THE LAVENDER TRIAL: DID A MATHEMATIC FICTION RESULT IN $600+ MILLION ERROR?

by: Kippy Wroten, Esq

When I was a small child, my grandmother earnestly told me I had 11 fingers. When challenged she proved it to me by counting my fingers: “10, 9, 8, 7, 6” she counted on one hand “plus 5” on the other is, of course, 11. “Numbers don’t lie” she proudly proclaimed. With this simple calculation, my grandmother demonstrated what appeared to be a straightforward mathematical truth to support a completely ridiculous conclusion.

In today’s article, I leave behind the grind of factual review and instead turn our focus singularly to examine the mathematical process used to reach the astronomical verdict. An examination of the methodology behind the numbers reveals the same nonsensical process by which a legal slight of hand was allowed to unfairly compound an otherwise modest penalty into Armageddon.

DOING THE MATH

In an effort to avoid any bias arising from the facts of our trial, I’m going to change the underlying scenario to a more neutral subject albeit one where reckless behavior creates a high potential of risk for devastating injury. My example uses the familiar but potentially dangerous activity of driving a car and the indefensible act of running a stop sign in a school zone. As a police officer sits at the corner watching out for the safety of the soon to arrive vulnerable children, enter reckless motorist who runs the stop sign. No children are present. No injury occurs. Still, the law has been violated. The driver is pulled over and receives a ticket. A fine will be paid.

For this example, let’s assume the legal fine for running a stop sign is set at $500. The driver therefore is assessed $500 for violating the Vehicle Code. Note that “if ” someone had been hurt as a result of the driver’s reckless act of running the stop sign, additional legal claims designed to compensate the injured person would also be available to a plaintiff. The actual injury would be evaluated and additional financial damages associated with running the stop sign would be assessed against the driver. The fine for running the stop sign however is static. It does not change. Only the availability of additional “compensatory” damages is impacted by the actual occurrence of an injury.

Violating a facility staffing ratio is very much like running a stop sign. It doesn’t matter whether anybody was injured or not. Violate the ratio, pay the fine. It seems simple, but as applied in Humboldt, it transitioned into the absurd. Here’s how.

THE MULTIPLIER

As perceived by the Humboldt Court, it's not the act of running the stop sign the driver is being fined for. It's the potential injury that running the stop sign could have caused that is being charged. As the theory goes, the stop sign was placed to protect everyone in the community. Residents pay their taxes in order to live in a safe community and every resident shares the same right to live in safety. That safety was threatened by the driver who ran the stop sign so even though nobody was actually hurt, the threat that they could have been hurt existed. Since every resident faced the potential threat of harm, then logically every resident is entitled to be compensated. Applying this logic means that even though the driver only ran the stop sign one time, the $500 fine is assessed per resident. In a community with 1,000 residents, the $500 fine is multiplied by 1,000. This equates to $500,000. I live in a city with about 200,000 residents. Running a stop sign in my neighborhood will therefore cost a bundle. If this argument appears absurd, it's because it is.

The fundamental error in the Humboldt award was caused by the serial repetition of a fine that is based on a single, facility wide calculation. No individual patient was entitled to receive any numeric staffing ratio of care, and no patient injury was claimed. Nonetheless, the Humboldt fine was repeatedly awarded to every patient in our facilities. The result was patently absurd and according to case law, the law is never supposed to be absurd.

POST MORTEM

On December 16, 2010 the California Department of Public Health published an All Facilities Letter which now more specifically defines the manner in which 3.2 compliance will be audited. Hourly census averaging is one new feature I would have liked to have had available at our trial. Nonetheless I am alarmed at the requirement for perfect document management, the automatic nature of non-compliance findings, and the general set-up the long term care industry continues to be subjected to for an ongoing blood letting at the hands of plaintiff attorneys. To emphasize the point, I leave you with a word problem from 5th grade math class to mull over.

Presume a government deficiency is deemed conclusive evidence to establish a staffing violation has occurred. A facility with 100 census provides adequate nursing services to meet the 3.2 compliance but fails to document the hours in a format that meets the new documentation criteria on 4% of the 90 days audited. A single deficiency is assessed without any monetary penalty. How much will the plaintiff attorney get?[ii]

About the author:
Founder and Shareholder of Wroten & Associates, Ms. Wroten's experience covers a broad spectrum of complex litigation encompassing all areas of healthcare liability including high exposure and class action claims of elder abuse, fraud, and corporate unfair business practices. Ms. Wroten's experience includes the successful defense of individual healthcare providers, independent long term care facilities, ancillary service providers, as well as related corporate enterprises and their executives.

Ms. Wroten started her legal career as a Deputy District Attorney for Orange County where she prosecuted gang, child and spousal abuse cases. Thereafter, she spent 15 years as a litigator for a prestigious healthcare defense firm where she was a shareholder and lead her long term care practice area. Ms. Wroten founded Wroten & Associates in 2006 to better meet the growing challenges of the long term care industry. Wroten & Associates is designed to provide personal service at rational rates.

Ms. Wroten is a sought after speaker who is dedicated to the education of the healthcare industry and legal community. She has been an invited lecturer for the Defense Research Institute, Irvine Medical Center, Chapman University College of Law, and the Association of Southern California Defense Counsel.

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REFERENCE NOTES

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i Our plaintiffs relied on a plaintiff class that was presumed despite the known fact that when appropriate notice to potential class members is actually given, less than 2% of the prospective members will request to be included. (Wang v. Chinese Daily News, Inc. (C.D. Cal. 2006) 236 R.R.D. 485, 488) as cited by Plaintiffs in "Plaintiffs' Motion Regarding Class Notice and Statement In Support Thereof."

ii This facility is understaffed 4 days (3.6 rounded up per ALF letter). 4 days x 100 patient census = 400 patient days. 400 patient days x $500 each = $200,000. The plaintiff attorney will additionally seek a court award of attorneys fees equating to 40% of the verdict plus expenses. This will add $80,000 for the attorney and at least enough in expenses to bring the defendants' cost in excess of $300,000. Add defense costs. (Mind you, plaintiff attorneys have done nothing more than collect DPH records. Nice return on investment.)