

Protecting Granny: Recent Developments in Nursing Home Litigation in Louisiana

I. INTRODUCTION

Louisiana is getting old. On a national scope, the next several decades are certain to foster dramatic changes in the make-up of the population.¹ As the baby-boom generation attains old age,² the population of elderly persons in America will increase from the current and already record level of 13% to as much as 20% by 2030.³ The actual number of elderly persons is predicted to double by that year.⁴

As an increasingly larger proportion of the population inches toward old age, it becomes ever more critical to focus on the health, care, and maintenance that such a significant group is to receive. The Department of Health and Human Services makes clear that:

[t]he rapid growth of the elderly, particularly the oldest old, represents in part a triumph of the efforts to extend human life, but these age groups also require a disproportionately large share of special services and public support. There will be large increases by 2030 in the numbers requiring special services in housing, transportation, recreation, and education, as well as in health and nutrition.⁵

As these demographic statistics illustrate, caring for the expanding elderly population in America must be pushed toward the forefront as a critical issue with ramifications affecting all levels of society—if it is not our grandparents who are in need of supervised care as they age, then it is our parents, and soon, us and our children. In Louisiana, the recent criminal prosecution of

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1. The Department of Health and Human Services Administration on Aging comments on “Aging into the 21st Century” by predicting that “[d]uring the next 3 to 4 decades, we can expect a very dramatic increase both in the number of elderly persons and in the proportion of elderly persons in the population.” DEP’T OF HEALTH & HUMAN SERV., ADMIN. ON AGING, STATISTICS: AGING INTO THE 21ST CENTURY (2008), http://www.aoa.gov/prof/Statistics/future_growth/aging21/summary.aspx.

2. The terms “old age,” “elderly,” and “elder” are used in this Comment to reference people 65 years or older.

3. DEP’T OF HEALTH & HUMAN SERV., *supra* note 1.

4. *Id.*

5. *Id.*

Mable and Salvador Mangano,⁶ owners of St. Rita's Nursing Home in Chalmette, Louisiana,⁷ where thirty-four residents were believed to have drowned after Hurricane Katrina, has thrust the issue of nursing home policy failure into the national spotlight.⁸ Although the Manganos were acquitted in their criminal prosecution,⁹ the case nevertheless serves as a blatant example of the breakdown in nursing home care in Louisiana.¹⁰ Nationally, news coverage of Katrina and its aftermath plunged Louisiana into the forefront of public interest stories across America,¹¹ with the devastation at St. Rita's and the Manganos' subsequent arrest serving as "vivid symbols of the inept preparation and response to the disaster."¹²

With the onslaught of nursing home litigation after Katrina, Louisiana courts are and will continue to be inundated with cases surrounding the ambiguities of the statutory scheme currently in place for dealing with nursing home issues. The existing state of the law regarding nursing homes in Louisiana is ill-prepared to deal with this fact. As this Comment will illustrate, Louisiana courts have failed to clearly distinguish between medical

6. State v. Mangano, No. 07-WLFN-12 (Parish of West Feliciana, 20th JDC Div. A Sept. 7, 2007). Salvador and Mabel Mangano were charged with thirty-five counts each of negligent homicide for cases in which patients died after Hurricane Katrina flooded St. Rita's and twenty-four counts each of cruelty to the infirm for patients that survived the storm's damage. Emily Kern, *In-Law Describes St. Rita's Planning*, THE ADVOCATE (Baton Rouge), Sept. 6, 2007, at 1B.

7. Chalmette, Louisiana, is a suburb of New Orleans, Louisiana.

8. See Carrie Kahn, *New Orleans Nursing Home Owners on Trial* (NPR radio broadcast Aug. 17, 2007), <http://www.npr.org/templates/story/story.php?storyId=12866093>; Carrie Kahn & Michele Norris, *Nursing Home Owners Found "Not Guilty" in Deaths* (NPR radio broadcast Sept. 7, 2007), <http://www.npr.org/templates/story/story.php?storyId=14248787>; Laura Parker, *Louisiana Nursing Home Case Puts Katrina Response on Trial*, USA TODAY, Aug. 8, 2007, http://www.usatoday.com/news/nation/2007-08-08-1Acover_N.htm.

9. Jurors voted unanimously to find the Manganos not guilty of negligent homicide and cruelty to the infirm after four hours of deliberation. Emily Kern, *St. Rita's Jurors Decide Quickly: First Secret Ballot was 5-1 for Acquittal*, THE ADVOCATE (Baton Rouge), Sept. 9, 2007, at 1A.

10. The Louisiana Attorney General's Office argued (in the author's view correctly) that the Manganos' refusal to evacuate the residents of St. Rita's before Hurricane Katrina constituted gross negligence which caused the deaths of thirty-five residents and suffering of twenty-four others. *Id.*

11. See, e.g., Carrie Kahn, *Nursing Home Owners Acquitted of Patient Deaths* (NPR radio broadcast Sept. 8, 2007), <http://www.npr.org/templates/story/story.php?storyId=14261612>; Laura Parker, *What Really Happened at St. Rita's?*, USA TODAY, Nov. 28, 2005, <http://www.globalaging.org/armedconflict/countryreports/americas/happened.htm>.

12. Parker, *supra* note 8.

malpractice and simple negligence in nursing home cases.¹³ The inconsistent application by the courts of the statutory scheme for nursing home claims has left nursing home residents in a state of uncertainty in the resolution of their claims. Further, through the efforts of the powerful Louisiana Nursing Home Lobby, a resident's right of action under the statutory bill of rights was successfully amended out.¹⁴ Eliminating the resident's right to sue for damages in this way completely contradicts the stated purpose of the statute, namely to protect those persons isolated from the community who often lack the means to assert their rights as individual citizens. This diminution of rights¹⁵ is further seen with the amendment of the Medical Malpractice Act to expressly include nursing homes, thereby imposing the requirement of a medical review panel and a cap on recovery upon all nursing home claims falling under the statutory definition of malpractice.¹⁶

While most nursing home malpractice cases have centered around "quality of care issues,"¹⁷ Katrina has brought about novel

13. See *infra* Part IV.

14. See *infra* Part III.C.1.

15. This shrinking of resident rights is not unique to Louisiana. In fact, many states have recently made it harder to sue nursing home facilities. R. Patrick Bedell, *The Next Frontier in Tort Reform: Promoting the Financial Solvency of Nursing Homes*, 11 ELDER L.J. 361 (2003) (discussing recent developments in Florida and Ohio laws that limit suit against nursing homes). Though this Comment is limited in scope to Louisiana nursing home litigation and the statutory scheme of this state, the issue is far reaching, as nursing home regulation is currently a controversial issue across the United States. See, e.g., Robin P. Bravchok, *Nursing Home Tort Reform and Ohio House Bill 412: Why Have We Abandoned Our Neglected and Abused Elderly Population*, 50 CLEV. ST. L. REV. 645 (2003); Kevin B. Dreher, *Enforcement of Standards of Care in the Long-Term Care Industry: How Far Have We Come and Where Do We Go from Here*, 10 ELDER L.J. 119 (2002); David A. Hyman, *Medical Malpractice and the Tort System: What Do We Know and What (If Anything) Should We Do About It?*, 80 TEX. L. REV. 1639 (2002); Michael L. Rustad, *Neglecting the Neglected: The Impact of Noneconomic Damage Caps on Meritorious Nursing Home Lawsuits*, 14 ELDER L.J. 331 (2006); David G. Stevenson & David M. Studdert, *The Rise of Nursing Home Litigation: Findings from a National Survey of Attorneys*, 22 HEALTH AFFAIRS 219 (2003); Christine V. Williams, *The Nursing Home Dilemma in America Today: The Suffering Must be Recognized and Eradicated*, 41 SANTA CLARA L. REV. 867 (2000).

16. See *infra* Part III.B.1.

17. Typical issues include "development of pressure sores, lack of cleanliness and proper hygiene, and accidental falls and/or intentional physical abuse at the hands of other residents or staff." Kathleen E. Petersen, *Common Types of Claims Being Filed and Litigated*, in NURSING HOME MALPRACTICE: EVALUATING AND ADDRESSING ACCOUNTABILITY 32-44 (Nat'l Bus. Inst., Inc. 2006).

issues that are just now being worked out in the courts.¹⁸ Legislative action to reintroduce a private right of action for damages into the Nursing Home Residents' Bill of Rights is necessary to ease the current tension surrounding nursing home litigation, clearly define the nursing home's classification as a hybrid health care provider and 24-hour boarding facility, and provide efficient means for speedy resolution of claims, while fostering the original purpose of the bill of rights: to protect those individuals who cannot always protect themselves.

Though it has been offered that tort reform is desirable and necessary in order to decrease the costs to financially strained nursing home facilities,¹⁹ this Comment argues that diminishing the nursing home resident's private right of action to sue for damages and allowing only for injunctive relief does not accomplish the reform's proposed goal, namely the betterment of patient care. The aim of tort reform on a national scope, including the implementation of caps in recovery and on attorney's fees, is to stabilize the nursing home and liability insurance markets;²⁰ however, this objective comes at too high a cost, eliminating the incentive for nursing homes to provide quality care. As this Comment will show,²¹ the statutory scheme currently in place in Louisiana for victims of nursing home abuse and neglect provides the express goal of protecting and preserving the rights of residents who are isolated from the community and have diminished rights as individual citizens. Nursing home residents should be afforded every right and protection of normal citizens, but taking away a resident's right to recover damages accomplishes exactly the opposite.

After a detailed analysis of the current statutory scheme for nursing home claims, including an examination of the Medical

18. Petersen accurately predicts the influx of nursing home cases after Katrina:

A flurry of lawsuits have been filed on the heels of the national media's reporting of the multiple drowning deaths of the elderly at one nursing home in St. Bernard Parish, and more deaths of the elderly at Orleans Parish nursing homes, either from allegations arising from a failure to evacuate and/or from allegations of harm that occurred during the actual evacuation process.

Id. at 35.

19. Bedell, *supra* note 15, at 362. Bedell's article argues for tort reform in the current nursing home tort regime, noting the influx of litigation and the increasing costs to nursing homes to defend these suits. *Id.* The article fails, however, to satisfactorily prove that scaling back on a resident's right to recover money damages leads to improved conditions for residents.

20. Stevenson & Studdert, *supra* note 15.

21. See *infra* Part III.C.

Malpractice Act²² (hereinafter “MMA”) and the Nursing Home Residents’ Bill of Rights²³ (hereinafter “NHRBR”), this Comment will comprehensively examine recent Louisiana jurisprudence on the issue of nursing home litigation. The jurisprudential survey will be organized into rulings pursuant to the MMA and those pursuant to the NHRBR. This Comment will further scrutinize the role of the Nursing Home Lobby in Louisiana, its influence in political campaigns, and its ability to persuade lawmakers in passing amendments to the NHRBR, which serve to limit resident rights.

II. BACKGROUND: CLASSIFICATION OF THE NURSING HOME IN LOUISIANA

Nursing homes are somewhat of an anomaly in the classification scheme of care units—on one hand, the nursing home is like a hospital in that it provides medical care to its residents. This cataloging is affirmed by the MMA, which expressly lists the nursing home as a “health care provider.”²⁴ On the other hand, the nursing home serves as a boarding house providing twenty-four-hour physical care and watch over its residents. Expounding on the inherent tension in the classification scheme of nursing homes, the Louisiana Department of Health and Hospitals promotes “nursing home culture change”²⁵ to emphasize the need for improved standards in the physical care given to residents: “Culture change reflects a shift from the ‘one-size fits all’ traditional medical model to a model that seeks to improve the quality of life for residents, while fostering an atmosphere of community within the nursing home setting for staff and residents alike.”²⁶ In other words, the nursing home provides more than the sterility of a hospital-type medical facility—it is a home, a community, and an overall care environment for its residents.

Because of the dualistic nature of the nursing home in providing both medical and physical care to its residents, the nursing home defies a traditional classification as strictly either a medical facility or a simple boarding house. The relevant question therefore becomes: despite the nursing home’s classification as a “health care provider” in the MMA, should acts or omissions

22. LA. REV. STAT. ANN. § 40:1299.41(2008).

23. § 40:2010.6.

24. “Health care provider” is defined in section 1299.41(A)(1).

25. La. Dep’t of Health & Hosps., Nursing Home Culture Change, <http://www.dhh.louisiana.gov/offices/page.asp?ID=112&Detail=4361> (last visited Oct. 4, 2008).

26. *Id.*

occurring in the nursing home truly be routed through a medical review panel pursuant to the MMA?²⁷

III. MEDICAL MALPRACTICE VERSUS NEGLIGENCE IN THE NURSING HOME SETTING: A STATUTORY ANALYSIS

A. Overview

Nursing homes are highly regulated institutions in Louisiana.²⁸ Title 40 of the Revised Statutes defines “nursing home” as follows:

a private home, institution, building, residence or other place, serving two or more persons who are not related by blood or marriage to the operator, whether operated for profit or not, and including those places operated by a political subdivision of the state of Louisiana, which undertakes, through its ownership or management, to provide maintenance, personal care, or nursing for persons who, by reason of illness or physical infirmity or age, are unable to properly care for themselves.²⁹

Pursuant to the statute, nursing homes are subject to the jurisdiction of the state Department of Health and Hospitals.³⁰ The statute further provides for an advisory committee with

the duty . . . to study the requirements and regulations of the Department of Health and Hospitals and the U.S. Department of Health, Education and Welfare, as published in the Federal Register, in relation to the establishment of minimum standards of maintenance and operations of

27. Elder abuse is different from traditional physician malpractice. “[N]ursing home malpractice” occurs mainly due to lack of attention to patients,” such as neglect which leads to abuse, and many residents never see a medical physician. Victoria A. Schall, *The New Extreme Makeover: The Medical Malpractice Crisis, Noneconomic Damages, the Elderly, and the Courts*, 5 APPALACHIAN J.L. 151 (2006) (citing H.R. COMM. ON GOV'T REFORM, SPECIAL INVESTIGATIONS DIV., MINORITY STAFF, NURSING HOME CONDITIONS IN TEXAS: MANY NURSING HOMES FAIL TO MEET FEDERAL STANDARDS FOR ADEQUATE CARE 2 (2002), <http://oversight.house.gov/documents/20040830114327-83314.pdf>).

28. Darrel J. Papillion, *State and National Activity in Nursing Home Litigation*, in NURSING HOME MALPRACTICE IN LOUISIANA: SUCCESSFUL CASE MANAGEMENT FROM INVESTIGATION TO TRIAL 2–9 (Nat'l Bus. Inst., Inc. 2000). Among these regulations are the MMA and the NHRBR.

29. LA. REV. STAT ANN. § 40:2009.2 (2008). The statute enumerates several institutions not qualifying as a “nursing home,” which are not pertinent to the current discussion.

30. § 40:2009.1.

nursing homes, and interpret such regulations as apply to the administration and operation of nursing homes.³¹

Specifically, the Department of Health and Hospitals is charged with prescribing minimum standards for: (1) location and construction of nursing homes; (2) the number of personnel; (3) sanitary conditions; (4) resident diet; and (5) vital equipment for the health and well-being of residents.³²

Historically, nursing home litigation has been brought pursuant to article 2315 of the Louisiana Civil Code, including survival actions under article 2315.1 and wrongful death actions under article 2315.2.³³ In order to prove negligence in the nursing home setting, a plaintiff must prove legal fault, causation, and actual damages by a preponderance of the evidence,³⁴ which requires a showing that: (1) the nursing home had a duty to the resident; (2) the nursing home breached that duty; (3) the breach of duty was the actual cause of the resident's injury; (4) the breach of duty was the legal cause of the resident's injury; and (5) actual damages occurred as a result.³⁵ It is generally accepted that the nursing home owes a reasonable duty of care to its residents (to protect against known risks, to provide adequate supervision and precautions, to provide sound care, and to maintain a clean and reasonably safe environment);³⁶ however, the nursing home does not have the duty to guarantee absolute safety in all situations.³⁷

In 2001, the MMA was amended to expressly include the nursing home as a "health care provider."³⁸ Thus, acts or omissions that occur in the nursing home setting may now fall under the MMA's coverage. If the act or omission is classified as "malpractice,"³⁹ the MMA is controlling; if the claim is one of

31. *Id.*

32. § 40:2009.4.

33. Petersen, *supra* note 17, at 33.

34. Perkins v. Entergy Corp., 782 So. 2d 606, 611 (La. 2001).

35. Kathleen E. Petersen, *Initial Considerations and Pre-Trial Procedures*, in NURSING HOME MALPRACTICE: EVALUATING AND ADDRESSING ACCOUNTABILITY 59, 60–61 (Nat'l Bus. Inst., Inc. 2006).

36. *Id.* at 61.

37. *Id.* (citing McGillivray v. Rapides Iberia Mgmt. Enters., 493 So. 2d 819 (La. App. 2d Cir. 1986)).

38. Petersen, *supra* note 17, at 33.

39. LA. REV. STAT. ANN. § 40:1299.41(A)(8) (2008) provides:

"Malpractice" means any unintentional tort or any breach of contract based on health care or professional services rendered, or which should have been rendered, by a health care provider, to a patient, including failure to render services timely and the handling of a patient, including loading and unloading of a patient, and also includes all legal responsibility of a health care provider arising from acts or omissions

simple negligence, the MMA will not apply. In the case in which the resident's claim is not classified as malpractice pursuant to the MMA, the resident may bring suit alleging negligence.⁴⁰ Moreover, in 1985, the Louisiana Legislature enacted the NHRBR, providing residents a private right of action to recover damages and attorney's fees if one of the statutorily enumerated rights was violated.⁴¹ The damage action under the NHRBR was soon amended out.⁴² The NHRBR currently provides relief only in the form of injunction,⁴³ which is, as this Comment will demonstrate, grossly inadequate recovery for a nursing home resident and contradictory to the purported goal of the NHRBR.

B. Louisiana Medical Malpractice Act

The Louisiana Legislature enacted the MMA in 1976, thereby creating a comprehensive scheme regulating medical malpractice cases.⁴⁴ The MMA expressly provides that “[a]ll malpractice claims against health care providers covered by this Part, other than claims validly agreed for submission to a lawfully binding arbitration procedure, shall be reviewed by a medical review panel”⁴⁵ as established by statute.⁴⁶ Unless the parties by agreement waive review,⁴⁷ the panel is a prerequisite for litigation falling under the Act, as “[n]o action against a health care provider

during the procurement of blood or blood components, in the training or supervision of health care providers, or from defects in blood, tissue, transplants, drugs, and medicines, or from defects in or failures of prosthetic devices implanted in or used on or in the person of a patient.

40. Petersen, *supra* note 35, at 67. Other possible causes of action may arise from breach of contract, negligence *per se*, *res ipsa loquitur*, and liability under *respondeat superior* for acts or omissions committed by nursing home employees. *Id.* at 68–69. A resident may be able to recover damages under the theory of detrimental reliance and under the Louisiana Unfair Trade Practices and Consumer Protection Law. *Id.* at 69.

41. 1985 La. Acts No. 734.

42. 2003 La. Acts No. 506, § 1.

43. LA. REV. STAT. ANN. § 40:2010.9.

44. WILLIAM E. CRAWFORD, PROFESSIONAL MALPRACTICE § 15, *in* 12 LOUISIANA CIVIL LAW TREATISE 249 (2000).

45. § 40:1299.47(A)(1)(a).

46. The medical review panel is comprised of three licensed physicians and one attorney, who acts as chairman. § 40:1299.47(C). Upon review of the evidence, “[t]he panel shall have the sole duty to express its expert opinion as to whether or not the evidence supports the conclusion that the defendant or defendants acted or failed to act within the appropriate standards of care.” § 40:1299.47(G).

47. § 40:1299.47(B)(1)(c).

covered by [the MMA], or his insurer, may be commenced in any court before the claimant's proposed complaint has been presented to a medical review panel."⁴⁸

The MMA also currently provides a damage cap on recovery, stating that the "total amount recoverable for all medical malpractice claims for injuries to or death of a patient, exclusive of future medical care and related benefits . . . shall not exceed five hundred thousand dollars plus interest and cost."⁴⁹ The statute imposes an additional limitation for recovery that "[a] health care provider qualified under [the MMA] is not liable for an amount in excess of one hundred thousand dollars plus interest thereon accruing after April 1, 1991, for all malpractice claims because of injuries to or death of any one patient."⁵⁰ However, the constitutionality of this provision of the MMA is being called into question by the courts.⁵¹ In fact, the Louisiana Third Circuit Court of Appeal recently held the limitation on liability unconstitutional, holding the cap to be a violation of the "adequate remedy by due process of law" provision in the State Constitution.⁵² The constitutional challenge was shut down for the time being by the Louisiana Supreme Court's pronouncement in *Arrington v. Glen-Med, Inc.*, holding that, as the issue was never brought before the trial court, the constitutionality of the medical malpractice cap could not be raised and argued for the first time on appeal.⁵³

1. Amendment of the MMA in 2001

In 2001, the Louisiana Legislature amended the MMA to specifically enumerate the nursing home as a "[h]ealth care provider."⁵⁴ Therefore, any nursing home death or injury arising

48. § 40:1299.47(B)(1)(a)(i).

49. § 40:1299.42(B)(1).

50. § 40:1299.42(B)(2).

51. See *Taylor v. Clement*, 940 So. 2d 796 (La. App. 3d Cir. 2006), writ granted and judgment vacated, 947 So. 2d 721, 947 So. 2d 732, 947 So. 2d 730 (La.), remanded, 970 So. 2d 545 (La. App. 3d Cir.), writ denied, 969 So. 2d 630 (La. 2007); *Arrington v. ER Physicians Group APMC*, 940 So. 2d 777 (La. App. 3d Cir. 2006), writ granted and judgment vacated, 947 So. 2d 719, 947 So. 2d 724, 974 So. 2d 727 (La.), remanded, 970 So. 2d 540 (La. App. 3d Cir.), writ denied, 969 So. 2d 630, 969 So. 2d 931 (La. 2007).

52. *Taylor*, 940 So. 2d at 798. But see *Butler v. Flint Goodrich Hosp.*, 607 So. 2d 517 (La. 1992), cert. denied, 508 U.S. 909 (1993) (holding the \$500,000 damages cap as constitutional); *Williams v. Kushner*, 549 So. 2d 294 (La. 1989) (holding the \$500,000 cap as constitutional in medical malpractice, but not addressing the \$100,000 limitation of liability).

53. 947 So. 2d 719, 720–21 (La. 2007).

54. § 40:1299.41(A)(1).

from malpractice as defined by the statute⁵⁵ is subject to review by a medical review panel and is limited in recovery to the statutory cap of \$500,000 plus interest and costs.⁵⁶ The nursing home resident's malpractice claim is also subject to one and three-year prescriptive periods pursuant to section 9:5628 of the Louisiana Revised Statutes:

No action for damages for injury or death against any physician . . . hospital or nursing home duly licensed under the laws of this state, . . . whether based upon tort, or breach of contract, or otherwise, arising out of patient care shall be brought unless filed within one year from the date of the alleged act, omission, or neglect, or within one year from the date of discovery of the alleged act, omission, or neglect; however, even as to claims filed within one year from the date of such discovery, in all events such claims shall be filed at the latest within a period of three years from the date of the alleged act, omission, or neglect.⁵⁷

The Louisiana Supreme Court recently clarified confusion regarding this statutory provision, holding section 9:5628 to constitute a prescriptive, not preemptive, period.⁵⁸

C. Nursing Home Residents' Bill of Rights

The legislature enacted the NHRBR in 1985, providing the following express statement of intent:

The legislature finds that persons residing within nursing homes are isolated from the community and often lack the means to assert their rights as individual citizens. The legislature further recognizes the need for these persons to live within the least restrictive environment possible in order to retain their individuality and some personal freedom. It is therefore the intent of the legislature to

55. § 40:1299.41 (A)(8).

56. § 40:1299.42(B)(1).

57. LA. REV. STAT. ANN. § 9:5628 (2007). If the plaintiff's claim does not fall within the purview of the MMA, suit obviously may be filed under either a contract or tort action, subject to their applicable prescriptive time periods. CRAWFORD, *supra* note 44, § 15, at 54.

58. *Borel v. Young*, 989 So. 2d 42 (La. 2007). On rehearing, the *Borel* Court made clear "there is no indication in the language, purpose, or public policy surrounding [the amendment to section 9:5628] of the legislature's intent to legislatively overrule this [C]ourt's [prior] holding . . . that both the one-year and three-year periods in [Louisiana Revised Statutes section] 9:5628 are prescriptive." *Id.* at 64.

preserve the dignity and personal integrity of residents of nursing homes through the recognition and declaration of rights safeguarding against encroachments upon nursing home residents' right to self-determination. It is further the intent that the provisions of R.S. 40:2010.6 through R.S. 40:2010.9 complement and not duplicate or substitute for other survey and inspection programs regarding nursing homes.⁵⁹

The NHRBR lists a statement of rights and responsibilities that all nursing homes must adopt and make public to its residents.⁶⁰ The twenty-two rights enumerated in the NHRBR include guarantees of freedom and choice in the resident's care and day to day living, the right of the resident to be treated with dignity, and specific provisions regarding the resident's medical treatment.⁶¹ If a resident's rights under the NHRBR are violated, the Department

59. 1985 La. Acts No. 734.

60. § 40:2010.8.

61. *Id.* The NHRBR guarantees a nursing home resident the following rights:

- (1) to civil and religious liberties;
- (2) to free communication, including use of mail, telephone, overnight visitation outside the nursing home with family and friends, flexible visitation hours;
- (3) to present grievances;
- (4) to manage one's own finances;
- (5) to be informed of what services he has to pay for without governmental assistance;
- (6) to be adequately informed of his medical condition and proposed treatment, and participate in the planning of such treatment, including the right to refuse treatment, unless otherwise indicated by the resident's physician;
- (7) to receive adequate and appropriate health care and protective support services;
- (8) to have privacy;
- (9) to be treated with dignity;
- (10) to be free from mental and physical abuse and from physical and chemical restraints, except in limited circumstances;
- (11) to be transferred and discharged under certain circumstances;
- (12) to select a personal physician;
- (13) to retain and use personal clothing and possessions;
- (14) to copies of rules and regulations;
- (15) to information concerning bed reservation in case of hospital stay;
- (16) to prompt response to all reasonable requests and inquires;
- (17) to withhold payment to physician if not visited;
- (18) to refuse medical research request;
- (19) to use tobacco;
- (20) to consume alcohol;
- (21) to reasonably retire and rise; and
- (22) to have any change in medical condition reported.

of Health and Hospitals is authorized to take “appropriate action.”⁶²

The NHRBR does provide a successful plaintiff with the right to recover attorney fees and costs.⁶³ Further, violations of the NHRBR are not duplicative of simple tort claims; thus, a plaintiff may bring a claim under the NHRBR alleging a violation of an enumerated right in addition to a simple negligence claim.⁶⁴

1. Amendment of the NHRBR in 2003

Prior to 2003, section 40:2010.9 of the Louisiana Revised Statutes provided that the plaintiff could bring an action to enforce rights pursuant to the statute and “to recover *actual damages* for any deprivation or infringement on the rights of a resident.”⁶⁵ With the enactment of Act Number 506 in the 2003 Regular Legislative Session, however, the Legislature dissolved the resident’s right to recover money damages under the NHRBR.⁶⁶ Now, only “injunctive relief” is available under the statute.⁶⁷

Act. No. 506 also added the following new law:

62. § 40:2010.8(D)(1) provides:

Any violations of the residents’ rights set forth in R.S. 40:2010.6 *et seq.* shall constitute grounds for appropriate action by the Department of Health and Hospitals. Residents shall have a private right of action to enforce these rights, as set forth in R.S. 40:2010.9. The state courts shall have jurisdiction to enjoin a violation of residents’ rights and to assess fines for violations not to exceed one hundred dollars per individual violation.

63. § 40:2010.9(A).

64. *See, e.g.,* *Petre v. Living Centers-East, Inc.*, 935 F. Supp. 808, 813 (E.D. La. 1996); *Pender v. Natchitoches Parish Hosp.*, 817 So. 2d 1239, 1243 (La. App. 3d Cir. 2002), *remanded*, 840 So. 2d 529 (La.), *on remand*, 844 So. 2d 1107 (La. App. 3d Cir. 2003).

65. 1995 La. Acts No. 1148, § 1 (emphasis added).

66. 2003 La. Acts No. 506.

67. LA. REV. STAT. ANN. § 40:2010.9(A) provides:

Any resident who alleges that his rights, as specified in R.S. 40:2010.8, have been deprived or infringed upon may assert a cause of action for injunctive relief against any nursing home or health care facility responsible for the alleged violation. The action may be brought by the resident or his curator, including a curator ad hoc. The action may be brought in any court of competent jurisdiction to enforce such rights or to enjoin any deprivation or infringement on the rights of a resident. Any plaintiff who prevails in such action shall be entitled to recover reasonable attorney fees, and costs of the action, unless the court finds that the losing plaintiff has acted in bad faith with malicious purpose, and that there was an absence of a justiciable issue of either law or fact, in which case the court shall award the prevailing party his reasonable attorney fees.

Any claim brought pursuant to R.S. 40:2010.8 *et seq.* shall be filed in a court of competent jurisdiction within one year from the date of the alleged act, omission or neglect, or within one year from the date of discovery of the alleged act, omission or neglect; however, even as to claims filed within one year from the date of such discovery, in all events such claims shall be filed at the latest within a period of three years from the date of the alleged act, omission or neglect. The provisions of this Section shall apply to all persons whether or not infirm or under disability of any kind and including, but not limited to, minors, interdicts and all persons adjudicated to be incompetent of handling their own affairs.⁶⁸

Thus, a resident's claim brought pursuant to the NHRBR is subject to prescriptive periods of one and three years.

By amending the NHRBR in 2003 to preclude recovery for damages under the statute, the legislature disregarded its own express statement of purpose to protect those persons in nursing homes isolated from the community who often lack adequate means to assert their rights as citizens.⁶⁹ Eliminating the resident's right to recover money damages under the NHRBR accomplishes the exact opposite of the legislature's purported goal. The Long Term Care Community Coalition⁷⁰ comments on the current state of the law in Louisiana regarding nursing home legislation, specifically by pointing out the deficiencies in the current regime. The coalition's article cites a Louisiana attorney's opinion on the shrinking rights of nursing home residents as a product of the powerful nursing home lobby in the state:

68. § 40:2010.9(C).

69. Despite the possibility that the NHRBR may provide the basis for a statutory duty imposed upon nursing homes, by which a resident whose enumerated right is violated could make out a claim of negligence *per se*, the fact remains that amending away a resident's right to recover damages from a violation of an enumerated right in the statute is contradictory to the goal of providing nursing home residents increased protection due to their isolated position in society. Petersen, *supra* note 35, at 68.

70. The LTCCC is a non-profit and advocacy organization that:
works to improve the lives of long term care consumers by strengthening regulation and enforcement and by educating consumers, policy makers [and] the news media [in an effort to protect] the rights and welfare of long term care consumers in all settings, including nursing homes, assisted living facilities and managed long term care.
RICHARD J. MOLLOT, LONG TERM CARE COMMUNITY COALITION, USING LAW AND REGULATION TO PROTECT NURSING HOME RESIDENTS WHEN THEIR GOVERNMENT FAILS THEM 2 (2006), http://www.ltccc.org/publications/documents/Using_Law_and_Regulation_to_Protect_Nursing_Home_Residents_Updated_sept82006.doc.

The nursing home lobby in Louisiana successfully stripped away [nursing home residents'] rights and now only injunctive relief is available. In addition, the nursing homes now fall under the protection of Louisiana's "medical malpractice act" by joining as a "qualified health care provider" to be a member of the Louisiana Patient's Compensation Fund which allows protection and a cap on damages of \$100,000 by the provider and \$400,000 from the PCF. The nursing home lobby also included their management companies, their owners, and their corporations now as "qualified health care providers" to receive protections under the cap of only \$100,000. The nursing home lobby has over 90% of our Medicaid funds, controls our legislature and continues to strip away any rights they may have. The event of Katrina victims dying in nursing homes in Louisiana captured a brief moment of attention from some in our nation. However, the happenings . . . throughout our state in long term care facilities [are] more appalling. Any exposure [or] assistance that can be given is so desperately needed. We don't have multimillion dollar verdicts because we have no punitive [damages], we have caps, and no penalties left. However, we have a state full of victims who need help from capable attorneys who are willing to do so.⁷¹

IV. JURISPRUDENTIAL SURVEY

A. Distinguishing Medical Malpractice from Simple Negligence: Difficulties and Inconsistencies

Louisiana nursing home jurisprudence is unique as compared to other states for several reasons. First, under Louisiana law, no punitive damages are to be awarded against nursing homes.⁷² Because of this, awards in this state are most often lower than in other states.⁷³ Second, cases that proceed far enough in the judicial

71. *Id.* at 28.

72. Papillion, *supra* note 28, at 5–6. In general, punitive damages are not recoverable in Louisiana. FRANK L. MARAIST & THOMAS C. GALLIGAN, JR., LOUISIANA TORT LAW § 7.03 (2d ed. 2004). There are certain exceptions provided by legislation in which punitive damages are recoverable, including situations involving injuries caused by "wanton and reckless disregard for the rights of others" (1) by an intoxicated driver and (2) by an individual engaged in criminal sexual activity with a victim of or younger than the age of seventeen.

Id.

73. Papillion, *supra* note 28, at 5–6.

process to be reported represent only a small portion of the negligence or malpractice cases out there—“the most egregious cases of nursing home neglect and abuse settle prior to trial or at least prior to appellate resolution.”⁷⁴ With that being said, this Comment nevertheless endeavors to thoroughly examine the recent Louisiana jurisprudence that is available, focusing on the various courts’ distinctions between medical malpractice and simple negligence and the inconsistent application of the distinguishing characteristics of medical malpractice and negligence by the courts.

B. Rulings Pursuant to the MMA

*1. Richard v. Louisiana Extended Care Centers: A New View of the Nursing Home’s Place within the MMA*⁷⁵

Since the Louisiana Supreme Court’s pronouncement in the landmark case of *Richard v. Louisiana Extended Care Centers*, it has been held that any claim classified as medical malpractice pursuant to the MMA filed against a qualified health care provider under the statute falls within the domain of the MMA and *must* be reviewed by medical review panel prior to suit.⁷⁶ In *Richard*, the curatrix of the plaintiff, a ninety-two-year-old double amputee, filed suit against the nursing home where the plaintiff resided before her death.⁷⁷ The petition alleged that the plaintiff sustained severe injuries including a “deep stellate laceration of the forehead, bilateral temporal contusions, brain hemorrhage, and contusions to the arms and elbows” when she was attacked by an employee of the nursing home or, in the alternative, was allowed to fall from her wheelchair.⁷⁸ The plaintiff’s curatrix filed suit alleging violations of the NHRBR; the nursing home thereafter filed for review under the MMA and, in the alternative, an exception of prematurity,⁷⁹ alleging the causes of action arose out of medical malpractice and should therefore be submitted to a medical review panel prior to suit.⁸⁰

74. *Id.* at 6.

75. *Richard v. Louisiana Extended Care Centers, Inc.*, 835 So. 2d 460 (La. 2003).

76. *Id.* at 467.

77. *Id.* at 461.

78. *Id.* at 462.

79. Because the decision of whether a case must be reviewed before a medical review panel is a threshold issue for any nursing home action, the defense counsel will generally file a dilatory exception of prematurity pursuant to Louisiana Code of Civil Procedure article 926(1). Petersen, *supra* note 17, at 34.

80. *Richard*, 835 So. 2d at 462.

In examining the nuances of the NHRBR and the MMA, the Louisiana Supreme Court noted the discrepancies in the circuit courts on whether a medical malpractice claim against a nursing home must be brought under the MMA, or whether it may be brought under the NHRBR.⁸¹ The court cited its previous conclusion on the intent of the MMA: “The principal purpose of [the MMA] is to limit the liability of health care providers who qualify under the Act by maintaining specified basic malpractice insurance and by contributing a surcharge to the Patients Compensation Fund.”⁸² However, because the MMA limits the liability of health care providers in derogation of victim’s rights, “the coverage of the Act should be strictly construed.”⁸³ Thus, the MMA should only apply in cases of malpractice as defined in the statute.⁸⁴

The court resolved the seeming contradiction between the requirements of the MMA and the NHRBR by holding that the NHRBR applies to claims outside the scope of the MMA: “the NHRBR addresses twenty-two different rights of nursing home residents. Twenty-one of these rights could never be characterized as malpractice.”⁸⁵ In the case of a nursing home, a resident is not always receiving medical care, even though the resident may at all times be confined to the nursing home.⁸⁶ Therefore, every act or omission occurring in the nursing home due to the resident’s confinement therein does not necessarily constitute medical malpractice to fall under the MMA.⁸⁷

In order to be covered by the MMA, the act or omission must be related to medical treatment.⁸⁸ The *Richard* court incorporated into its analysis the six-part test articulated in *Coleman v. Deno*⁸⁹ to be utilized in determining coverage by the MMA:

- (1) whether the particular wrong is “treatment related” or caused by a dereliction of professional skill;
- (2) whether the wrong requires expert medical evidence to determine whether the appropriate standard of care was breached;
- (3) whether the pertinent act or omission involved assessment of the patient’s condition;
- (4) whether an incident occurred

81. *Id.* at 464.

82. *Id.* at 466.

83. *Id.*

84. *Id.*

85. *Id.* at 467. The supreme court did not specifically state which of the twenty-one rights could never be classified as malpractice, however.

86. *Id.* at 468.

87. *Id.*

88. *Id.*

89. 813 So. 2d 303, 315–16 (La. 2002).

in the context of a physician-patient relationship, or was within the scope of activities which a hospital is licensed to perform; (5) whether the injury would have occurred if the patient had not sought treatment; and (6) whether the tort alleged was intentional.⁹⁰

The court ultimately punted on the factual resolution of the case by remanding for a determination under the *Coleman* factors of whether the plaintiff's allegations of negligence constituted medical malpractice under the MMA so as to warrant consideration by a medical review panel.⁹¹ This landmark case held, therefore, that a resident asserting a claim under the NHRBR which also falls under the MMA (according to the statutory definition of malpractice and application of the *Coleman* factors) *must* seek the review of a medical review panel before proceeding to court.

2. *Post-Richard Ramifications*

After *Richard* was handed down, the Louisiana Supreme Court remanded several cases for reconsideration in light of the ruling. In *Pender v. Natchitoches Parish Hospital*, the court originally held that a nursing home patient who died after falling from her wheelchair was not first required to go before a medical review panel because the claim was brought pursuant to the NHRBR.⁹² Upon remand, the court complied with the reasoning in *Richard*, stating:

It is clear from *Richard* that a plaintiff's allegations of negligence must be medical malpractice claims under Louisiana law to invoke provisions of the [MMA]. In the present case, the violation of the NHRBR could very well have been not only a violation of the NHRBR but also an act of medical malpractice.⁹³

90. *Richard*, 835 So. 2d at 469. *Coleman v. Deno* specifically addressed medical malpractice in a hospital setting, not a nursing home. 813 So. 2d at 307. However, beginning with *Richard*, Louisiana courts have cited the *Coleman* factors with approval in nursing home cases. *See, e.g.*, *Jordan v. Stonebridge, L.L.C.*, 862 So. 2d 181 (La. App. 5th Cir. 2003), *writ denied*, 869 So. 2d 851 (La. 2004).

91. *Id.*

92. *Pender v. Natchitoches Parish Hosp.*, 844 So. 2d 1107, 1108 (La. App. 3d Cir. 2003) (citing the original opinion in *Pender v. Natchitoches Parish Hospital (Pender I)*, 817 So. 2d 1239 (La. App. 3d Cir. 2002)).

93. *Id.* at 1110. The court ultimately remanded this case for a factual determination of whether the alleged violation of the NHRBR also fell under medical malpractice according to the *Coleman* factors. *Id.*

The supreme court also remanded *Hebert v. Chateau Living Center, LLC* in light of *Richard*. In that case, the court originally found that the NHRBR enumerates separate causes of action that are distinct and in addition to a resident's medical malpractice claims.⁹⁴ The specific allegations of the plaintiff in *Hebert* included "failure to properly nourish and hydrate [the resident], and a failure to hire, train, supervise and retain competent staff."⁹⁵ The court concluded that, despite the limitations *Richard* imposes on allegations that classify as malpractice, "there still remains a cause of action separate and distinct from the MMA for the failure of nursing homes to treat its residents with dignity and personal integrity. Those claims can be brought without the necessity of a medical review panel."⁹⁶ Thus, the plaintiff's allegations for failure to treat the resident with respect and dignity were rightly brought pursuant to the NHRBR and did not constitute medical malpractice therefore requiring a medical review panel.⁹⁷

Later, in *Miller v. Nursing Homes Management, Inc.*, the Louisiana second circuit exhibited some care in distinguishing between a resident's claims which must be routed to a medical review panel and those which must not; however, the court's rationale in making this distinction ignored the seemingly obvious purpose which the nursing home was meant to serve: custodial watch over the plaintiff while her mother recuperated from a broken hip.⁹⁸

In *Miller*, a bedridden plaintiff developed bedsores after being admitted to a nursing home for a temporary stay.⁹⁹ In her petition, the plaintiff alleges that the nursing home "breached the standard of care by failing to turn her, to keep socks on her feet, and to keep her in a clean and sanitary condition."¹⁰⁰ The second circuit held:

the plaintiff was completely bedridden . . . [and] required extensive care beyond basic shelter Allowing the condition to develop and remain untreated constitutes a failure to provide health care. Further, any claims regarding the failure of the nursing home to properly treat the plaintiff

94. *Hebert v. Chateau Living Center, L.L.C.*, 857 So. 2d 1183, 1184 (La. App. 5th Cir. 2003) (citing the original opinion in *Hebert v. Chateau Living Center, L.L.C.*, 836 So. 2d 489, 492 (La. App. 5th Cir. 2002)).

95. *Id.*

96. *Id.*

97. *Id.*

98. *Miller v. Nursing Homes Mgmt., Inc.*, 867 So. 2d 1000, 1001 (La. App. 2d Cir. 2004).

99. *Id.*

100. *Id.* at 1002.

once the [bedsores] developed are squarely based upon medical malpractice.¹⁰¹

In this way, the court distinguished the plaintiff's claim that the nursing home failed to provide her clean and sanitary conditions, which involves the resident's physical care and does not fall under the MMA, from the claim regarding the home's lack of proper medical treatment to the resident, which does fall under the MMA. This division of the plaintiff's claim into both malpractice and negligence components is arbitrary: the plaintiff was plainly admitted to the nursing home to receive shelter rather than medical care, and in this duty, the nursing home failed.¹⁰²

C. Rulings Pursuant to the NHRBR/Rulings of Simple Negligence

After *Richard*, several cases have distinguished nursing home malpractice from simple negligence such that the medical review panel was rendered unnecessary. Upon close examination of the underlying facts and rationale of these cases, however, the distinctions that were drawn were based on a fine and inconsistent line between what constitutes malpractice and what does not.

In *Jordan v. Stonebridge*, the plaintiff issued a Plan of Care to the nursing home, detailing that the plaintiff, a mentally retarded sixty-two year old man who weighed over 300 pounds, was to be taken to the shower only with the assistance of two orderlies.¹⁰³ Despite this express plan, the plaintiff was moved from his wheel chair to the shower by only one orderly, and in doing so, the plaintiff fell and fractured his leg.¹⁰⁴

The fifth circuit, applying the *Coleman* factors and relying on *Richard*, concluded that "the alleged negligent acts herein, mishandling of the patient in a routine transfer from his wheel chair to his shower chair, [were] in the course of his 24-hour custodial care at Stonebridge rather than part of his medical treatment and [do] not come under the MMA."¹⁰⁵ In coming to this decision, the court stated that, under the facts of the case, the plaintiff was not undergoing medical treatment at the nursing

101. *Id.* at 1004–05.

102. The trial court held, in the author's view correctly, that "because the purpose of the plaintiff's residence in the nursing home was to receive shelter rather than medical care or treatment, there was no need to bring the matter before a [medical review panel]." *Id.* at 1004.

103. *Jordan v. Stonebridge*, L.C.C., 862 So. 2d 181, 182 (La. App. 5th Cir. 2003), *writ denied*, 869 So. 2d 851 (La. 2004).

104. *Id.* at 183.

105. *Id.* at 184.

home: handling the plaintiff's day-to-day activities, according to the court, "simply does not rise to the level of medical treatment or the requirement of professional skill."¹⁰⁶ The court's analysis here distinguished away the fact that the plaintiff was in the nursing home under a detailed protocol of care, which included the administration of eighteen daily medications. Ultimately, the plaintiff's claim rested on the nursing home's act of mishandling a resident in contradiction to his plan of care, a provision which is expressly listed in the MMA as malpractice.¹⁰⁷ In this way, *Jordan* illustrates the inconsistent application of the distinguishing characteristics of medical malpractice from simple negligence in the courts.

Another case that demonstrates the moving line dividing medical malpractice from claims of simple negligence is *Thibodeaux v. Stonebridge*.¹⁰⁸ In that case, a nursing home resident brought suit in tort and under the NHRBR. The main issue on appeal was the resident's entitlement to damages.¹⁰⁹ The plaintiff was injured when a nursing home employee ran into her with a metal food cart and knocked her down.¹¹⁰ Citing *Short v. Plantation Management Corporation*,¹¹¹ the court held that the nursing home's initial tort was compounded by the home's lengthy delay in seeking medical treatment for the plaintiff, a violation that the court concluded should fall under the NHRBR.¹¹² This conclusion, however, is misguided—the holding is inconsistent with the prior line of jurisprudence in that the plaintiff's claim clearly was "related to medical treatment," or lack thereof, to fall under the MMA.¹¹³

106. *Id.*

107. LA. REV. STAT. ANN. § 40:1299.41(A)(8) (2008) (for the exact language of the provision, see *supra* note 39).

108. 873 So. 2d 755 (La. App. 5th Cir. 2004).

109. *Id.* at 767. In this case, plaintiff brought suit prior to the amendment of the NHRBR, and was thus able to recover damages pursuant to her NHRBR claim.

110. *Id.* at 756.

111. 781 So. 2d 46 (La. App. 1st Cir. 2000). In *Short*, the nursing home resident's causes of action "were so intricately intertwined that they could not be separated out." *Id.* at 66. The first circuit held: "We do not believe attorney fees should only be based on the portion of the recovery associated with the Residents' Bill of Rights Law because we cannot practically separate the cause of action based on tort from the cause of action based on the Residents' Bill of Rights Law." *Id.* The plaintiff was thus awarded attorneys' fees based on recovery, rather than the resident's NHRBR claim alone. *Id.*

112. *Thibodeaux*, 873 So. 2d at 767.

113. *Richard v. Louisiana Extended Care Centers, Inc.*, 835 So. 2d 460, 468 (La. 2003) (holding that the act must be related to medical treatment to be covered by the MMA).

The jurisprudence took an interesting turn in *Henry v. West Monroe Guest House, Inc.* when the court held that a resident's claim can be legitimately bifurcated into medical malpractice, requiring a submission to a review panel, and a claim pursuant to the NHRBR.¹¹⁴ Applying the *Coleman* factors, the court took up the plaintiff's argument that the failure to check and change the nursing home resident's adult diaper in a timely manner is properly categorized as a NHRBR claim.¹¹⁵ The court premised its reasoning on the conclusion that changing a resident's diaper is not medical treatment, failing to take into account the fact that the nursing home's lack of care in this instance caused the plaintiff to develop bedsores. This type of omission should give rise to review under the MMA, if earlier distinctions in the jurisprudence are to be followed.¹¹⁶ The court did, however, note that the plaintiff's malpractice claims were presented separately to a medical review panel.¹¹⁷ In this way, the plaintiff could maintain a claim under the MMA and a claim under the NHRBR separately and simultaneously.¹¹⁸

V. RECENT DEVELOPMENTS

A. Current State of the Law in Louisiana: It Is Time for a Change

1. Disadvantages of Routing Nursing Home Claims under the MMA

As previously discussed in this Comment,¹¹⁹ the routing of a claim under the MMA has a series of disadvantages for the plaintiff, with one of the most significant being the stalling of the case in the lengthy review process.¹²⁰ With the addition of nursing homes to the list of health care providers covered by the MMA, the Louisiana Legislature has effectively reinforced the barrier to litigation for nursing home residents by forcing their claims to be reviewed by a medical review panel, a process which can add more than a year to the time it takes to resolve the suit.¹²¹ "Louisiana is

114. 895 So. 2d 680, 684 (La. App. 2d Cir. 2005).

115. *Id.* at 683.

116. *Id.*

117. *Id.*

118. *Id.* at 684.

119. *See supra* Part III.B.

120. *See generally* LA. REV. STAT. ANN. § 40:1299.41 (2008).

121. Steve Ritea, *Wrongs vs. Rights*, TIMES PICAYUNE (New Orleans), Apr. 18, 2005, www.nola.com/speced/nursinghomes/t-p/index.ssf?/speced/nursinghomes/articles/wrongsvrights.html#continue.

not exactly a ‘plaintiff’s Mecca’ insofar as nursing home litigation is concerned.”¹²² In fact, it takes approximately eighteen months to get through the medical panel review and another eighteen months of “court filings and wrangling” before the case ever even arrives at trial.¹²³

Another serious drawback of the current system for nursing home residents is the imposition of the damage cap pursuant to the MMA. While Joseph Donchess, executive director of the Louisiana Nursing Home Association, attempts to attribute the legal protections of the MMA vis-à-vis the damage cap to an essential shield from “frivolous lawsuits that threaten to bankrupt nursing homes,”¹²⁴ the truth is that the legislative amendment requiring nursing home “malpractice” claims to be brought before a medical review panel prior to suit amounts to a stripping away of already dwindling nursing home residents’ rights. By capping the amount of recoverable damages for the nursing home plaintiff pursuant to the MMA, the Legislature has left nursing home residents with grossly inadequate relief.

2. Disadvantages of Claims Brought Pursuant to the NHRBR

The purpose of the NHRBR is clear: to protect nursing home residents who are isolated from the community and lack the means to assert their rights as individual citizens. In this way, the NHRBR expressly set out to afford nursing home residents the same rights and protections as self-sufficient citizens, including the right to sue for damages. Eliminating the nursing home plaintiff’s private right of action to seek damages in the NHRBR in 2003 completely contradicts the original purpose of the statute.¹²⁵ The Legislature clearly enacted the amendment to the NHRBR in reaction to the supreme court’s holding in *Richard*,¹²⁶ with the court’s pronouncement that twenty-one of the twenty-two rights enumerated in the NHRBR are not malpractice, the legislature acted quickly to amend the private right of action to recover money damages out of the statute. “Nursing home owners feared the ruling opened the door for plaintiffs to bring lawsuits alleging violations of the bill of rights—suits outside the constraints of malpractice laws that carried the potential for big judgments.”¹²⁷

122. Papillion, *supra* note 28, at 8.

123. Ritea, *supra* note 121.

124. *Id.*

125. § 40:2010.6.

126. The supreme court handed down *Richard* on January 14, 2003. Act No. 506 became law only months later on June 20, 2003. 2003 La. Acts No. 506.

127. Ritea, *supra* note 121.

The Louisiana Nursing Home Lobby wields significant power in the state legislature.¹²⁸ “In recent years, Louisiana’s nursing home industry, which contributes heavily to political campaigns, has persuaded lawmakers to vastly limit damage awards, to give malpractice protections to workers who primarily provide non-medical care, and to prohibit plaintiffs from using a nursing home residents’ bill of rights to collect damages.”¹²⁹ The lobby also holds the bulk of the funds spent on long-term care in the state.¹³⁰ Through the action of the nursing home lobby in the legislature to enact the amendment of the NHRBR eliminating the right to recover damages, the nursing home was able to remain under a shield of liability, with only injunctive relief now available to a nursing home resident under the NHRBR.

3. Time for Change

As this Comment has shown, the current statutory scheme in Louisiana is ineffective and does not adequately provide relief for nursing home residents. Further, the inconsistent application by the courts of the statutory scheme regarding exactly what constitutes medical malpractice versus simple negligence has left residents in a state of uncertainty regarding the resolution of their claims. “We’re not protecting the people in nursing homes. We’re regressing for the benefit of big business,” said Van Robichaux, a New Orleans-area lawyer who specializes in nursing home lawsuits. “Doctors are good people, but they’re humans and they make mistakes and that’s understandable and forgivable, but what happens a lot of times in a nursing home is not an accident. It’s repetitive, intentional neglect, oftentimes for profit. And that’s not excusable. And it’s not an accident.”¹³¹ According to a national survey of nursing homes for 2003,¹³² the top deficiencies included:

- (1) Unsanitary food preparation;
- (2) Poor quality of care;
- (3) High number of accidents;

128. *Battle for Home Care May Advance with Blanco’s Backing*, LAFAYETTE DAILY ADVERTISER, Oct. 9, 2004, <http://www.dhh.louisiana.gov/offices/medialibrary.asp?ID=162&FromSearch=1&Detail=154>.

129. Ritea, *supra* note 121.

130. *See Battle for Home Care*, *supra* note 128.

131. Ritea, *supra* note 121.

132. Petersen, *supra* note 17, at 37 (quoting a study by professors at the University of California, San Francisco, published in 2004, with survey data by the Centers for Medicare and Medicaid Services (CMS) of the U.S. Department of Health and Human Services. *See Kaiser State Health Facts*, www.statehealthfacts.org) (last visited Nov. 13, 2008).

- (4) Professional standards not being followed;
- (5) Failure to prevent accidents;
- (6) Poor housekeeping;
- (7) Failure to prevent decubitus sores (or pressure sores);
- (8) Failure to follow a resident's mandatory Comprehensive Care Plan;
- (9) Failure to respect a resident's dignity; and
- (10) Poor infection control.¹³³

In Louisiana, the deficiency found in 49% of all nursing homes surveyed, making it the state's number one deficiency, was the failure to follow professional health care standards.¹³⁴ Further, "[f]or nursing homes with the most serious deficiencies classified by state regulators according to the CMS's definitions of either 'actual harm' or 'immediate jeopardy,' Louisiana ranked thirty-four out of the fifty states plus the District of Columbia with the highest percentage in these two categories."¹³⁵ Only 8.9% of nursing homes in Louisiana were listed as having none of the deficiencies.¹³⁶

As these statistics show, Louisiana is in need of a change. The current law which categorizes a nursing home resident's claim as malpractice pursuant to the MMA is fraught with disadvantages to the plaintiff, as noted above. If a resident pursues a claim pursuant to the NHRBR, that plaintiff is limited to injunctive relief and is not entitled to damages under the statute. Moreover, and perhaps more importantly, the current statutory causes of action available to the nursing home resident provide little to no incentive for nursing homes to better their conditions. Because the MMA provides a limit to the nursing home's liability, and the NHRBR allows for no recovery of money damages, a case that makes it to court for judgment only has a slight impact on the nursing home:

[C]ash amounts of jury awards and settlements in Louisiana nursing home cases often pale in comparison to other death and injury lawsuits because plaintiffs can't claim lost earnings, and the life expectancy of the victims is not long. Smaller amounts, advocates and plaintiffs' lawyers say, have less of an impact on bad homes and give the impression that an elderly person's life is worth less than a younger person's.¹³⁷

133. *Id.*

134. *Id.*

135. *Id.* at 37-38.

136. *Id.* at 38.

137. Ritea, *supra* note 121.

All in all, the current statutory scheme for nursing home plaintiffs must be reformed to provide for damages rather than simply injunctive relief under the NHRBR. In this way, if *Richard* is to be followed, the nursing home resident may seek relief under the NHRBR for violations of twenty-one of the twenty-two enumerated rights without first being caught up in the lengthy medical review process and still have an enforceable and effective right of action to pursue under the NHRBR.

VI. CONCLUSION

The existing state of the nursing home law in Louisiana is in dire need of a change. The complex statutory provisions that currently regulate nursing homes lack a substantial remedy for the resident: the MMA's requirement of panel review significantly delays a plaintiff's claim from reaching trial, and the cap on damages provides limited relief for the plaintiff (if the claim ever makes it past the medical review panel stage). Likewise, the NHRBR after 2003 provides the resident no right of action for recovery of money damages. Taken as a whole, this statutory scheme is grossly lacking in providing means of compensation to the injured resident.

Through the action of the powerful Nursing Home Lobby in Louisiana, the state legislature has bowed to the self-serving interest of the nursing home industry, while sacrificing resident care. As long as the legislature allows for the continuation of a system without any real teeth, nursing homes will have no incentive to improve internal conditions and resident management. Amending the NHRBR back to its pre-2003 state to provide relief in the form of money damages would accomplish the goals that the legislature originally purported to be the intent of the NHRBR: to preserve the dignity and personal integrity of residents living in nursing homes by allowing residents monetary relief when their personal rights have been violated.

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