

## MEDICAL DEFENSE AND HEALTH LAW

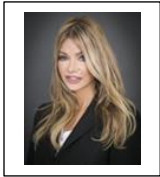
OCTOBER 2017

### IN THIS ISSUE

*In this article, Ms. Endelicato discusses the ramifications of a current medical negligence/elder abuse matter which is being reviewed by the California Supreme Court. Such decision will impact the amount of penalties for violation of Patient Bill of Rights; it will impact the bases of an award for punitive damages; and it will impact whether knowledge of a Director of Nursing of acts or omissions, will suffice for extension of corporate liability.*

### Penalties and Punitive Damages: California Supreme Court to Review Controversial Interpretation of Statute Providing Damages in Actions against Nursing Homes

#### ABOUT THE AUTHOR



**Constance A. Endelicato** is an accomplished trial lawyer with over 29 years of litigation experience in defending healthcare providers. Ms. Endelicato's clients include physicians in all disciplines of medicine, hospitals, skilled nursing facilities, surgery centers, and allied healthcare professionals. Her cases range from catastrophic injuries, including birth injury, spinal cord injury, and brain injury, to elder and dependent abuse, wrongful death actions, and mass tort litigation. As a reflection of Ms. Endelicato's accomplishments, her extensive trial experience has afforded her membership in the prestigious American Board of Trial Advocates, among a nominal number of women in the United States. Ms. Endelicato is a recipient of the 2017 Business Insurance and CLM Women to Watch Award. Additionally, Ms. Endelicato has been named by the Los Angeles and San Francisco legal newspaper, The Daily Journal, as one of the Top 100 Women Lawyers in California. Ms. Endelicato is a current member of the IADC Medical Defense and Health Law Committee where she acts as the current Vice Chair of Webinar. She can be reached at [cendelicato@wshblaw.com](mailto:cendelicato@wshblaw.com).

#### ABOUT THE COMMITTEE

The Medical Defense and Health Law Committee serves all members who represent physicians, hospitals and other healthcare providers and entities in medical malpractice actions. The Committee recently added a subcommittee for nursing home defense. Committee members publish monthly newsletters and *Journal* articles and present educational seminars for the IADC membership at large. Members also regularly present committee meeting seminars on matters of current interest, which includes open discussion and input from members at the meeting. Committee members share and exchange information regarding experts, new plaintiff theories, discovery issues and strategy at meetings and via newsletters and e-mail. Learn more about the Committee at [www.iadclaw.org](http://www.iadclaw.org). To contribute a newsletter article contact:



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*The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.*

The California High Court is slated to review a recent Court of Appeal decision which contradicts earlier precedent and if upheld, will afford patients a new avenue for seeking penalties and punitive damages against skilled nursing facilities and intermediate care facilities.

The statute at issue is California Health & Safety Code 1430 (b) which provides residents of nursing homes actionable recourse for violation of their rights, while limiting remedies to a penalty of up to \$500, attorneys' fees and costs, and injunctive relief. The statute has been previously interpreted as providing up to \$500 per action by the Court of Appeal in *Nevarrez v. San Marino Skilled Nursing and Wellness Center* (2013) 221 Cap. App. 4<sup>th</sup> 102, and *Lemaire v. Covenant Care California* (2015) 234 Cal.App.4<sup>th</sup> 860. Based upon the prior cases, the defense strategy was to immediately attempt to resolve the cause of action for violation of patient rights by tendering a draft in the amount of \$500 in exchange for a dismissal to avoid attorneys' fees and costs from accruing.

However, in a recent published decision, *Jarman v. HCR ManorCare, Inc.* (2017) Cal. App. 5<sup>th</sup> 807, the Court of Appeal sent shockwaves when it upheld damages that included recovery for \$500 *per violation versus per action*, and found that punitive damages were warranted, despite the trial court's determination that there was insufficient evidence of recklessness, malice, oppression, or fraud.

In *Jarman*, the jury found 382 violations over a period of three months. The Court of Appeal found that the sheer number of violations

constituted conscious disregard for patient safety. Hence, the Court of Appeal held that violation of 1430(b), can support a punitive damages award, absent a showing of intentional act.

The Court of Appeal also held that the Director of Nursing was deemed a "managing agent", pursuant to Elder Abuse and Dependent Adult Protection Act requirements for punitive damages. This finding is also troubling in that the Court of Appeal is disregarding the necessary element of "ratification", a key element of elder and dependent adult abuse or neglect actions when holding the employer facility liable.

Prior to this holding, in addition to establishing recklessness, malice, oppression, or fraud, the injured party was required to establish ratification by the employer. This entailed proving (1) that the defendant was an officer, director, or managing agent of the tortfeasor; 2) that an officer, director, or managing agent had advance knowledge of the unfitness of the tortfeasor and employed him or her with a knowing disregard of the rights or safety of others; (3) that an officer, director, or agent authorized the tortfeasor's conduct; and (4) that an officer, director, or agent knew of the wrongful conduct and adopted or approved the conduct after it occurred.

The Jarman decision completely does away with the above requirements and will enable plaintiffs to more readily establish the elements of an elder abuse or neglect claim. In this regard, if the decision in Jarman is upheld by the California Supreme Court, we will see a dramatic increase in suits filed as



well as a dramatic increase in plaintiffs' demands and jury verdicts.

(It should be noted that states such as Arizona, Connecticut, Florida, Georgia, New York, Wisconsin, and Louisiana, have statutes that are similar to California's 1430(b), and allow injured parties to seek damages for violation of patient's rights.)

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