulnerable adult; or

   b. An act or omission by a person or entity with a duty of care that demonstrates such a serious disregard of consequences of such magnitude as to constitute a clear and present danger to the vulnerable adult’s welfare, health, or safety.


2. Abuse

   a. Definition

      Abuse refers to the willful action or inaction that inflict injury, unreasonable confinement, punishment, or intimidation on a vulnerable adult. If a vulnerable adult is unable to express or demonstrate physical harm, pain, or mental anguish, the abuse is presumed to cause physical harm, pain, or mental anguish. Abuse includes exploitation and physical, mental, and sexual abuse. Wash. Rev. Code Ann. § 74.34.020(2) (West 2013).

   b. Single Act and/or Pattern

      The legislature has not specified what frequency of conduct qualifies as abuse. However, based on the definitions above, either a single act or pattern may qualify as abuse.
c. Legal Requirement for the act(s) or omission(s):

To establish a breach of the standard of care, a plaintiff must prove that a health care provider:

(i) failed to exercise the degree of skill, care, and learning expected of a reasonably prudent health care provider at that time in that profession acting in the same or similar circumstances; and

(ii) (2) that such failure proximately caused the complained-of injury.


3. Exploitation

Exploitation is defined as the act of forcing, compelling, or exerting undue influence over a vulnerable adult thereby causing the vulnerable adult to act in a way that is inconsistent with a relevant past behavior, or causing the vulnerable adult to perform services for the benefit of another. Wash. Rev. Code Ann. § 74.34.020(2)(d) (West 2013).

B. Vulnerable Adults

1. Types of Impairment

The statutory definition of “vulnerable adult” includes a person:

a. Sixty years of age or older who has the functional, mental, or physical inability to care for himself or herself; or

b. Found incapacitated under chapter 11.88 RCW; or

c. Who has a developmental disability as defined under RCW 71A.10.020; or

d. Admitted to any facility; or

e. Receiving services from home health, hospice, or home care agencies licensed or required to be licensed under chapter 70.127 RCW; or

f. Receiving services from an individual provider; or

g. Who self-directs his or her own care and receives services from a personal aide under chapter 74.39 RCW.


C. Persons/Entities Excluded from Statute
A person participating in good faith in making a report under this statute or testifying about alleged abuse, neglect, financial exploitation, abandonment, or self-neglect of a vulnerable adult in a judicial or administrative proceeding is immune from liability resulting from the report or testimony. A person making a permissive report under this statute does not have a duty to report and no civil liability shall attach for any failure to make a permissive report under this statute.

a. Of note, conduct conforming with the reporting and testifying provisions of this statute shall not be deemed a violation of any confidential communication privilege. Nothing in this statute shall be construed as superseding or abridging remedies provided in chapter 4.92 RCW. Wash. Rev. Code Ann. § 74.34.050 (West 2013).

D. Reporting Requirement for Litigation to State

1. Types of Reporters

a. A “mandated reporter” is an employee of the department; law enforcement officer; social worker; professional school personnel; individual provider; an employee of a facility; an operator of a facility; an employee of a social service, welfare, mental health, adult day health, adult day care, home health, home care, or hospice agency; county coroner or medical examiner; Christian Science practitioner; or health care provider subject to chapter 18.130 RCW. Wash. Rev. Code Ann. § 74.34.020(11) (West 2013).

b. A “permissive reporter” means any person, including, but not limited to, an employee of a financial institution, attorney, or volunteer in a facility or program providing services for vulnerable adults. Wash. Rev. Code Ann. § 74.34.020(13) (West 2013).

2. Report Requirements

(1) When there is reasonable cause to believe that abandonment, abuse, financial exploitation, or neglect of a vulnerable adult has occurred, mandated reporters shall immediately report to the department.

(2) When there is reason to suspect that sexual assault has occurred, mandated reporters shall immediately report to the appropriate law enforcement agency and to the department.

(3) When there is reason to suspect that physical assault has occurred or there is reasonable cause to believe that an act has caused fear of imminent harm:
(a) Mandated reporters shall immediately report to the department; and

(b) Mandated reporters shall immediately report to the appropriate law enforcement agency, except as provided in subsection (4) of this section.

(4) A mandated reporter is not required to report to a law enforcement agency, unless requested by the injured vulnerable adult or his or her legal representative or family member, an incident of physical assault between vulnerable adults that causes minor bodily injury and does not require more than basic first aid, unless:

(a) The injury appears on the back, face, head, neck, chest, breasts, groin, inner thigh, buttock, genital, or anal area;

(b) There is a fracture;

(c) There is a pattern of physical assault between the same vulnerable adults or involving the same vulnerable adults; or

(d) There is an attempt to choke a vulnerable adult.

(5) When there is reason to suspect that the death of a vulnerable adult was caused by abuse, neglect, or abandonment by another person, mandated reporters shall, pursuant to RCW 68.50.020, report the death to the medical examiner or coroner having jurisdiction, as well as the department and local law enforcement, in the most expeditious manner possible. A mandated reporter is not relieved from the reporting requirement provisions of this subsection by the existence of a previously signed death certificate. If abuse, neglect, or abandonment caused or contributed to the death of a vulnerable adult, the death is a death caused by unnatural or unlawful means, and the body shall be the jurisdiction of the coroner or medical examiner pursuant to RCW 68.50.010.

(6) Permissive reporters may report to the department or a law enforcement agency when there is reasonable cause to believe that a vulnerable adult is being or has been abandoned, abused, financially exploited, or neglected.

(7) No facility, as defined by this chapter, agency licensed or required to be licensed under chapter 70.127 RCW, or facility or agency under contract with the department to provide care for vulnerable adults may develop policies or procedures that interfere with the reporting requirements of this chapter.

(8) Each report, oral or written, must contain as much as possible of the following information:
(a) The name and address of the person making the report;

(b) The name and address of the vulnerable adult and the name of the facility or agency providing care for the vulnerable adult;

(c) The name and address of the legal guardian or alternate decision maker;

(d) The nature and extent of the abandonment, abuse, financial exploitation, neglect, or self-neglect;

(e) Any history of previous abandonment, abuse, financial exploitation, neglect, or self-neglect;

(f) The identity of the alleged perpetrator, if known; and

(g) Other information that may be helpful in establishing the extent of abandonment, abuse, financial exploitation, neglect, or the cause of death of the deceased vulnerable adult.

(9) Unless there is a judicial proceeding or the person consents, the identity of the person making the report under this section is confidential.

(10) In conducting an investigation of abandonment, abuse, financial exploitation, self-neglect, or neglect, the department or law enforcement, upon request, must have access to all relevant records related to the vulnerable adult that are in the possession of mandated reporters and their employees, unless otherwise prohibited by law. Records maintained under RCW 4.24.250, 18.20.390, 43.70.510, 70.41.200, 70.230.080, and 74.42.640 shall not be subject to the requirements of this subsection. Providing access to records relevant to an investigation by the department or law enforcement under this provision may not be deemed a violation of any confidential communication privilege. Access to any records that would violate attorney-client privilege shall not be provided without a court order unless otherwise required by court rule or case law.

Wash. Rev. Code Ann. § 74.34.035 (West 2013).

E. Preclusion of Arbitration


F. Relationship to Medical Malpractice Action

**G. Criminal Provision**

1. *See* RCWA 9A.42 for Criminal Mistreatment Statute of Dependent Persons.

   Under the applicable Washington Criminal Code, a “dependent person” is a person who, because of physical or mental disability, or because of extreme advanced age, is dependent upon another person to provide the basic necessities of life. A resident of a nursing home, as defined in RCW 18.51.010, a resident of an adult family home, as defined in RCW 70.128.010, and a frail elder or vulnerable adult, as defined in RCW 74.34.020(13), is presumed to be a dependent person for purposes of this chapter. Wash. Rev. Code Ann. § 74.34.145 (West 2013).

2. **Interplay with State Civil Statute**

   When the initial report or investigation by the department of social and health services indicates that the alleged abandonment, abuse, financial exploitation, or neglect may be criminal, the department shall make an immediate report to the appropriate law enforcement agency. The department and law enforcement will then coordinate in investigating reports made under this chapter. The department may provide protective services and other remedies as specified in this statute. Wash. Rev. Code Ann. § 74.34.063(2) (West 2013).

**H. Statute of Limitations**


**I. Burden of Proof**

The Vulnerable Adult Statute (“VAS”) establishes a separate cause of action with its own standards of proof that differ from those of common law negligence. *Warner v. Regent Assisted Living*, 132 Wash. App. 126, 134 (2006). For instance, the VAS does not require the plaintiff to proffer expert testimony to prove neglect, abuse, or pain and suffering. *Id.* The burden of proof rests on the plaintiff to prove that the defendant engaged in a pattern of conduct or inaction prohibited under the VAS. *Conrad v. Alderwood Manor*, 1119 Wash. App. 275, 281 (2003). In causes of action under the VAS, a plaintiff need not establish causation by direct and positive influence. *Id.* Rather, a plaintiff only needs to show by a chain of circumstances from which the ultimate fact required is naturally and reasonably inferable. *Id.*
J. Can Regulations Establish Standard of Care?

Unclear.

II. DAMAGES

A. Damages Available

1. Actual Damages
2. Pain and Suffering
3. Costs of Suit
   a. “Costs” includes, but is not limited to, reasonable fees for a guardian, guardian ad litem, and experts, if any, that may be needed for the litigation for a claim brought under this provision.
4. Attorney’s Fees
5. Punitive Damages
   No. Washington courts have a long-standing rule prohibiting punitive damages without express legislative authorization, which is not found in the VAS. Dailey v. N. Coast Life Ins. Co., 129 Wash. 2d 572, 575 (1996).

B. Does Pain and Suffering of Decedent/Resident Survive Death?

Yes. The personal representative shall only be entitled to recover damages for pain and suffering, anxiety, emotional distress, or humiliation personal to and suffered by a deceased on behalf of the beneficiaries listed in RCW 4.20.020, and such damages are still recoverable regardless of whether or not the death was caused by the injury that is the basis for the cause of action. Wash. Rev. Code Ann. §4.20.046(1) (West 2013).

C. Attorney’s Fees Available:

1. Yes.
2. If available, are the attorney’s fees limited?
   Yes. Attorney’s fees must be reasonable. Wash. Rev. Code Ann. 74.34.200(3) (West 2013).

III. LEGISLATION AFFECTING STATUTE

A. Pending: None.
B. Anticipated: None.
I. Civil Statute Protecting Dependent Adults or Elders from Neglect or Abuse: *West Virginia Code § 16-5C-15* (providing a civil remedy for depravations of nursing home residents’ rights).

A. Conduct

1. Any nursing home that deprives a resident of any right or benefit created or established for the well-being of this resident shall be liable to the resident for injuries suffered as a result of such deprivation. The right or benefit may be created or established by:

   (a) By the terms of any contract;

   (b) By any state statute or rule; or

   (c) By any applicable federal statute or regulation.

2. Resident rights established by West Virginia Code of State Rules

   (a) Each resident shall be free from mental and physical abuse, and free from chemical and physical restraints except when the restraint is authorized in writing by a physician for a specified and limited period of time, except under emergency circumstances.3

   (b) A resident has the right to be free from verbal, sexual, physical, and mental abuse, financial exploitation, discrimination, denial of privileges, corporal punishment and involuntary seclusion.4

   (c) The nursing home shall develop and implement written policies and procedures that prohibit neglect, abuse of residents, and misappropriation of resident property.5

---

1 *W. Va. Code § 16-5C-15(c).* A similar cause of action exists for residents of assisted living facilities under *W. Va. Code § 16-5D-15(c).*

2 Chapter 64 Series 13 of the West Virginia Code of State Rules contains a number of rights afforded to nursing home residents. Only the most relevant are included here.

3 *W. Va. CSR § 64-13-4.16.a.*

4 *W. Va. CSR § 64-13-4.16.c.1.*
(d) A nursing home shall care for its residents in a manner and in an environment that promotes maintenance or enhancement of each resident's quality of life.  

(e) A resident has the right to reside and receive services in the nursing home with reasonable accommodations for individual needs and preferences, except when the health or safety of the person or other residents would be endangered.  

(f) The nursing home shall provide medically-related social services to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident.  

B. Nursing Home Residents

1. **Resident**: an individual living in a nursing home.  

2. **Nursing home or facility**:
   
   (a) Any institution, residence or place, or any part or unit thereof, however named;  

   (b) In West Virginia;  

   (c) Which is advertised, offered, maintained or operated by the ownership or management, whether for a consideration or not;  

   (d) For the express or implied purpose of providing accommodations and care;  

   (e) For a period of more than twenty-four hours;  

   (f) For:
      
      (i) Four or more persons who are ill or otherwise incapacitated and in need of extensive, ongoing nursing care due to physical or mental impairment; or  

      (ii) Which provides services for the rehabilitation of persons who are convalescing from illness or incapacitation.  

C. Persons/Entities Excluded From Statute

1. Entities excluded from the definition of “nursing home”:

---

5 *W. Va. CSR § 64-13-4.16.c.2.A.*  
6 *W. Va. CSR § 64-13-5.1.*  
7 *W. Va. CSR § 64-13-5.9.a.*  
8 *W. Va. CSR § 64-13-5.11.a.*  
9 *W. Va. Code § 16-5C-2(e), (g).*
(a) The care or treatment in a household of a close relative;  
(b) Nursing homes operated by the federal government;  
(c) Extended care facilities operated in conjunction with a hospital;  
(d) Institutions operated for the treatment and care of alcoholic patients;  
(e) Offices of physicians;  
(f) Hotels, boarding homes or other similar places that furnish to their guests only room and board; and  
(g) Homes or asylums operated by fraternal orders.

2. **Nursing homes that have exercised all care reasonably necessary to prevent and limit the deprivation and injury to the resident are not liable for compensatory damages.** *W. Va. Code § 16-5C-15(c).*

**D. Reporting Requirement for Litigation to State**

None.

1. However, at least thirty days prior to the filing of a medical professional liability action against a health care provider, the claimant is required to serve a notice of claim on each health care provider the claimant will join in litigation.10

2. Further, if, after its investigation, the Secretary of the Department of Health and Human Resources determines that the complaint has merit, he is required to advise any injured party of the possibility of a civil remedy.11

**E. Preclusion of Arbitration:**

Arbitration is not necessarily precluded.

1. **Statutory Treatment of Waiver:** Any waiver by a resident or his or her legal representative of the right to commence an action under this section, whether oral or in writing, is null and void as contrary to public policy.12

2. **Case law:** "Congress did not intend for arbitration agreements, adopted prior to an occurrence of negligence that results in a personal injury or wrongful death, and which require questions about the negligence be

---

10 *W. Va. Code § 55-7B-6.* Per a recent amendment to West Virginia Code § 16-5C-15 (see Part III below), the provisions of the Medical Professional Liability Act (§ 55-7b-1, et seq.) are applicable to claims brought by nursing home residents.

11 *W. Va. Code § 16-5C-8(b).*

12 *W. Va. Code § 16-5C-15(c).*
submitted to arbitration, to be governed by the Federal Arbitration Act."

Brown v. Genesis Healthcare Corp., 228 W.Va. 646, 724 S.E.2d 250 (2011) (Syllabus Point 21). In accordance with Marmet Health Care Center, Inc. v. Brown, 132 S.Ct. 1201 (2012) (per curiam), the West Virginia Supreme Court overruled this syllabus point. Brown v. Genesis Healthcare Corp., 229 W. Va. 382, 385, 729 S.E.2d 217 (W. Va. 2012). Thus, “in an abundance of caution and with deference to the Supreme Court's mandate that the arbitration clauses only be found unenforceable under state common law principles that are not specific to arbitration, we determine that the fairest route is to reverse the circuit courts' prior orders and permit the parties to develop the evidence.” Id.

F. Relationship to Medical Malpractice actions

Per a recent amendment to West Virginia Code § 16-5C-15 (see Part III below), the provisions of the Medical Professional Liability Act (§ 55-7b-1, et seq.) are applicable to claims brought by nursing home residents under West Virginia Code § 16-5C-15.

G. Criminal Provision: Abuse or neglect of incapacitated adult.


1. A caregiver who neglects an incapacitated adult or who knowingly permits another person to neglect an incapacitated adult is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than $100 nor more than $500 or confined in jail for not more than one year, or both fined and confined.

2. A caregiver who abuses an incapacitated adult or who knowingly permits another person to abuse an incapacitated adult is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than $100 nor more than $500 or confined in jail for not less than ninety days nor more than one year, or both fined and confined.

3. A caregiver of an incapacitated adult who intentionally and maliciously abuses or neglects an incapacitated adult and causes the incapacitated adult bodily injury is guilty of a felony and, upon conviction thereof, shall be fined not less than $100 nor more than $1,000 and imprisoned in a state correctional facility not less than two years nor more than ten years.

4. A caregiver of an incapacitated adult who intentionally and maliciously abuses or neglects an incapacitated adult and causes the incapacitated adult serious bodily injury is guilty of a felony and, upon conviction thereof, shall be fined not less than $1,000 nor more than $
and imprisoned in a state correctional facility not less than three years nor more than fifteen years.

5. Definitions:

(a) **Caregiver**: any person who has assumed the legal responsibility or a contractual obligation for the care of an incapacitated adult, or has voluntarily assumed responsibility for the care of an incapacitated adult. The term includes a facility operated by any public or private agency, organization or institution which provides services to, and has assumed responsibility for the care of an incapacitated adult.

(b) **Abuse**: the intentional infliction of bodily injury on an incapacitated adult;

(c) **Neglect**: the unreasonable failure by a caregiver to provide the care necessary to assure the physical safety or health of an incapacitated adult;

(d) **Incapacitated adult**: any person eighteen years of age or older who by reason of advanced age, physical, mental or other infirmity is unable to carry on the daily activities of life necessary to sustaining life and reasonable health.

6. **Interplay with State Civil Statute?**

The statutes and case law do not specify.

H. **Statute of Limitations:**

Two years for cause of action for injury to a person alleging medical professional liability. *W. Va. Code § 55-7B-4(a).*


1. Necessary elements of proof that an injury or death resulted from the failure of a health care provider to follow the accepted standard of care:

(a) The health care provider failed to exercise that degree of care, skill and learning required or expected of a reasonable, prudent health care provider in the profession or class to which the health care provider belongs acting in the same or similar circumstances; and

(b) Such failure was a proximate cause of the injury or death.

14 Per a recent amendment to West Virginia Code § 16-5C-15 (see Part III below), the provisions of the Medical Professional Liability Act (§ 55-7b-1, et seq.) are applicable to claims brought by nursing home residents.
2. Necessary elements for “loss of chance” theory (health care provider's failure to follow the accepted standard of care deprived the patient of a chance of recovery or increased the risk of harm to the patient which was a substantial factor in bringing about the ultimate injury to the patient):

(a) Plaintiff must also prove, to a reasonable degree of medical probability, that following the accepted standard of care would have resulted in a greater than twenty-five percent chance that the patient would have had an improved recovery or would have survived.

J. Can Regulations Establish Standard of Care:


II. DAMAGES

A. Damages Available\(^\text{15}\)

1. Actual/Compensatory Damages\(^\text{16}\)
2. Punitive Damages
3. Injunctive Relief

B. Does Pain and Suffering of Decedent/Resident Survive Death:


C. Attorney’s Fees Available: No.

1. If available, are the attorney’s fees limited? N/A

III. LEGISLATION AFFECTING STATUTE


1. Added Provisions:

(a) Nothing in this section or any other section of the code shall limit the protections afforded nursing homes or their health care providers under W. Va. Code 55-7b.

\(^{15}\) \textit{W. Va. Code § 16-5C-15(c)}.

\(^{16}\) Compensatory damages for noneconomic loss are capped. \textit{W. Va. Code § 55-7B-8,
(b) The amendments to this section enacted during the 2013 Regular Session of the Legislature shall be effective July 1, 2013: Provided, that there shall be no inference, either positive or negative, to any legal action pending pursuant to this section as of July 1, 2013. The amendments to this section in 2013 are not in any way intended to modify, change, expand or contract the Medical Professional Liability Act. The proper construction of this section and the limitations and provisions of W. Va. Code 55-7b shall be determined by principles of statutory construction.

B. Anticipated: None.

IV. Civil Statute Imposing Duty to Report Neglect or Abuse of the Elderly: West Virginia Code § 9-6-1.

A. Neglect: The unreasonable failure by a caregiver to provide the care necessary to assure the physical safety or health of an incapacitated adult; or the unlawful expenditure or willful dissipation of the funds or other assets owned or paid to or for the benefit of an incapacitated adult or resident. W. Va. Code § 9-6-1(3).

1. Caretaker: a person or entity who cares for or shares in the responsibility for the care of an incapacitated adult on a full-time or temporary basis, regardless of whether such person or entity has been designated as a guardian or custodian of the incapacitated adult by any contract, agreement or legal procedures. Caregiver includes health care providers, family members, and any person who otherwise voluntarily accepts a supervisory role towards an incapacitated adult. W. Va. Code § 9-6-1(13).

B. Abuse: The infliction or threat to inflict physical pain or injury on or the imprisonment of any incapacitated adult or facility resident. W. Va. Code § 9-6-1(2).

C. Duty to Report: If any medical, dental or mental health professional, Christian Science practitioner, religious healer, social service worker, law-enforcement officer, humane officer, state or regional ombudsman or any employee of any nursing home or other residential facility has reasonable cause to believe that an incapacitated adult or facility resident is or has been neglected, abused or placed in an emergency situation, or if such person observes an incapacitated adult or facility resident being subjected to conditions that are likely to result in abuse, neglect or an emergency situation, the person shall immediately report the circumstances. W. Va. Code § 9-6-9(a).

D. Criminal Penalty for Failure to Report: Any person subject to the mandatory reporting provisions of this article who knowingly fails to make any report required herein or any person who knowingly prevents another person from making such a report is guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than one hundred dollars or imprisoned in the county jail for not more than ten days, or both fined and imprisoned. W. Va. Code § 9-6-14.
I. Civil Statute Protecting Dependent Adults or Elders from Neglect or Abuse: Wis. Stat. § 46.90, et.seq.

A. Conduct

(1) **Neglect:** The failure of a caregiver, as evidenced by an act, omission, or course of conduct, to endeavor to secure or maintain adequate care, services, or supervision for an individual, including food, clothing, shelter, or physical or mental health care, and creating significant risk or danger to the individual's physical or mental health. Neglect does not include a decision that is made to not seek medical care for an individual, if that decision is consistent with the individual's previously executed declaration or do-not-resuscitate order under ch. 154, a power of attorney for health care under ch. 155, or as otherwise authorized by law.¹

(2) **Abuse:**

(a) **Definition:**

(i) Physical abuse (the intentional or reckless infliction of bodily harm);

(ii) Emotional abuse (language or behavior that serves no legitimate purpose and is intended to be intimidating, humiliating, threatening, frightening, or otherwise harassing, and that does or reasonably could intimidate, humiliate, threaten, frighten, or otherwise harass the individual to whom the conduct or language is directed);

(iii) Sexual abuse;

(iv) Treatment without consent (the administration of medication to an individual who has not provided informed consent, or the performance of psychosurgery, electroconvulsive therapy, or experimental research on an individual who has not provided informed consent, with the knowledge that no lawful authority exists for the administration or performance);

(v) Unreasonable confinement or restraint (the intentional and unreasonable confinement of an individual in a locked room, involuntary separation of an individual from his or her living area, use on an individual of physical restraining devices, or the provision of unnecessary or excessive medication to an individual, but does not include the use of these methods or devices in entities regulated by the department if the methods or devices are employed in conformance with state and federal standards governing confinement and restraint); or

(vi) Deprivation of a basic need for food, shelter, clothing, or personal or health care, including deprivation resulting from the failure to provide or arrange for a basic need by a person who has assumed responsibility for meeting the need voluntarily or by contract, agreement, or court order.2

(b) Single Act and/or Pattern:

Unknown, but the language suggests that a single act is sufficient.

(c) Legal Requirement for the act(s) or omission(s):

Any person, other than a person in charge of or employed in a facility or program under s. 940.295(2) who does any of the following may be penalized:

(i) Intentionally subjects an individual at risk to abuse;

---

(ii) Recklessly subjects an individual at risk to abuse; or

(iii) Negligently subjects an individual at risk to abuse.

(3) **Financial Exploitation:**

Any person who does any of the following may be penalized:

(i) Obtaining an individual’s money or property by deceiving or enticing the individual, or by forcing, compelling, or coercing the individual to give, sell at less than fair market value, or in other ways convey money or property against his or her will without his or her informed consent;

(ii) Theft;

(iii) The substantial failure or neglect of a fiscal agent to fulfill his or her responsibilities;

(iv) Unauthorized use of an individual’s personal identifying information or documents;

(v) Unauthorized use of an entity’s identifying information or documents;

(vi) Forgery; or

(vii) Financial transaction card crimes.

B. Adult At Risk

(1) **Elder Adult at Risk:** Any person age 60 or older who has experienced, is currently experiencing, or is at risk of experiencing abuse, neglect, self-neglect, or financial exploitation.

---

3 Exploitation will not be addressed in this compendium – instead, only the abuse and/or neglect portions of the statutes.


C. Persons/Entities Excluded From Statute

(1) Nothing in this section may be construed to mean that an individual at risk (including at elder adult at risk) is abused solely because he or she consistently relies upon treatment by spiritual means through prayer for healing, in lieu of medical care, in accordance with his or her religious tradition.\(^6\)

(2) A health care provider acting in the scope of his or her practice or employment who commits an act or omission of mere inefficiency, unsatisfactory conduct, or failure in good performance as the result of inability, incapacity, inadvertency, ordinary negligence, or good faith error in judgment or discretion is not considered to be abuse of an elder adult.\(^7\)

D. Reporting Requirement for Litigation to State

Except as provided in § 46.90(4)(ae), a person specified in § 46.90(4)(ab) who has seen an elder adult at risk in the course of the person's professional duties shall file a report with the county department, the elder-adult-at-risk agency, a state or local law enforcement agency, the department, or the board on aging and long-term care if the elder adult at risk has requested the person to make the report, or if the person has reasonable cause to believe that any of the following situations exist:

(1) The elder adult at risk is at imminent risk of serious bodily harm, death, sexual assault, or significant property loss and is unable to make an informed judgment about whether to report the risk; or

(2) An elder adult at risk other than the subject of the report is at risk of serious bodily harm, death, sexual assault, or significant property loss inflicted by a suspected perpetrator.\(^8\)

E. Preclusion of Arbitration: Unknown.

F. Relationship to Medical Malpractice Actions

---

A health care provider acting in the scope of his or her practice or employment who commits an act or omission of mere inefficiency, unsatisfactory conduct, or failure in good performance as the result of inability, incapacity, inadvertency, ordinary negligence, or good faith error in judgment or discretion.\(^9\)

G. **Criminal Provision\(^{10}\)**

(1) Any person who intentionally subjects an individual at risk to abuse under circumstances that:

(a) Cause death is guilty of a Class C felony.
(b) Cause great bodily harm is guilty of a Class F felony.
(c) Are likely to cause great bodily harm is guilty of a Class G felony.
(d) Cause bodily harm is guilty of a Class H felony.
(e) Are likely to cause bodily harm is guilty of a Class I felony.
(f) Are not causing and not likely to cause bodily harm is guilty of a Class B misdemeanor.

(2) Any person who recklessly subjects an individual at risk to abuse under circumstances that:

(a) Cause death is guilty of a Class C felony.
(b) Cause great bodily harm is guilty of a Class F felony.
(c) Are likely to cause great bodily harm is guilty of a Class I felony.
(d) Cause or are likely to cause bodily harm is guilty of a Class A misdemeanor.

(3) Any person who negligently subjects an individual at risk to abuse under circumstances that:

(a) Cause death is guilty of a Class D felony.

(b) Cause great bodily harm is guilty of a Class F felony.

(c) Are likely to cause great bodily harm is guilty of a Class I felony.

(d) Cause or are likely to cause bodily harm is guilty of a Class A misdemeanor.

(e) Are not causing and not likely to cause bodily harm is guilty of a Class B misdemeanor.

(4) Possible Penalties:11

(a) For a Class C felony, a fine not to exceed $100,000 or imprisonment not to exceed 40 years, or both.

(b) For a Class D felony, a fine not to exceed $100,000 or imprisonment not to exceed 25 years, or both.

(c) For a Class F felony, a fine not to exceed $25,000 or imprisonment not to exceed 12 years and 6 months, or both.

(d) For a Class G felony, a fine not to exceed $25,000 or imprisonment not to exceed 10 years, or both.

(e) For a Class H felony, a fine not to exceed $10,000 or imprisonment not to exceed 6 years, or both.

(f) For a Class I felony, a fine not to exceed $10,000 or imprisonment not to exceed 3 years and 6 months, or both.

(g) For a Class A misdemeanor, a fine not to exceed $10,000 or imprisonment not to exceed 9 months, or both.

(h) For a Class B misdemeanor, a fine not to exceed $1,000 or imprisonment not to exceed 90 days, or both.

(i) For a Class C misdemeanor, a fine not to exceed $500 or imprisonment not to exceed 30 days, or both.

(5) Habitual Criminality:1²

If the actor is a repeater and the present conviction is for any crime for which imprisonment may be imposed, the maximum term of imprisonment prescribed by law for that crime may be increased as follows:

(a) A maximum term of imprisonment of one year or less may be increased to not more than two years.

(b) A maximum term of imprisonment of more than one year but not more than ten years may be increased by not more than two years if the prior convictions were for misdemeanors and by not more than four years if the prior conviction was for a felony.

(c) A maximum term of imprisonment of more than ten years may be increased by not more than two years if the prior convictions were for misdemeanors and by not more than six years if the prior conviction was for a felony.

H. Statute of Limitations

The later of three years from the date of injury, or one year from the date the injury was discovered but limited to five years from the date of the act or omission.1³

I. Burden of Proof

Beyond a reasonable doubt.  

J. Can Regulations Establish Standard of Care: Unknown.

K. Elder-Adult-At-Risk Agency Response

(1) Upon responding to a report, the elder-adult-at-risk agency or the investigative agency shall determine whether the elder adult at risk or any other individual involved in the alleged abuse, financial exploitation, neglect, or self-neglect is in need of services. From the appropriation under s. 20.435(7)(dh), the department shall allocate to selected counties not less than $25,000 in each fiscal year, and within the limits of these funds and of available state and federal funds and of county funds appropriated to match the state and federal funds, the elder-adult-at-risk agency shall provide the necessary direct services to the elder adult at risk or other individual or arrange for the provision of the direct services with other agencies or individuals. Those direct services provided shall be rendered under the least restrictive conditions necessary to achieve their objective.

(2) If, after responding to a report, the elder-adult-at-risk agency has reason to believe that the elder adult at risk has been the subject of abuse, financial exploitation, neglect, or self-neglect, the elder-adult-at-risk agency may do any of the following:

(a) Request immediate assistance in initiating a protective services action under ch. 55 or contact an investigative agency, as appropriate;

(b) Take appropriate emergency action, including emergency protective placement, if the elder-adult-at-risk agency determines that the emergency action is in the best interests of the elder adult at risk and the emergency action is the least restrictive appropriate intervention;

---

14 Wis. Stat. § 939.70 (2011); Wis. Stat. § 940; State v. Poellinger, 153 Wis.2d 493, 501 (Wis. 1990).
(c) Refer the case to law enforcement officials, for further investigation or to the district attorney, if the elder-adult-at-risk agency has reason to believe that a crime has been committed;

(d) Refer the case to the licensing, permitting, registration, or certification authorities of the department or to other regulatory bodies if the residence, facility, or program for the elder adult at risk is or should be licensed, permitted, registered, or certified or is otherwise regulated;

(e) Refer the case to the department of safety and professional services if the financial exploitation, neglect, self-neglect, or abuse involves an individual who is required to hold a credential; or

(f) Bring a petition for a guardianship and protective services or protective placement under ch. 55 or a review of an existing guardianship if necessary to prevent financial exploitation, neglect, self-neglect, or abuse and if the elder adult at risk would otherwise be at risk of serious harm because of an inability to arrange for necessary food, clothing, shelter, or services.16

(3) An elder adult at risk may refuse to accept services unless a guardian authorizes the services. The elder-adult-at-risk agency or other provider agency shall notify the elder adult at risk of this right to refuse before providing services.17

II. DAMAGES

A. Damages Available

(1) Actual damages;

(2) Pain, suffering and noneconomic damages (limited to $750,000);

(3) Loss of consortium, society and companionship or loss of love and affection;

17 Wis. Stat. § 46.90(5m)(c) (2011).
(4) Loss of earnings or earning capacity;
(5) Each element of medical expenses; or
(6) Costs of suit.

B. **Does Pain and Suffering of Decedent/Resident Survive Death**

Yes. If the decedent dies before judgment, he/she is still entitled to damages for pain and suffering. “Noneconomic damages for the victim’s pre-death pain and suffering survive the victim’s death under the survival statute and are referred to as survival actions. The survival action…is not a new cause of action. It is rather the cause of action held by the decedent immediately before or at death, now transferred to his personal representative.”

C. **Attorney’s Fees Available**

Yes. For civil actions, attorney fees are subject to the limitations found in Wis. Stat. 814.04 and 814.045.

III. **LEGISLATION AFFECTING STATUTE**

A. **Pending:** None known.

B. **Anticipated:** None known.

---

I. Civil Statute Protecting Dependent Adults or Elders from Neglect or Abuse:  None

A. Vulnerable Adults

"Vulnerable adult" means any person eighteen (18) years of age or older who is unable to manage and take care of himself or his money, assets or property without assistance as a result of advanced age or physical or mental disability


B. Persons/Entities Excluded From Statute:  None

C. Reporting Requirement for Litigation to State:  None

D. Preclusion of Arbitration

A written agreement to submit any existing or future controversy to arbitration is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of the contract.


E. Relationship to Medical Malpractice actions

No civil elder abuse statute exists in Wyoming, and does not affect medical malpractice actions

F. Criminal Provision

A person is guilty of abuse, neglect, abandonment or exploitation of a vulnerable adult if the person intentionally or recklessly abuses, neglects, abandons, intimidates or exploits a vulnerable adult.

_Wyo Stat. Ann. § 6-2-507(a)_

1. Interplay with State Civil Statute:  No Civil Statute.

G. Statute of Limitations:  Two Years – _Wyo Stat. Ann. § 1-3-107_

I. Can Regulations Establish Standard of Care: No

II. DAMAGES

A. Damages Available
   1. Actual Damages
   2. Special Damages
   3. Punitive Damages
   4. Injunctive Relief
   5. Costs of Suit

B. Does Pain and Suffering of Decedent/Resident Survive Death:
   No. Pain and suffering of the decedent, according to the words of the statute, have no part in establishing damages. Parsons v. Rousallis, 488 P.2d 1050, 1052 (Wyo. 1971) (citing Wyo Stat. Ann. § 1-4-101, §1-38-101 et seq.)

C. Attorney’s Fees Available: No.
   1. If available, are the attorney’s fees limited?

III. LEGISLATION AFFECTING STATUTE

A. Pending: None

B. Anticipated: None