

# ELDER LAW & LONG TERM CARE

Wroten & Associates, Inc.  
Attorneys at Law



## The Increasing Number of Claims for Violation of Resident's Rights and its Impact on Liability Costs

By Regina Casey



A recent study by Aon Risk Solutions, in partnership with the American Health Care Association, found that long term care liability costs are rising as a result of the average claim size increasing - despite the fact that claim frequency is decreasing. In its study, Aon found that the average claim size has increased four percent, and nationwide, liability claims have risen from an average of \$125,000 in 2005 to \$153,000 in 2010. This increase in claim size is important to long term care providers, especially when coupled with the uncertainty of Medicare and Medicaid funding and reimbursement.

In California, the liability cost for long term care facilities is higher than the national average. California has a projected loss rate per occupied long term care bed of \$2,020 in 2011, which is the fourth highest loss rate in the study. The projected average liability cost for 2011 is \$192,000.

Why are liability costs in California among the highest in the country when California caps non-economic damage awards at \$250,000? One reason is California's elder adult protection law. Enacted in 1991, The Elder Abuse and Dependent Adult Civil Protection Act (EADACPA, Cal. Welfare & Institutions Code Sections 15657-15657.7) provides a tool for the plaintiffs' bar to circumvent the limitation on the recovery of non-economic damages in individual cases of elder abuse by placing an emphasis on the "custodial" rather than the "professional" nature of long term care, thereby enabling plaintiffs to get around the protections normally afforded healthcare providers.

Now comes proposed legislation SB558 (Simitian), which will fundamentally change the way juries decide elder abuse cases by establishing a lesser standard of proof from "clear and convincing" to a "preponderance of the evidence" by amending EADACPA. Not only has tort reform in California been ineffectual in protecting the long term care industry, but recent legislation is increasing the burden for providers to defend themselves.

Another reason claim severity may be increasing in California is the recent rise in claims for alleged violations of resident rights, as Health and Safety Code Section 1430(b) creates a civil cause of action for these violations. In addition to claims for elder abuse and negligence, now plaintiffs are including separate causes of action for violating resident rights under 22 C.C.R. Section 72527. In addition to alleging that defendants failed to keep plaintiff free from mental and physical abuse; failed to provide good personal hygiene; and failed to treat plaintiff with dignity, thus violating his or her rights, plaintiffs are routinely claiming defendants failed to employ, train and/or supervise an adequate number of staff violating 22 C.C.R. Section 72527(a)(24) and Health and Safety Code Section 1599.1(a).

With the lesser burden of preponderance of the evidence, plaintiffs will simply need to present testimony of a family member that the resident was allowed to lay in soiled sheets for long periods of time to persuade a jury to conclude the resident's rights were violated.

If staffing is below 3.2 PPD at any time during the plaintiff's residency, plaintiff's counsel will be confident they will be able to recover attorney fees and costs under Health and Safety Code Section 1430(b), even if elder abuse is

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### Save the Date



**4th Annual Wroten & Associates' Long Term Healthcare Conference**

Thursday, May 31, 2012  
at Disney's Grand California,  
Anaheim, California.

### E-NEWSLETTER

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## “Increasing Claims”

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not established, thus reducing counsel’s risk of taking a case to trial. Therefore, if a long term care facility finds itself in the unfortunate circumstance of having elder abuse litigation levied against it, reaching a reasonable settlement will be more challenging when violations of residents rights are raised.

How do you prevent plaintiffs’ counsel from inflating the settlement value of a case by arguing insufficient staffing? If staffing appears to be below minimum statutory requirements, then shift the focus of the case from statistical staffing ratios to the actual

care that was provided. Emphasize the care documented in the chart that clearly shows the resident’s needs were met. If documentation is poor, then rely on the testimony of the various care providers to establish that appropriate care was in fact given.

The best approach to preventing the upward spiral of liability costs is to maintain good documentation of the care provided in the facility record as well as maintain documentation of sufficient staffing and training of personnel to counter claims of violations of resident rights and substandard care. ■

## OPINION } Postscript: I Year After Humbolt

By Kippy Wroten



On July 6th we celebrated the dubious 1 year anniversary of the catastrophic \$677 million Humboldt verdict that served up the long term care industry on the proverbial platter and started a plaintiff attorney feeding frenzy. To be certain, this was an anniversary I would have rather avoided, particularly given the glutony of litigation that has unfolded in the aftermath of this perverse legal hell hole. Well, we are supposed to learn from our mistakes so let’s review the legal landscape birthed from the loins of Humboldt County one year ago. Take a big breath, this is going to stink.

First, let’s review the status of 6 of the 11 similarly branded understaffing class action claims that followed the Lavender fiasco and have had initial hearings where courts have ruled on three of the fundamental legal questions that drove the Lavender verdict. (1) 3.2 nursing PPD is an individual patient right; (2) a claim brought by a representative plaintiff against one facility can tie together all related facilities into a single case; and (3) the Superior Court is an appropriate jurisdiction for such a claimed violation of staffing to be heard despite the legislative mandate for oversight by the Department of Public Health. As we look at these first strikes, remember that fairness and constitutional due process dictate that every citizen will have notice of just what it takes to comply with the law, particularly where the penalty is financial castration.

1. Shuts v. Covenant Holdco (Alameda County). God bless this state court judge who decided simply that the Superior Court is not equipped to navigate the regulatory waters which were expressly legislated to be the domain of the Department of Public Health. Case dismissed.

2. Wehlage v. Evergreen (North District). Court refuses to defer to the rule of the Department of Public Health but will not allow plaintiffs to bootstrap affiliated facilities together. 8 of 9 facility defendants dismissed.
3. Valentine v. Thekkek (Alameda County). Seems like an opportunity for the court to make the same ruling as in Shuts. Not so. The court defers a decision on the right to 3.2 staffing and whether facilities can be bootstrapped for review later in the class certification process. These defendants all remain hostage.
4. Walsh v. Kindred Healthcare (North District). Another opportunity for courts in the same jurisdiction to come together. Not. Here the court rules that the 3.2 ratio is not a patient right but may be used to support argument there were inadequate numbers of qualified personnel employed.
5. Chandler v. LBCC (Los Angeles County). Tentative rulings initially favor full dismissal. Then comes the Lavender verdict. About face. Class certified. Plaintiffs in heaven.
6. Pakdaman v. Country Villa (Los Angeles County). Finally, consistency. But then again, it’s the same judge as ruled in Chandler.

Next let’s look at the action taken by those actually charged with oversight. On only their third effort, the Department of Public Health finalized interpretive guidelines for their 3.2 PPD staffing audits. I personally want to extend a hand of gratitude that the DPH finally came out with these guidelines. And only a decade after the legislature directed them to adopt regulations defining the application of the 3.2 PPD ratio (and barely months after one unfortunate long term care provider was held accountable

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**“Postscript”**

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under the unique “interpretive guidelines” developed in one Humboldt County court). Well, almost. Unfortunately interpretive guidelines aren’t regulations (and that is what our legislature mandated DPH accomplish). Regardless that there is a lot in the All Facilities Letter to like, it really would have been most helpful if the DPH would have actually adopted an operative regulation requiring the 3.2 standard. Instead 22 C.C.R. Section 72329,

with its very own 3.0 PPD standard, remains the operative California regulation while Section 72329.1, which finally adopts the 3.2 PPD ratio, remains in abeyance awaiting financing. Financing in California? Pigs will fly. (That’s for you Kelly.) ■

**WANT TO HEAR MORE?**

Kippy Wroten will be speaking at the following event:

September 15, 2011 / Boston, MA

DRI: The Voice of the Defense Bar conference, “Nursing Home/ALF Litigation”.

Her session is titled “Class Actions I: The Skilled Healthcare Case and Verdict”

<http://www.dri.org/open/SeminarDetail.aspx?eventCode=20110190>

**Dukes Revisited: A Much Needed Win for Employers**

By Laura Sitar



In Fall 2010 we highlighted the certification of what appeared to be the largest employment class action in United States history, Dukes v. Wal-Mart Stores. The Dukes case, which was first brought by California employee, Betty Dukes, alleged female employees at Wal-Mart were routinely subjected to sex discrimination in pay, job assignments and promotions. The certified class included more than 1.5 million current and former female Wal-Mart employees in more than 3,400 stores across the United States. Well, the U. S. Supreme Court granted review shortly after our newsletter was published and on June 20, 2011 issued its long awaited opinion reversing the Ninth Circuit and denying certification. The decision was a win for employers all around!

The essence of the claim made by the Wal-Mart employees, as summarized by the Court, was that Wal-Mart “operated under a general policy of discrimination.” The Court found the claim insufficient to support class certification stating that “other than the

bare existence of delegated discretion, respondents have identified no ‘specific [discriminatory] employment practice’- much less one that ties all their 1.5 million claims together.”<sup>1</sup> The Court further reasoned the lawsuit lacked the “glue” which would hold its claims together and without which it would be impossible to believe that examination of the class members’ claims for relief would produce a common answer to the crucial question “why was I disfavored?”

While class actions will remain part of the legal landscape, the Supreme Court’s decision will undoubtedly have a deterrent effect. The decision requires trial courts to more rigorously examine class action complaints to determine whether a claim should proceed as a class action. Trial courts will be required to look beyond general and conclusory allegations, a handful of anecdotes, and irrelevant statistical analysis (all present in the Dukes case) to determine if standards for certification can actually be met. ■

<sup>1</sup> Wal-Mart Stores, Inc. v. Dukes, No. 10-277, U.S. Supreme Court (June 20, 2011).

## Purposeful Leadership

By Marilyn Allemann, L.C.S.W.



**P**urposeful leadership means making decisions as part of an overall strategy to enable people to follow your lead. Often people are put in a leadership position and just lead by the seat of their pants. They make decisions that seem good at the time without evaluating each action as part of a strategic or overall plan. How will your employees know what is expected of them? Here are some suggestions to help you become a purposeful leader.

### Evaluate Decisions and Actions

As a leader you will be watched very closely by your employees. If you have a good relationship with the people you lead, their performance will validate your skillful leadership qualities. It is important for you to evaluate each decision or action from a leadership perspective. For example, ask yourself if the decision or action will help or hurt your influence as a leader. Keep your employees informed of progress or obstacles that may hinder or demand a reevaluation of your strategy. Remind them of the purpose behind the processes. Remember people want to find meaning and purpose in their work.

### Don't Make Promises Unless You Can Keep Them

This can be a problem for some leaders, as they are optimistic about future growth and may make promises based on what they would like to see happen. Most people understand that plans change, but if you say you are going to do something, do it. Employees will expect you to follow through. If you are unable to deliver on your promise, it is important to provide some explanation or feedback as to why you were unable to keep the promise.

### Directional Leadership

Leaders need to know what their vision is and consistently communicate this vision. It is important to work out exactly

what direction you want a task or project to take and then to communicate concisely that direction. A great analogy to emphasize the importance of this is described by Mark Shead, President of the Xerox Corporation; imagine 15 people holding the edges of a parachute. The parachute is held tight so it doesn't touch the ground. Each person holding on has a "general" idea of where they are heading, but no real plan for getting there. One person is going to head straight toward the goal. Another is trying to head toward the goal but at a different angle, another wants to head to a few secondary goals before reaching the final goal, and so on. Even though they may be working toward the same goal, they are moving in different directions and will most likely end up frustrated, tripping over each other, working against each other, and ultimately defuse or delay the completion of the goal.

**"The very essence of leadership is its purpose. And the purpose of leadership is to accomplish a task. That is what leadership does - and what it does is more important than what it is or how it works."**

**Colonel Dandridge M. Malone**

reaching the common goal. That is not to say that as a leader you don't take input from others and that you can't make adjustments midway through a project as new information presents itself, but you mustn't leave leadership to chance and just hope for the best. Always keep the desired outcomes in mind.

Purposeful leading can be a challenging; it requires effort, practice and focus. Being a purposeful leader requires an awareness of how you lead and the impact that your decisions have on others. This self awareness will improve your leadership skills and earn you the well deserved respect and influence with others that effective leaders can experience. ■

Additional information can be found on Marilyn Allemann's website, [www.MastersExecutiveCoaching.com](http://www.MastersExecutiveCoaching.com). Please contact Marilyn Allemann directly at [mwallemann@sbcglobal.net](mailto:mwallemann@sbcglobal.net) with any questions.

## CONTACT US

If you have questions or comments, we want to hear from you. Please email us at:  
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# W&A 3rd Annual Long Term Healthcare Conference Recap

## Crisis Management: Through the Eyes of the Experts



**W**rotten & Associates 3rd annual long term healthcare conference was held at Disney's Grand California in Anaheim, California on Thursday, June 2, 2011. The theme was crisis management. Experts in the field of long term care presented crisis management solutions for the long term care industry. Attendees included owners, nurses, administrators, insurance professionals, risk managers, operators, staff and in-house counsel. Continuing Education Units (CEU) were offered.

### What Our Attendees Are Saying

- “ Thank you for providing the forum to learn with our industry colleagues and to be able to network. ”
- “ Helpful handouts and effective speakers, thank you for hosting the conference, we look forward to next year. ”



Wrotten & Associates' Shareholders  
Darryl Ross, Regina Casey, Kippy Wrotten & Laura Sitar



- “ I learned how to be a better leader. Mary Tellis-Nayak's presentation was excellent. ”
- “ The panel discussions led by legal counsel were highly useful. ”
- “ Very inspirational, I'm raising my personal bar. ”

### Mark Your Calendar for Next Year

4th Annual Long Term Healthcare Conference

Thursday, May 31, 2012

Disney's Grand California, Anaheim, California

See [www.wrottenlaw.com](http://www.wrottenlaw.com) for more information and registration.



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