U.S. Department of Health and Human Services
Assistant Secretary for Planning and Evaluation
Office of Disability, Aging and Long-Term Care Policy

ADDRESSING LIABILITY ISSUES IN CONSUMER-DIRECTED PERSONAL ASSISTANCE SERVICES (CDPAS):

The National Cash and Counseling Demonstration and Selected Other Models

January 2004

Office of the Assistant Secretary for Planning and Evaluation

The Office of the Assistant Secretary for Planning and Evaluation (ASPE) is the principal advisor to the Secretary of the Department of Health and Human Services (HHS) on policy development issues, and is responsible for major activities in the areas of legislative and budget development, strategic planning, policy research and evaluation, and economic analysis.

The office develops or reviews issues from the viewpoint of the Secretary, providing a perspective that is broader in scope than the specific focus of the various operating agencies. ASPE also works closely with the HHS operating divisions. It assists these agencies in developing policies, and planning policy research, evaluation and data collection within broad HHS and administration initiatives. ASPE often serves a coordinating role for crosscutting policy and administrative activities.

ASPE plans and conducts evaluations and research–both in-house and through support of projects by external researchers–of current and proposed programs and topics of particular interest to the Secretary, the Administration and the Congress.

Office of Disability, Aging and Long-Term Care Policy

The Office of Disability, Aging and Long-Term Care Policy (DALTCP) is responsible for the development, coordination, analysis, research and evaluation of HHS policies and programs which support the independence, health and long-term care of persons with disabilities–children, working age adults, and older persons. The office is also responsible for policy coordination and research to promote the economic and social well-being of the elderly.

In particular, the office addresses policies concerning: nursing home and community-based services, informal caregiving, the integration of acute and long-term care, Medicare post-acute services and home care, managed care for people with disabilities, long-term rehabilitation services, children's disability, and linkages between employment and health policies. These activities are carried out through policy planning, policy and program analysis, regulatory reviews, formulation of legislative proposals, policy research, evaluation and data planning.

This report was prepared under contract #100-02-0018 between the U.S. Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation, Office of Disability, Aging and Long-Term Care Policy and the Boston College School of Social Work. For additional information about this subject, you can visit the DALTCP home page at http://aspe.hhs.gov/daltcp/home.shtml or contact the ASPE Project Officer, Pamela Doty, at HHS/ASPE/DALTCP, Room 424E, H.H. Humphrey Building, 200 Independence Avenue, S.W., Washington, D.C. 20201. Her e-mail address is: Pamela.Doty@hhs.gov.

ADDRESSING LIABILITY ISSUES IN CONSUMER-DIRECTED PERSONAL ASSISTANCE SERVICES (CDPAS):
The National Cash and Counseling Demonstration and Selected Other Models

Charles P. Sabatino, J.D.
Sandra L. Hughes, J.D.

Commission on Law and Aging
American Bar Association

January 2004

Prepared for
Office of Disability, Aging, and Long-Term Care Policy
Office of the Assistant Secretary for Planning and Evaluation
U.S. Department of Health and Human Services
Contract #100-02-0018

TABLE OF CONTENTS

ACKNOWLEDGMENTS

The authors would like to thank the many people from the Cash and Counseling Demonstration States who generously responded to our requests for information, perspective, and clarification. We especially appreciate the invaluable help provided by Sandra Barrett, Assistant Director, Arkansas Department of Aging and Adult Services, Lou Comer, Consumer Directed Care Project Director, Florida Department of Elder Affairs, and William Ditto, Executive Director, New Jersey Department on Disability Services. We likewise wish to thank the many knowledgeable people connected with the California In-Home Supportive Services Program and the New York State Consumer-Directed Personal Assistance Program who provided essential information, background, and experience in helping us to understand the operation of those programs. On the home front, we would like to that our Boston College project officer Kevin Mahoney, Ph.D., and Pam Doty of the Office of the Assistant Secretary for Planning and Evaluation at the U.S. Department of Health and Human Services for their vital guidance, support and assistance throughout the project. Finally, the authors would like to thank former intern Rebecca Harbour Partesotti for her indispensable research, investigation, and interviewing that so successfully helped launch this project.

EXECUTIVE SUMMARY

This report addresses the liability issues that may arise in government-sponsored consumer-directed personal assistance programs (CDPAS). In analyzing these issues, the report focuses on the programs implemented in Arkansas, Florida and New Jersey as part of the Cash and Counseling Demonstration, but also briefly addresses variations on the liability analysis for two well-established CDPAS programs, California's In-Home Supportive Services Program and New York's Consumer-Directed Personal Assistance Program. The purpose of this report is twofold: first, to identify the circumstances in which negligence or other misconduct could result in liability and what persons or entities are likely to be liable; and second, to identify steps that can be taken to reduce exposure to such liability.

The methodology for this analysis involved review of all available program materials and operational procedures, relevant law and regulations, available literature and reports on the state programs,[1] and telephone interviews with several key contacts from the three Cash and Counseling programs and the California and New York programs. Legal research revealed that there are very few reported cases that discuss liability issues in the context of government sponsored consumer-directed care. Consequently, much of the legal analysis in this report is based on either the application of basic legal principles of tort law or analogies to comparable situations where appropriate. However, in the case of claims between workers and consumers, there is considerable case law that is directly analogous, in the context of both traditional agency care and privately employed care providers.

Although not identical, the Cash and Counseling programs in Arkansas, Florida and New Jersey share the following characteristics:

- All participants are Medicaid recipients who have been determined to be eligible for specific numbers of hours of home care services, based on their level of need or claims history.

- The consumer's eligibility level for traditional Medicaid long term care benefits is converted into a cash benefit amount or "allowance."

- Consultants, who are private agencies or individuals with whom the state has contracted, provide supportive services to consumers to help them convert the cash allowance into a spending plan. Most of the consumer's allowance typically is used to

[1] The reports that have been prepared to date for the Cash and Counseling Demonstration are available at the Demonstration's website, http://www.hhp.umd.edu/aging/CCdemo/products.html.

pay wages to CDPAS workers, but consumers have the discretion to spend part of their allowance on a variety of goods and services that enable them to function more independently, such as equipment and home modifications.

- Consultants are also responsible for advising the consumer about hiring, training and supervising personal assistance workers.

- If the consumer is unable to or does not wish to assume the responsibility of directing his or her own care, the consumer has the option of designating an authorized representative.

- In addition to providing these supportive services from consultants, the state contracts with one or more fiscal intermediary agencies that are available to perform employer bookkeeping functions for the consumer.

- Once the spending plan has been completed and the workers hired, consultants maintain regular contact with the consumer, and consultants and/or fiscal agents periodically review consumer records to check for errors or overspending.

In this model of consumer-directed care, the state relinquishes considerable control over services to consumers. This raises the concern that in the absence of state control, there may be a decline in the quality of care and that: (1) poor care may result in injury to consumers; and (2) the state or its agents may be held responsible for the injury. However, the preliminary data from the Cash and Counseling Demonstration supports the conclusion that there is no increase in risk of injury to consumers under the consumer-directed model of care, compared to agency-provided care.[2]

Building on that conclusion, this analysis of liability risk (i.e., the risk of being held legally responsible for the injury suffered by another) finds that the risk of liability as between the consumer and the worker is no greater than that encountered under agency provided care. In addition, because in many cases family members serve as CDPAS workers under this model of care, there is, as a practical matter, less likelihood that the parties will seek compensation for personal injuries in the courts.

Putting aside any impact of familial relationships, personal assistance workers face a heightened theoretical risk of liability if they are negligent in performing caregiving duties, compared to agency provided care, because in the latter structure the agency shoulders the ultimate responsibility for injury under the doctrine of vicarious liability. Absent the agency, the individual worker employed by the consumer bears the sole legal responsibility for injuries caused by the worker's negligence. However, the practical likelihood of liability

---

[2] Leslie Foster, et al., *Does Consumer Direction Affect the Quality of Medicaid Personal Assistance in Arkansas?* (2003).

is influenced by the extent of assets or insurance owned by a prospective defendant. Individuals providing personal assistance are likely to have insignificant assets compared to agencies and in practical terms, are therefore likely to be "judgment proof."

In the case of injury to workers while on the job, liability risk is affected dramatically by the availability of workers' compensation. Where workers are *not* covered by workers' compensation benefits, consumers who have assets are more likely to be subject to suit for compensation if a worker is injured on the job, because of the absence of other remedies. Workers' compensation provides a relatively simple administrative remedy to injured workers and, at the same time, bars most personal injury actions by the worker against the consumer.

With respect to other actors in the provision of services -- i.e., the state sponsoring agency, consultants, fiscal agents, public authorities (as in California), or consumer-directed provider agencies (as in New York) -- this analysis finds that their liability risk is limited to the specific tasks they perform, with minimal risk of vicarious liability for personal injury negligently caused by personal assistance workers. The risk of direct liability is also relatively very low because of each actor's limited functions. Thus, in general, delivering home care services through the Cash and Counseling model or a similar consumer-directed structure results in a relatively low level of liability risk where employer and support functions are "unbundled" in a clearly defined and communicated fashion.

Seeking to provide a broad taxonomy of all possible tort liability risks, this report identifies the following liability risks for each of the actors in consumer-directed care:

Worker's Liability Risk

Section II.A and Section II.C discuss the following liability risks for workers:

- **Negligent caregiving**. Case law demonstrates that individual workers face a significant risk that they may be found liable if they are negligent in performing their caregiving duties, including leaving the consumer unattended. However, if a worker's income and assets are low or modest, as is the case for many in this field, the worker may, in practical terms, be "judgment proof." From this perspective, the risk of enforceable liability for negligent caregiving is a risk that is not likely to materialize (Section II.A.1).

- **Negligence in non-caregiving matters**. A worker may be found liable for negligence in non-caregiving activities, most notably creating a hazard in the consumer's home. However, here, again, if a worker does not have sufficient income

or assets to pay the judgment in a damage action, this is a risk that is not likely to materialize (Section II.A.2).

- **Failure to report abuse or neglect**. A worker may be a mandatory reporter under the state's adult protective services (APS) law and may therefore be both civilly and criminally liable for failure to report abuse or neglect that comes to attention of the worker. However, liability can easily be avoided by complying with the APS law (Section II.A.3.a). As a practical matter, workers employed by the consumer or the consumer's representative, especially if the worker is a family member, may have greater emotional or economic barriers to reporting, compared to agency-employed workers.

- **Liability for abuse or neglect**. A worker may be criminally liable under the state's APS law if the worker abuses or neglects the consumer. This is a low level risk because of the infrequency of encountering worker misconduct that rises to the level of abuse or neglect. Of course, on the rare occasions when it does occur, the injury to the consumer can be extremely serious (Section II.A.3.b).

- **Liability for injury to third party caused by the worker**. The worker and the consumer are potentially liable for injuries to third parties caused by the worker while acting within the scope of employment. The worker's liability is direct, i.e., flowing directly from his or her own action or inaction, while the consumer's risk of liability is vicarious, arising from the employer-employee doctrine of *respondeat superior*. Unless the worker and the consumer have sufficient income or assets to pay the judgment in a damage action, this too is a risk that has a low probability of materializing (Section II.C).

- **Liability for injury to third party caused by consumer**. A third party may claim that an injury inflicted by a consumer was caused by the negligent care or supervision of the worker, thus making the worker liable for damages. However, such claims are rare and are likely to be dismissed for failure to prove that the worker owed a duty of care to the third party (Section II.C).

Consumer's Liability Risk

Section II.B and Section II.C discuss the following liability risks for consumers:

- **Negligence in maintaining the workplace**. Consumers face a distinct risk of liability for on the job injuries to individual workers they employ unless those employees are covered by workers' compensation. The existence of workers' compensation coverage is a key protection for both workers who risk injury and for consumers who, without it, face significant liability risk. The case law demonstrates

that a consumer may be found liable for negligence in maintaining the workplace -- that is, for creating or failing to correct hazardous conditions in the consumer's home. If the consumer lives with a family member or friend who is the owner or renter of the consumer's home, that family member or friend may also be liable on a theory of premises liability (Section II.B.1). It is true that the consumer could be liable for injury caused to any person invited into his or her home on these same legal grounds. However, the frequency and level of involvement of a personal assistance services worker in the home raise the risk to a substantially higher level, although no higher than is faced with agency-provided services.

- **Injuries caused by the consumer's mental impairment**. Cases in which consumers with mental impairments engage in negligent or aggressive behavior that causes injury to the worker are more complicated, because state law varies on whether the consumer's mental impairment will be recognized as a defense in an action for damages. The trend is to recognize the defense when asserted by a defendant who is confined to a residential facility, and there is case law suggesting that in at least some circumstances, this defense will also be accepted in the home care setting (Section II.B.2).

- **Wrongful discharge and other employment-related claims**. As an employer, the consumer is potentially liable for a variety of employment related claims, such as discharge in violation of an employment agreement or employment actions that are discriminatorily motivated. However, this is a low frequency risk, and consumers can be protected from liability by a carefully worded employment agreement and by being made aware of any applicable state employment laws (Section II.B.3).

- **Liability for injuries to third parties caused by the workers**. Consumers may be liable as employers on the basis of vicarious liability (also referred to as *respondeat superior*) for injuries caused to third parties by their workers while acting within the scope of employment. For example, an auto accident caused by the worker while running an errand for the consumer could result in such liability (Section II.C).

Authorized Representative's Liability Risk

Section II.D discusses the following liability risks for authorized representatives:

- **Liability for negligence and for breach of fiduciary duty**. In addition to potential liability for negligence (that is, failure to exercise ordinary care) in performing the duties of an authorized representative, an authorized representative may well have a heightened "fiduciary duty" to the consumer. However, in most cases authorized representatives are relatives or friends whose caregiving commitment is high, as is

their level of care in performing their duties, thus significantly reducing the likelihood of negligence or breach of fiduciary duty (Section II.D).

- **Liability for negligent hiring of a worker**. The parent or other legally responsible person who is acting as the consumer's authorized representative may be liable for injuries or damage that results from a worker's failure to properly supervise or care for the consumer. However, case law on negligent hiring and parental liability strongly suggests that the authorized representative would be liable only if the representative: (1) knew or had reason to know that the consumer was likely to cause such damage or injuries; and (2) the authorized representative was negligent in hiring the personal assistant responsible for the supervision or care of the consumer (Section II.D).

- **Liability as the employer of the worker**. The authorized representative normally will be considered the joint employer, or the sole employer of the worker if the consumer has no ability to self direct his or her care, and therefore will have potential employment related liability (see Section II.B.3), including vicarious liability for torts committed by the worker that cause injury to third parties.

- **Liability for abuse, neglect or exploitation of the consumer**. In states that provide for a civil cause of action for abuse of a vulnerable adult, the representative may be liable to the consumer if the representative abuses, neglects or exploits the consumer. The representative could also be criminally liable. Again, this is a very low-incidence risk. Finally, the representative may be a mandatory reporter under the state APS law (Section II.D).

Fiscal Agent's Liability Risk

Because the role of the fiscal agent is limited (processing payroll records and issuing paychecks, and, in some cases, fiscal monitoring), the liability risks for fiscal agents are correspondingly quite limited. The report does not address the various contractual obligations to the state that the fiscal agent may incur. The report does analyze the following personal injury liability risks for fiscal agents in Section III:

- **Liability to consumers for breach of contract**. In some states, the fiscal agent (FA) enters into an agreement directly with the consumer, creating the possibility of a breach of contract action by the consumer if the FA fails to issue a paycheck to the worker and the consumer, as a result, loses the worker's services and suffers injury. However, the possible theories of liability are speculative and difficult to prove, and even if the plaintiff is nonetheless successful, the amount of damages a consumer or worker will be able to recover is likely to be insignificant (Section III.A).

- **Tort liability to consumers and workers for failure to pay worker**. Negligence resulting in failure to pay the worker could also give rise to a tort action by the worker or the consumer against the FA. Here, too, there are serious legal obstacles to these claims, such as the difficulty of proving causation, and in any case, the amount of damages at stake is likely to be insignificant (Section III.B).

- **Liability to consumers for negligent monitoring**. A fiscal agent's negligence in monitoring a consumer's expenses and detecting problems could result in negative consequences for the consumer such as dis-enrollment from the CDPAS program, but here again there are serious legal obstacles to recovery, most notably the consumer's contributory negligence in deviating from the spending plan (Section III.C).

- **Liability for failure to report abuse or neglect**. A fiscal agent may be a mandatory reporter under the state's adult protective services (APS) law and may therefore be both civilly and criminally liable for failure to report abuse, neglect, or exploitation that comes to attention of the FA. Liability can easily be avoided by complying with any applicable APS reporting requirements (Section III.D).

Consultant's Liability Risk

In the Cash and Counseling model of CDPAS, consultants, rather than the state, are assigned the most critical program functions -- assisting the consumer in designating an authorized representative and developing the spending plan and the back-up plan; providing consultation with regard to hiring, training and supervising workers; and monitoring program quality and initiating action to correct problems. While the fact that the consultant's functions are so critical certainly creates a significant risk of liability, this risk is mitigated by the fact the consumer explicitly bears primary responsibility for decisions regarding development of the spending plan and the back-up plan and selection and supervision of a worker, including hiring/firing, training, and scheduling. This separation of responsibility should protect the consultant from being deemed vicariously liable for injury to consumers caused by workers or by deficiencies in the spending plan or back-up plan. The way the program defines the functions of the consultant (or case worker by any other name) is critical to the liability risk analysis, for liability risk follows function.

Consultants can effectively protect themselves against liability by: (1) being very clear in practice about staying within the bounds of consultation versus case management; (2) complying with program procedures and instructions carefully and executing all responsibilities conscientiously and with reasonable care; and (3) making it clear all times that it is the role of the consumer, not the consultant, to make decisions regarding the consumer's care.

Section IV discusses the following liability risks for consultants:

- **Liability for negligent designation of an authorized representative**. To the extent that the consultant takes on responsibility for screening and/or approving an authorized representative, the consultant may be liable to the consumer for negligence in investigating, evaluating, or approving that selection, if the representative subsequently is negligent in performing his or her responsibilities or otherwise fails to act in the consumer's best interest (Section IV.A).

- **Liability for negligent assistance in the development of the spending plan and back-up plan**. If the consultant provides inadequate or incorrect advice, the consultant may be liable for negligent assistance in the development of the spending plan or back-up plan. In states that give consultants authority to approve the spending plan and/or the back-up plan, the consultant may be liable for negligent approval of a deficient plan (Section IV.B).

- **Liability for negligent assistance in hiring, training and supervising workers**. Similarly, if the consultant provides inadequate or incorrect advice regarding hiring, training or supervising workers, the consultant may be liable for negligence if the consumer who relies on that advice is subsequently injured (Section IV.C).

- **Liability for negligent monitoring**. A consultant may be liable if the consultant is negligent in monitoring program quality or fails to initiate action to correct problems identified in the course of monitoring, resulting in injury to the consumer (Section IV.D).

- **Liability for failure to report abuse or neglect**. A consultant may be a mandatory reporter under the state's adult protective services (APS) law and may therefore face civil and/or criminal liability for failure to report abuse or neglect that comes to attention of the consultant (Section IV.E).

State's Liability Risk

In the Cash and Counseling model of CDPAS, the state's risk of liability for personal injury is greatly reduced. Most of the functions that were performed by the state or a provider agency in traditional Medicaid-funded home care services are now unbundled and performed by consumers (e.g., hiring and supervising workers), consultants (e.g., advising consumers and monitoring care), and fiscal agents (e.g., payroll services for workers). The core functions that continue to be performed by the state, such as enrolling consumers and responding to serious problems in connection with consumer care, carry some risk of liability, but if the state program is well structured and operated in accordance with that structure, this risk is minimal.

Section V discusses the following liability risks for states:

- **Liability for failure to obtain adequate consent**. State programs that elect not to screen applicants to determine whether the applicant is an appropriate candidate for CDPAS risk liability if the state enrolls a consumer without first obtaining the consumer's voluntary agreement to participate in the program (Section V.A).

- **Liability for failure to adopt adequate criteria and procedures for selection of an authorized representative for consumers who lack the capacity to designate a representative**. The relatively informal criteria and procedures for selection of an authorized representative that are now in effect in the Cash and Counseling states create the risk that the state may be liable if a representative mismanages a consumer's care, particularly the care of a consumer who lacks the capacity to designate a representative (Section V.B).

- **Liability for negligent response to a problem or complaint regarding consumer's care**. The state may be liable if it fails to exercise ordinary care in responding to a problem or complaint regarding a consumer's care However, this liability risk is no different from that faced in agency-provided care (Section V.C).

- **Liability as alleged employer of the individual worker**. If the state is found to be the employer of the individual worker, the state will be vicariously liable for torts committed by that person while acting within the scope of employment and for workers' compensation if the worker is injured on the job. However, in the Cash and Counseling model, where the consumer, and not the state (or fiscal agent), controls the key employer functions (hiring/firing, assigning and scheduling tasks, training, and supervision), the risk of such liability is negligible (Section V.D).

- **Vicarious liability for consultant's or fiscal agent's negligence and other tortious conduct**. Even though the state identifies an individual who provides consultant or fiscal agent services as an independent contractor, if the state exercises sufficient control over the independent contractor, the state can nevertheless be found to be the employer of that contractor and will be vicariously liable for the contractor's negligence and other tortious conduct. In the Cash and Counseling model, the state typically does not exercise such control (Section V.E).

- **Liability based on nondelegable duty**. The state will be liable if a tortious act is committed by the consultant or the fiscal agent while carrying out a "nondelegable duty" of the state. The concept of "nondelegable duty" has been used in those cases where a court concludes that as a matter of policy, the government should be responsible for the torts of independent contractors who are carrying out the work of or executing a responsibility of the government. However, courts vary in how they approach this issue, and the content of statutes or regulations setting forth the state's

responsibilities in connection with CDPAS is likely to determine whether a nondelegable duty exists (Section V.E).

- **Liability for failure to provide effective emergency back-up care**. The Cash and Counseling Demonstration states required consumers to develop back-up strategies as part of the planning process, but if the state takes on a system-wide role in securing or providing emergency back-up, the state will take on significantly greater risk of liability for failure of back-up care, depending upon the level of responsibility and function assumed. For example, under the current federal Independence Plus Medicaid waiver templates for consumer-directed personal assistance programs, the state is required to "assure" emergency backup care for consumers. Undertaking a responsibility to "assure" emergency back-up brings with it a high level of liability risk if the state's emergency backup system fails and the consumer suffers injury as a result. (Section V.F).

CDPAS programs can be structured in many ways, and it is beyond the scope of this report to identify and analyze the liability issues associated with each of the variations on CDPAS. However, Section VI of the report does address two well-established CDPAS programs, California's In-Home Supportive Services (IHSS) Program and New York's Consumer-Directed Personal Assistance Program (CDPAP). There are several significantly different liability issues that may arise in the California IHSS program:

- The liability risks for counties and state agencies involved in IHSS are small because they have been given broad statutory immunity. However, the state does assume the responsibility of covering all workers with workers' compensation protection (Section VI.A.2).

- The public authorities in each county act as the employer of IHSS workers for purposes of collective bargaining, but the public authorities have been granted statutory immunity which shields them from vicarious liability arising out of the consumer-worker relationship (Section VI.A.3).

- The public authorities also perform certain other designated functions, such as: screening and referral of workers through employment registries; providing training; providing emergency back-up support; and monitoring services. The immunity provision for public authorities, unlike that for the state and counties, does not extend to functions such as these that a public authority carries out directly. Therefore, liability risk follows and is proportional to the breadth and depth of the specific function undertaken by the public authority (Section VI.A.3).

The New York CDPAP program is structured around a provider agency, Concepts of Independence, Inc., that serves as the employer of record of the workers for purposes of employee payroll and benefits functions and for purposes of entering into a Medicaid

provider agreement with the state. At the same time, the consumer retains responsibility for directing his or her care and services to substantially the same extent as is done in the Cash and Counseling model. Accordingly, the liability issues are substantially similar in the two models, except that all workers are mandatorily covered by workers' compensation through Concepts, the provider agency.

Section VII, Conclusions and Options to Address Liability Risk, reiterates the conclusions reached in Sections II through VI. This section also sets forth an array of steps CDPAS program administrators may want to consider to address the liability risks for each actor in consumer-directed care. The steps include:

- **Options to Address the Worker's Liability Risks**
  - Fully inform the worker of the liability risks and document the process.
  - Require workers' compensation coverage for all workers.
  - Make available optional training programs for workers.

- **Options to Address the Consumer's Liability Risks**
  - Fully inform the consumer of the liability risks.
  - Inform the consumer of the possible need for liability insurance if the consumer has assets at risk.
  - Document that the consumer has received this information and agrees to these risks.
  - Provide workers' compensation for all individual workers.
  - Offer worker background checks to consumers.
  - Advise the consumer to enter into a written employment agreement with the worker that allows termination of employment at will.
  - Provide information and training regarding employment laws that apply to the consumer.

- **Options to Address the Authorized Representative's Liability Risks**
  - Fully inform the authorized representative of the liability risks.
  - Get written documentation that the authorized representative has been informed of and agrees to these risks.
  - Follow the same options as for consumers, as appropriate.

- **Options to Address the Fiscal Agent's Liability Risks**
  - Implement a quality management plan.
  - Utilize liability insurance.
  - Seek assurance from the state regarding the adequacy of back-up plans.
  - Check applicability of the state APS law.

- **Options to Address the Consultant's Liability Risks**
  - Implement a quality management plan.

- **S** Utilize liability insurance.
- **S** Clearly communicate and document the consultant's role.
- **S** Ensure that important decisions are made by the consumer.
- **S** Adopt clear and explicit criteria for the approval of spending plans and back-up plans.
- **S** Check applicability of state APS law.

- **Options to Address the State's Liability Risks**
  - **S** Institute procedures to obtain the consumer's informed and voluntary agreement to participate in the program.
  - **S** Consider adopting more formal criteria and procedures for the designation of an authorized representative.
  - **S** Adopt a quality management plan in connection with consultant monitoring and the state's response to problems that are reported by consultants.
  - **S** Avoid vicarious liability as the employer of workers by following the Cash and Counseling model.
  - **S** Minimize the risk of vicarious liability for the torts of consultants and fiscal agents by avoiding indicia of an employment relationship.
  - **S** Take care to avoid assumption of additional potential liability risks when drafting regulations, rules and protocols relating to CDPAS.
  - **S** Negotiate an indemnity clause in contracts with consultants and fiscal agents.
  - **S** Enact legislation limiting liability in connection with CDPAS.

I. INTRODUCTION

Government-sponsored programs offering consumer direction and consumer choice in personal assistance services[3] are not a new or unusual concept. The largest state program, the California In-Home Supportive Services Program, which "accounts for slightly over half of all the estimated participants in consumer-directed programs nationwide,"[4] has been in existence for almost 30 years.[5] As of 2002, "One hundred thirty-nine (139) programs offering consumer-directed home and community-based (HCB) support services were identified nation-wide,"[6] and these programs served an estimated 468,000 individuals.[7] However, three factors are likely to result in a dramatic increase in consumer-directed services in the next few years, an increase that warrants a closer look at the legal issues related to such services, including the subject of this report, liability issues related to consumer direction. These factors are:

- The Cash and Counseling Demonstration, jointly sponsored and funded by the United States Department of Health and Human Services (DHHS) and the Robert Wood Johnson Foundation, which represents the largest and most sophisticated research effort to date designed to evaluate the safety, efficacy, and economic feasibility of consumer-directed care. The program, which is described in greater detail in Section I.A, randomly assigned Medicaid recipients in three states, Arkansas, Florida, and New Jersey, who were eligible for home care and interested in managing their own supports and services, to two groups: an "experimental" group, which received consumer-directed personal assistance services; and a "control" group, which received traditional agency care. Although the analysis of the data collected in the Cash and Counseling Demonstration is ongoing, initial reports support the conclusion that consumer-directed personal assistance services

---

[3] In using the term "consumer direction" we refer to "a philosophy and orientation to the delivery of home and community-based long-term care that puts informed consumers and their families in the driver's seat with respect to making choices about how best to meet their disability-related supportive services needs. At a minimum, the consumer-directed services model allows persons with disabilities of all ages or others, such as family members, acting as their representatives to select and dismiss the individuals -- generally termed personal assistants, aides, or attendants -- who are paid to provide assistance with basic and instrumental activities of daily living and other disability-related supportive services." Pamela Doty and Susan Flanagan, U.S. Department of Health and Human Services, *Highlights: Inventory of Consumer-Directed Support Programs* (2002), available at: http://aspe.hhs.gov/daltcp/reports/highlght.htm.

[4] *Id.*

[5] The California IHSS program has been in effect since 1974. Bonnette v. California Health and Welfare Agency, 704 F.2d 1465, 1467 (9th Cir. 1983).

[6] Doty and Flanagan, *supra* note 3.

[7] *Id.*

significantly increase consumer satisfaction without compromising consumer health or safety.[8]

- The Independence Plus initiative of DHHS' Centers for Medicare and Medicaid Services ("CMS"), which is intended to expedite "the ability of states to offer families with a member who requires long-term supports and services, or individuals who require long-term supports and services, greater opportunities to take charge of their own health and direct their own services."[9] The key component of this initiative is the issuance of two Medicaid waiver "templates," a Section 1115 waiver template for demonstration projects and a Section 1915(c) waiver template for home and community-based services, both of which are intended to encourage the states to develop additional consumer-directed personal assistance services (CDPAS) programs.[10] In general, the waiver templates follow the model of the Cash and Counseling Demonstration in its specifications regarding the structure and components of CDPAS programs that will be approved under the waivers.

- Increased consumer demand for such services among both younger and older persons with disabilities. Younger persons with disabilities were the original proponents of consumer-directed personal assistance services as part of the "independent living" movement.[11] But older consumers have caught on too. As recently reported by the AARP, "Persons 50 and older with disabilities, particularly those age 50-64, strongly prefer independent living in their own homes to other alternatives. They also want more direct control over what long-term supportive services they receive and when they receive them."[12] In June of 2001, the Assistant Secretary for Planning and Evaluation in the U.S. Department of Health and Human Services (HHS) joined other federal and private sponsors to host "Independent Choices: A National Symposium on Consumer-Direction and Self-Determination for the Elderly and Persons with Disabilities" in Washington, D.C. One of the key themes

---

[8] See, e.g., Leslie Foster, et al., *Does Consumer Direction Affect the Quality of Medicaid Personal Assistance in Arkansas?* (2003). This report, along with the other reports that have been prepared to date for the Cash and Counseling Demonstration, are available at the Demonstration's website, http://www.hhp.umd.edu/aging/Ccdemo/products.html.

[9] *Independence Plus: A Demonstration Program for Family or Individual Directed Community Services*, at http://cms.hhs.gov/independenceplus/summery.pdf (last visited October 1, 2003).

[10] Independence Plus, §1115 Demonstration Version, A Demonstration Program for Family or Individual Directed Community Services, and Independence Plus, 1915(c) Waiver Version, A Waiver Program for Family or Individual Directed Community Services, at http://cms.hhs.gov/independenceplus/1115temp.pdf (last visited October 1, 2003) and http://cms.hhs.gov/independenceplus/1915temp.pdf (last visited October 1, 2003).

[11] Marie R. Squillace and James Firman, *The Myths and Realities of Consumer-Directed Services*, available at http://www.consumerdirection.org/reso_mandr.htm.

[12] AARP, *Beyond 50 2003: A Report to the Nation on Independent Living and Disability* 8 (2003). The AARP notes that the policy implication of this finding is to "encourage 'consumer-directed' long-term supportive services in publicly funded programs such as Medicaid." *Id.*

> articulated in that conference was that consumer-directed services are desirable and appropriate not only for younger adults with physical disabilities but also for the elderly, for individuals with cognitive impairments such as mental retardation or dementia, or for people with severe and persistent mental illness.[13]

As CMS encourages additional experiments with CDPAS, a primary concern is the quality and safety of such programs and the related issue of their effect on liability for personal injuries.[14] In Arkansas, the first of the Cash and Counseling states for which an analysis of the quality and safety of the program has been completed, research data demonstrated that CDPAS increased consumer satisfaction "without discernibly compromising consumer health, functioning or self-care."[15] A recent study of consumer-directed care in Washington state similarly concluded that "[t]here was no evidence of problems of quality of care or consumer safety attributable to self-directed care."[16]

Another concern has been possible fraud and abuse. In a 1999 survey by the National Council on Aging, "[t]he most pressing ethical and legal issues cited by the [state] administrators were abuse or exploitation of the consumer... and the potential for fraud or misuse of funds."[17] Here, again, the experience in the Cash and Counseling Demonstration has been that the implementation of CDPAS has not resulted in an increase in fraud or abuse. In New Jersey, the Cash and Counseling evaluators noted that "representatives of the personal care industry, consultants, fiscal agent staff, [and] state [program] staff" all reported having seen no "evidence of material abuse of the cash allowance."[18] Similarly, in Arkansas:

> To date... there has been *no* material abuse of the cash benefit.... Nor has substantial exploitation of consumers been detected under IndependentChoices. While traditional providers raised concerns about the

---

[13] Marie R. Squillace, *Independent Choices: National Symposium on Consumer-Directed Care and Self-Determination for the Elderly and Persons with Disabilities -- Summary Report* (February 2002), prepared for the U.S. Department of Health and Human Services, Assistant Secretary for Planning and Evaluation, Office of Disability, Aging and Long-Term Care Policy.

[14] Foster, *supra* note 8, at 1 ("some stakeholders fear that eliminating [home health care] agency involvement jeopardizes consumer health and safety").

[15] *Id.* at v.

[16] Heather M. Young and Suzanne K. Sikma, *Evaluation of the Implementation of Self-Directed Care in Washington State (Final Report)* 17 (2002).

[17] National Council on Aging, *1999 Survey of State Administrators on Information, Knowledge, Attitudes and Practices in Consumer Direction*, Executive Summary, available at http://www.consumerdirection.org/reso_1999.htm.

[18] Barbara Phillips & Barbara Schneider, *Enabling Personal Preference: The Implementation of the Cash and Counseling Demonstration in New Jersey (Final Report)* 138 (Mathematica Policy Research, Inc. 2003) [hereinafter New Jersey Implementation Report], available at http://www.hhp.umd.edu/AGING/CCDemo/Products/NJ%20Eval%20Main%20Report.pdf.

safety and well-being of a few cash recipients, state investigations in every case concluded that these concerns were unfounded.[19]

The fact that in the aggregate, there has not been an adverse effect on the quality of care or an increase in fraud and abuse is certainly reassuring in terms of liability. However, this does not mean that there will not be individual cases in which workers, consumers, authorized representatives, consultants, fiscal agents, and state agencies are negligent or make mistakes, causing injury to others and the potential for liability. The purpose of this report is therefore twofold: first, focusing primarily on the Cash and Counseling model, to identify the circumstances in which such conduct could result in liability and what persons or entities are likely to be liable; and second, to identify steps that can be taken to reduce exposure to such liability.

A. The Cash and Counseling Demonstration

The Cash and Counseling Demonstration, which is designed to evaluate scientifically the safety, efficacy and economic feasibility of consumer-directed care, also represents an effort to develop a model structure for the delivery of consumer-directed personal assistance services. The distinguishing feature of this structure is that key supportive services are provided to the consumer without compromising the consumer's ultimate decision-making authority:

> Perhaps the fundamental tenet of the Cash and Counseling model -- the tenet that distinguishes it from other models of consumer direction -- is the provision of counseling and fiscal services to help consumers manage their cash benefit. Some critics of the Cash and Counseling model argue that an unfettered cash allowance would be preferable, on the grounds that such an allowance is more consistent with the philosophy of consumer direction than a program that imposes restrictions on, and monitors, the uses of the cash benefit. States, however, must balance this argument with the concern that state Medicaid funds might be misused, which could jeopardize political support for the program.[20]

With some variation from state to state, the following elements are typical of the programs in Arkansas, Florida and New Jersey during implementation phases of

---

[19] Barbara Phillips & Barbara Schneider, *Moving to Independent Choices: The Implementation of the Cash and Counseling Demonstration in Arkansas (Final Report)* 120 (Mathematica Policy Research, Inc. 2002) (emphasis in original) [hereinafter Arkansas Implementation Report], available at http://www.hhp.umd.edu/AGING/CCDemo/Products/C%20&%20C%20Arkansas%20Implementation.pdf. See also Squillace & Firman, *supra* note 11.

[20] Arkansas Implementation Report, *supra* note 19, at 132.

approximately 18 months that began in December 1998 for Arkansas, November 1999 for New Jersey, and June 2000 for Florida:[21]

- All participants are Medicaid recipients who have been determined to be eligible for specific numbers of hours of home care services based on their level of need or claims history. The consumer's eligibility level for traditional Medicaid long term care benefits is converted into a cash benefit amount or "allowance" using a formula which is designed to ensure that the ultimate cost of CDPAS is approximately equal to the cost of agency care (for example, the formula may take into account a state's experience that in traditional agency care, the amount of service hours approved are typically not fully utilized).

- In the experimental phase of the Cash and Counseling demonstration, participants who expressed an interest in consumer-directed personal assistance services were randomly assigned to either the "control" group, which received traditional agency care, or the "experimental" group, which received CDPAS. Outside the experimental context, the goal would be to give Medicaid participants a choice of receiving traditional agency care or CDPAS.

- Consumers who elect CDPAS are assigned to consultants[22] who help the consumer with several essential components of the program. Consultants are private agencies or individuals with whom the state has contracted to provide supportive services to consumers.

- The consultant first helps the consumer convert the cash allowance into a spending plan. Most of the consumer's allowance typically is used to pay wages to CDPAS workers, but consumers have the discretion to spend part of their allowance on a variety of goods and services that enable them to function more independently, such as equipment (e.g., a micro-wave oven to heat pre-cooked meals) and home modifications (e.g., installation of grab bars in the bathroom).[23] Within the constraints of their allowance, consumers also have discretion in setting the pay rate and scheduling the hours worked by personal assistants. An essential tenet of consumer-

---

[21] Barbara Phillips, et al., *Lessons from the Cash and Counseling Demonstration in Arkansas, Florida and New Jersey (Final Report)* (Mathematica Policy Research, Inc. 2003) p. 3 [hereinafter Lessons Report]. These variations are further described in Sections II-V. For a detailed discussion of the programs in Arkansas and New Jersey, see Phillips & Schneider, Arkansas Implementation Report, *supra* note 19, and Phillips & Schneider, New Jersey Implementation Report, *supra* note 18. The Florida implementation report is pending as of this writing.

[22] The term "consultant" is used by Florida and New Jersey, whereas Arkansas uses the term "counselor." In this report we use "consultant" because it best reflects the advisory role that the consultant plays in consumer-directed care.

[23] Product liability questions theoretically could arise in the CDPAS context. However, since experience with and concern over such liability was insignificant in the Cash and Counseling states, the subject is not included in this report.

directed care is that the consumer is the expert on the consumer's needs, so the consultant's role in this aspect of the program is necessarily limited to advising the consumer regarding options for structuring the spending plan. Nevertheless, some approval process of the plan is in place in all three states, usually at the level of the state agency overseeing the program.

- The consultant is also responsible for advising the consumer about hiring, training and supervising care workers. Here, too, the consultant's role is to provide training and advice, with the consumer retaining ultimate control and decision-making authority. The consultant also helps the consumer develop an emergency back-up plan to cover situations when a regular worker is not available or fails to show up for work.

- If the consumer is unable to or does not wish to assume the responsibility of directing his or her own care, the consumer has the option of designating an authorized representative (typically a family member or close friend) to assume this role.

- In addition to receiving these supportive services from consultants, the state also contracts with one or more fiscal intermediary agencies that are available to perform employer bookkeeping functions for the consumer. In this report, these agencies are referred to as the fiscal agent because this is the term used in the Cash and Counseling Demonstration.[24] The consumer may elect to have the fiscal agent calculate all legally required payroll deductions, based on time sheets prepared and submitted by the consumer, and to forward these payments to the appropriate state and federal agencies. The fiscal agent can also prepare and issue paychecks to workers. Almost all consumers elect to use the service of the fiscal agent rather than assume bookkeeping responsibilities themselves.

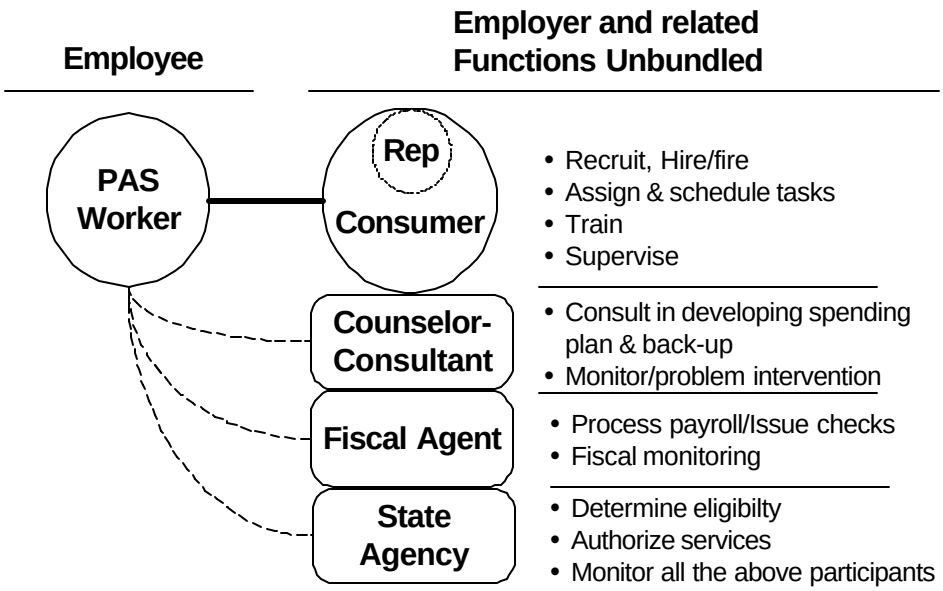
- Once the spending plan has been completed and the workers hired, consultants maintain regular contact with the consumer, and consultants and/or fiscal agents periodically review consumer records to check for errors or overspending. This ongoing monitoring is intended both as continuing support, helping to ensure that small problems do not become big problems, and as a form of quality management, that is, as a way to ensure that the consumer receives adequate care and that funds are appropriately spent.

The participants and their roles in the Cash and Counseling model are illustrated in Figure 1 below. The diagram structure shows a primary employer-employee relationship between the consumer (or the consumer's representative) and an independent worker who provides of personal assistance services. The consumer's responsibilities are listed to

[24] Although the term "fiscal employer agent" is used both by the Centers for Medicare and Medicaid Services and in Section 3504 of the Internal Revenue Code, the function is the same.

the right of the consumer figure. In addition to this primary employment relationship, there are other participants who fulfill designated employer and related functions: the counselor or consultant, the fiscal agent, and the state agency responsible for the Cash and Counseling program. They are listed in order of their level of direct involvement with the consumer. Their specific duties are summarized to the right of each figure. Because they also have some actual or potential interaction with the independent worker, albeit limited, their relationship to the independent provider is illustrated by a dotted line.

FIGURE 1.
Parties Involved in Cash & Counseling



B. The Scope of this Report

This report focuses primarily on liability issues that are likely to arise in a CDPAS program modeled on the structure of the Cash and Counseling Demonstration. One section will consider how these issues might differ under other CDPAS models, such as the California In-Home Supportive Services (IHSS) program and New York's Consumer Directed Personal Assistance Program (CDPAP).

In deciding which of a multitude of possible legal claims merited discussion, we used the following criteria. First, we do not discuss issues that are common to Medicaid programs in general (e.g., Medicaid fraud). We also do not discuss possible federal law claims that are not unique to CDPAS, such as claims under the Americans with

Disabilities Act[25] or the Supreme Court's *Olmstead* decision.[26] Finally, we have assumed that the various actors in the Cash and Counseling structure (i.e., consumers, workers, authorized representatives, fiscal agents, consultants and state agencies) for the most part will act in good faith and will not intentionally do a poor job or engage in fraud.[27] In cases of fraudulent conduct, it is obvious that some liability, perhaps including criminal liability, is likely to result.

Instead, we have focused on claims that may arise when despite good faith -- and the state's considerable efforts at monitoring and quality management -- fallible people make mistakes that result in injury to others. These claims are primarily state law tort claims, particularly claims for negligence that may arise when a worker, consumer, authorized representative, fiscal agent, consultant or state agency fails to act with ordinary care and causes injury. We also touch on several situations in which intentional tort or contract law claims might be asserted and in which potential liability under state adult protective services statutes may arise.

It is important to note that the liability issues we discuss are governed virtually exclusively by state law, and, thus, the law applicable to the claim may vary considerably from state to state. It can be difficult to do more than generalize about the likelihood of liability in a particular situation because much may depend on the law in a particular state. Our ability to assess the likelihood of liability is also hindered by the dearth of reported decisions[28] dealing with consumer-directed care.[29] With respect to many liability issues, we have been able to obtain guidance from decisions involving home care agencies or privately-employed personal assistants, even though there are virtually no directly applicable decisions involving government funded CDPAS programs. With respect to other issues, and especially where we have not been able to identify an analogous situation, our analysis is necessarily more speculative.

The following four sections of this report discuss the liability risks associated with each aspect of consumer-directed care programs modeled on the Cash and Counseling

---

[25] 42 U.S.C. §12101 *et seq.* (2000).

[26] Olmstead v. L.C., 527 U.S. 581 (1999).

[27] This assumption is supported by the experience in the Cash and Counseling Demonstration. See discussion at notes 13-19, *supra*.

[28] By "reported" cases we mean those cases in which a judge, usually of an appellate court, has written an opinion with factual findings and legal holdings, and the opinion has been published in an official or unofficial law reporter system or has otherwise been made generally available (most often, by inclusion in one of the two main commercial legal data bases, WestLaw and LEXIS).

[29] There are only a few reported decisions to date involving consumer-directed care, even though such programs are not new. Likely reasons for the absence of lawsuits include: many potential defendants are likely to be judgment proof; and the close, and often familial, relationships between consumers, providers, and authorized representatives may deter potential lawsuits between these parties.

Demonstration: Section II, Potential Liability Arising from the Relationship Between Consumers and Workers; Section III, Liability Risk of Fiscal Agents; Section IV, Liability Risk of Consultants; and Section V, Liability Risk for States and Other Governmental Entities. Section VI discusses how these issues are affected by other models of CDPAS, such as the California In-Home Supportive Services program and New York's Consumer-Directed Personal Assistance Program. The conclusions we reach in each of these sections are detailed in the final section, Section VII, which also sets forth a variety of steps that can be taken to reduce potential liability. As explained in Section VII, the overall effect on liability of CDPAS is mixed.

C. Methodology

The methodology for this analysis involved review of all available program materials and operational procedures, relevant law and regulations, available literature and reports on the state programs, and telephone interviews with several key contacts from the three Cash and Counseling programs.

D. Possible Legal Bases for Claims of Liability in Connection with CDPAS

Before discussing the specific liability issues that arise in the context of consumer directed personal assistance services, it is helpful to summarize the legal framework within which these issues may arise. The possible legal bases for claims of liability fall into three categories: (1) tort claims, which are claims that the defendant engaged in "conduct that amounts to a legal wrong and that causes harm for which courts will impose civil liability;"[30] (2) contract claims, which are claims that the defendant breached an agreement between the parties; and (3) claims for violation of a right created by statute, such as failure to make a report of abuse as required by a state adult protective services law. The rights and liabilities governed by tort law and by contract law are private. They can be enforced only through the civil justice system and will result in liability only if the potential plaintiff decides to initiate and pursue legal remedies. In contrast, rights and liabilities created by statute may be subject to enforcement by the state or federal government, by private enforcement, or by both, and enforcement by the government may be through a civil action, a criminal action, or both.

Most of the potential claims discussed in this article are tort claims. Torts range from intentional interference with one's person (such as assault, battery, and false imprisonment) to the more familiar types of torts involving negligence and malpractice, and

[30] Dan B. Dobbs, *The Law of Torts* 1 (2000) [hereinafter Torts].

injuries to intangible interests, such as those involving good reputation, privacy, or emotional distress. However, the claims that are most likely to be asserted in the context of CDPAS are negligence claims. The essential elements of a negligence claim are:

1. The defendant owed the plaintiff a duty of care (for instance, not to engage in unreasonably risky conduct);
2. the defendant breached that duty by his/her conduct;
3. the defendant's conduct is a "proximate cause" of the plaintiff's harm, meaning that the defendant's conduct not only caused the harm in fact, but it is perceived to have a significant causal relationship to the harm suffered by the defendant; and
4. the plaintiff must have sustained actual injury or harm as a result of the defendant's conduct.[31]

Home care services can give rise to two kinds of negligence claims: claims for ordinary negligence, in which the legal standard is whether the defendant used "ordinary care," defined as "the care of a reasonable and prudent person;"[32] and medical malpractice, in which the legal standard is "whether the defendant's conduct conformed to the medical standard or medical custom in the relevant community."[33] As we discuss in Section II.A, cases involving home health care agencies and privately employed individuals make it clear that the first standard applies to both professionals and non-professionals, such as CDPAS workers, who assist with homemaking chores and activities of daily living, and that the second standard applies only to medical professionals providing medical services.

Assuming the plaintiff can establish a *prima facie* case (i.e., initially establish each of the elements of negligence), the defendant may be able to defeat the claim by asserting one of a number of defenses. The defenses that are most likely to be asserted in the context of consumer-directed care are:

- Contributory or comparative negligence, including assumption of risk. Under the traditional common law rule, any contributory negligence by the plaintiff constituted a complete bar to a claim of negligence.[34] However, most states now apply comparative fault, "reducing the plaintiff's recovery in proportion to the plaintiff's fault."[35] Similarly, the defense of assumption of risk, which also barred recovery under traditional common law, has in most states now been either abolished or

---

[31] *Id.* at 269.

[32] *Id.* 265.

[33] *Id.* at 633.

[34] *Id.* at 494. Contributory negligence is defined as "negligence of a plaintiff in failing to exercise care for herself that is one of the causes of her harm." *Id.* at 495.

[35] *Id.* at 503.

merged with the concept of contributory negligence.[36] "Assumption of risk" is not easily defined (traditionally, "assumed risk always seemed to be a way of talking about some other established legal doctrine"[37]), but in the context of comparative negligence, it refers to risk-assuming conduct on the part of the plaintiff that falls short of consent to accept all risks generated by the defendant (in which case the defendant would not have a duty of care to the plaintiff, a situation which is now sometimes referred to as "primary assumption of risk").[38]

- **Workers' compensation**.[39] In all states, the traditional rules regarding employer liability for on the job injuries have, for the most part, been replaced by workers' compensation, a no fault system of insurance.[40] This means that the worker receives compensation for work-related injuries, regardless of the employer's fault or the worker's own contributory negligence or assumption of risk.[41] However, under workers' compensation, the employer's liability is limited and the worker may be paid less compensation than the worker might have received as damages in a tort action (for example, "in the case of an employee's total disablement, two-thirds of her average wage for a limited period of years plus medical expenses, but notably not for pain and suffering").[42] It is important to note that the exclusive remedy provision of workers' compensation usually does not apply where injury is caused by a third party.[43] Thus, if a worker has a car accident while doing an errand for the consumer, and the other driver is at fault, workers' compensation would not bar the worker's claim against the driver. Similarly, where a consumer is living in his or her daughter's home, and the worker is injured in a "slip and fall" incident, due to negligent maintenance of the home, the worker may be able to bring a claim against the daughter, even though the worker is covered by workers' compensation.

- **Spousal and parental immunity**. Spouses, parents or children of consumers often act as authorized representatives, and in some states, spouses, parents or children may be permitted to act as workers. As we discuss in the introduction to Section II, most of the common law rules regarding parental and spousal immunity have in large

---

[36] *Id.* at 538-9.

[37] *Id.*

[38] *Id.* and Herrle v. Estate of Helen I. Marshall, 53 Cal.Rptr.2d 713, 715-6 (Cal. App. 1996).

[39] For a comprehensive discussion of the worker's compensation system and its applicability to consumer-directed personal assistance services, see Susan Flanagan, *Accessing Workers' Compensation Insurance for Consumer-employed Personal Assistance Workers: Issues, Challenges and Promising Practices* (forthcoming).

[40] Torts, *supra* note 30, at 1098. Some states permit employers to opt out of workers' compensation, *id.*, and some categories of employees, such as domestic employees, may be excluded from mandatory coverage, 82 *Am. Jur. 2D* Workers' Compensation §112 (2003).

[41] Torts, *supra* note 30, at 1098.

[42] *Id.*

[43] *Id.*

part been overruled. Yet, in some states and in some circumstances, these common law rules may still bar recovery in a dispute between consumers and workers, consumers and authorized representatives, or workers and authorized representatives.

- **Governmental immunity**. In the introduction to Section V (Liability Risk for States and Other Government Entities), we describe the rules regarding governmental immunity that might under some circumstances bar a claim against a state agency, other governmental entity, or government official.

- **Consent**. In Section V.A (Failure to Obtain the Consumer's Clear Agreement to Participate in CDPAS), we discuss the importance of the consumer's choice in the decision of whether or not to participate in consumer-directed personal assistance services.

The concepts above are most easily applied in circumstances in which one person's negligence is alleged to have caused another person's injury. However, tort cases often involve more complicated actions and relationships, such as actions by an organization or corporate entity, and relationships in which an employee may be acting on behalf of an employer when an injury occurs. Because of this, different conceptual bases of negligence have evolved over time to define the duties and liabilities arising from different relationships:

- **Personal liability**. This is the simplest form of liability, holding one person responsible for his or her negligent or intentional acts that result in harm to another.[44]

- **Direct corporate liability**. Under this theory, an institution may be held directly liable for acts, or failures to act in matters that are directly within its control. For example, a hospital may not be directly responsible for a doctor's performance in the operating room, but it may be directly responsible for its failure to exercise reasonable care in selecting its staff members and granting clinical privileges. Similarly, an agency doing background checks of individuals seeking to be personal assistance services workers in a consumer-directed program may not be directly responsible for injury caused by that worker, but it may be directly responsible for its failure to exercise reasonable care in performing the background check, which if done correctly would have revealed the worker to be dangerously irresponsible.[45]

- **Vicarious liability**. This theory of liability holds a principal strictly responsible for the acts or omissions of his or her agent, based upon the common law doctrine of

---

[44] See *id.* at §§333-336.

[45] *Id*.

respondeat superior, this doctrine literally meaning "let the master answer." It requires the existence of an employment relationship (or in legal parlance, a "master-servant" or "agency" relationship). If an injury is caused by the negligent or intentional wrongdoing of an employee who is acting within the scope of his or her employment, then the employer is liable for such conduct under this doctrine.[46]

The application of vicarious liability to CDPAS has been a persistent worry of states undertaking such programs, because it poses the dilemma of control.[47] The greater the control exercised by the state or any other entity over the conduct of personal attendants, the more likely it will be deemed the *de facto* employer of the worker and thus strictly liable for the negligent conduct of that worker. The less control exercised by the state or other entity, the greater are its perceived worries over accountability and quality of care.

Legally, the label of "employer" represents a conclusion that some entity exercises such power and control over the conduct of some person that it should bear the burden of responsibility for certain obligations established by law (e.g., social security, unemployment compensation, workers' compensation) or for injuries negligently caused by that person, whom we will label the "employee."[48] Whether the label can or must be applied varies under different statutes and different contexts. Thus, one must constantly ask: "Employer for what purpose?" Indeed, a key characteristic of the Cash and Counseling Demonstration and other CDPAS programs is that they, in effect, unbundle the notion of employer into specific responsibilities that are relevant to personal assistance services and then apportion and assign these responsibilities among the parties involved in the particular CDPAS program. Thus, for example, for purposes of employee withholding and benefits, one entity may be the employer of record, but for purposes of accountability for injury caused by the negligence of a worker, the same entity may not be deemed the employer. The "employer" for purposes of the latter circumstance may also be called the "common law" employer.

As a starting point, all the CDPAS programs view the consumer as having direct and primary control over the work of the personal assistant, and thus, the consumer deserves the label of THE employer, or common law employer, primary employer, or managing employer.[49] But unlike simple employment situations involving two parties -- employer and

---

[46] *Id*.

[47] Marshall B. Kapp, "Enhancing Autonomy and Choice In Selecting and Directing Long-Term Care Services," 4 *Elder Law Journal* 55, 95-96 (Spring 1996).

[48] Charles P. Sabatino and Simi Litvak, "Liability Issues Affecting Consumer-Directed Personal Assistance Services -- Report and Recommendations," 4 *Elder Law Journal*, 247, 258-261 (Fall 1996). See also Susan A. Flanagan & Pamela S. Green, *Consumer-Directed Personal Assistance Services: Key Operational Issues for State CD-PAS Programs Using Intermediary Service Organizations*, (prepared for the U.S. Department of Health & Human Services, Office of the Assistant Secretary for Planning and Evaluation, Washington, DC, October 24, 1997).

[49] *Id.*

employee -- publicly funded CDPAS programs typically involve three or four parties or more: the consumer, the individual worker, the payer or regulator of the program, an intermediary fiscal agent that handles payroll, and other entities such as consultants (in Cash and Counseling) or public authorities (in California) or consumer-directed provider agencies (in New York). Conventional tort law is not well adapted to such service configurations, so the apportioning of responsibility among the participants has presented a challenge to these novel programs to be as clear and cogent as possible about who is responsible for what.

II. POTENTIAL LIABILITY ARISING FROM THE RELATIONSHIP BETWEEN CONSUMERS AND WORKERS

Both the case law involving home health care agencies and common sense suggest that the relationship between consumers and CDPAS workers can give rise to a variety of legal claims. The most likely are personal injury claims based on the alleged negligence of either party. Workers may injure consumers both through negligence in the way they provide personal assistance services (for example, bathing the consumer in scalding water) and by negligently creating hazards in the consumer's home (for example, creating a fire hazard by leaving magazines piled near a heater).[50] These are discussed in Section II.A.1 and Section II.A.2 below. Similarly, consumers may be negligent in creating or failing to correct dangerous conditions in their homes that cause injury to the worker. The most common such cases are "slip and fall" cases -- cases where a condition at the defendant's home causes the plaintiff to slip and fall and suffer injury. Section II.B.1 examines these scenarios.

Third parties may also assert personal injury claims against consumers and workers (Section II.C). A third party who is injured by the worker while the worker is engaged in personal assistance services -- for example, a third party whose car is hit by the worker's car while the worker is on the way to the grocery store for the consumer -- may assert a claim both against the worker for direct liability and against the consumer for vicarious liability as an employer. In the same example, if the third party is at fault, and the worker is injured in the car accident, the worker may seek compensation from the third party, and where the worker has workers' compensation, it too would cover the injury. Finally, a third party who is injured by a physically or mentally disabled consumer may allege that the worker had a duty to supervise the consumer and that the worker's negligence in performing this duty caused the injury. Third-party permutations are discussed in Section II.C below.

Although personal injury claims based on alleged negligence are the most likely, the relationship between consumer and worker can also give rise to several other kinds of claims. Section II.A.3.b touches upon the possibility that extreme neglect or clearly substandard care by workers could result in civil or criminal liability for abuse under state adult protective services ("APS") statutes. Independent workers may also be "mandatory reporters" under the APS law, thus exposing them to civil or criminal penalties if they fail to report suspected abuse they observe during the course of their work (Section II.A.3.a). Friction in the employment relationship itself may result in claims by workers against

[50] For simplicity, throughout this report, actions that were brought by a consumer's representative, or by a family member on his or her behalf, are usually described as though the consumer were the plaintiff.

consumers -- described in Section II.B.3 for wrongful discharge and a variety of other employment related claims.

Finally, in Section II.D, we discuss the potential liability of authorized representatives for negligence in performing their duties, including the likelihood that a court would find that the authorized representative owed a fiduciary duty to the consumer.

The use of family members as workers raises another issue in claims between consumers, workers and authorized representatives -- that of tort immunity rules that may apply in legal actions between family members. Spouses, parents and children frequently serve as representatives, and the Section 1115 demonstration program waiver for the Cash and Counseling program allows legally responsible relatives to serve as workers, which is normally prohibited under Medicaid rules.[51] New Jersey elected to permit spouses to act as workers,[52] and Florida permits all legally responsible relatives to act as workers.[53] The common law rules regarding parental and spousal immunity have in large part been overruled by case law or by statute, but in some states and in some limited circumstances, these rules might bar recovery in a dispute related to consumer-directed personal assistance services.[54]

As in many endeavors, personal assistance services involve the possibility of inadequate performance, injury, or even abuse -- not only to the consumer, but also to workers or third parties. In this section we discuss in detail the nature and level of risk of liability to both consumers and workers under the consumer-directed model.

A. Worker Liability Risk

1. Negligent Caregiving

Although there are no reported decisions in negligence suits between consumers and workers arising from consumer-directed personal assistance services, the substantial number of reported cases involving alleged negligence by employees of home health care

---

[51] Arkansas Implementation Report, *supra* note 19, at xii; 42 C.F.R. §440.167. Consumer-directed care programs are typically implemented under one of two Medicaid waiver provisions, Section 1115 waivers for demonstration programs and Section 1915(c) waivers for family or individual directed community services. The Cash and Counseling programs in Arkansas, Florida and New Jersey were implemented under Section 1115 waivers, which can permit "legally responsible" relatives to serve as providers, whereas Section 1915(c) waivers are very restrictive in permitting legally responsible relatives to serve as providers.

[52] New Jersey Implementation Report, *supra* note 18, at xiii.

[53] E-mail from Lou Comer, Consumer Directed Care Project Director, Florida Department of Elder Affairs, to Sandra L. Hughes, Consultant, ABA Commission on Law and Aging (October 29, 2003) (on file with authors).

[54] See Torts, *supra* note 30, at 751-7.

agencies provides useful information regarding both the kinds of injuries that are likely to occur in the context of CDPAS and the legal theories of liability that are available to consumers who seek compensation.[55]

Malpractice versus Ordinary Negligence

A threshold question in these cases is whether claims against personal assistance workers must be based on a breach of professional standards (which requires testimony by expert witnesses) or merely ordinary negligence (which can be determined by a jury without such testimony). The case law consistently supports the latter view:

- **Case 1: Ordinary negligence**. In *Headley v. Maxim Healthcare Services, Inc.*, the plaintiff claimed that she was injured when the legs of a Hoyer lift gave way while a nursing assistant was transporting her to the shower, and that the nursing assistant's improper and negligent placement of the legs of the lift caused the accident.[56] The defendant home health care agency moved for summary judgment, arguing that the plaintiff's claim was one for medical malpractice, rather than ordinary negligence, and that it was therefore barred by the one year statute of limitations applicable to such claims.[57] The trial court denied the motion because the nursing assistant was not in one of the designated professions for a medical claim and because the fall occurred while the plaintiff was being transported to the shower, not while she was receiving medical care.[58]

- **Case 2: Ordinary negligence**. *Williams v. Metro Home Health Care Agency* also illustrates the judicial acceptance of ordinary negligence as the proper analysis, even though the care provider in that case was a nurse.[59] In *Williams*, the plaintiff alleged that, although an agency nurse was scheduled to see him three days a week to educate and assist him in caring for his decubitis ulcers, the nurse actually visited him only once a week. The plaintiff claimed that as a result of the nurse's negligent care, he developed an ulcer that required surgical treatment.[60] The defendants moved for summary judgment based on the plaintiff's failure to name an expert witness to

---

[55] Most of these decisions address questions of law and do not indicate the final disposition of the case and whether the defendant was ultimately found liable. However, because jury verdicts in tort cases are typically determined by the specific facts in the case and are often idiosyncratic, this does not detract from their value as illustrations of potential claims. Because of the relatively large number of tort cases involving consumers and providers, this report discusses only the most significant of these cases in detail. Other cases are mentioned briefly in this report, but are described in greater deal in Appendix A, a chart of tort actions arising out of the consumer-provider relationship.

[56] 716 N.E.2d 1241 (Ohio Ct. of Common Pleas 1999).

[57] *Id.*

[58] *Id.* at 1243.

[59] 817 So.2d 1224, 1226 (La. Ct. App. 2002).

[60] *Id.*

establish the standard of care, and the trial court denied the motion.[61] On appeal, the appellate court upheld the trial court because expert testimony was not necessary to establish negligence: "Expert testimony is not mandated where the physician or caretaker does an obviously careless act from which a lay person can infer negligence."[62]

Thus, the nature of the claim is determined, not by whether the actor is a health professional, but by the nature of the task in issue.[63]

Leaving the Consumer Unattended

The most common negligent care-giving scenarios involve some variation on leaving the consumer unattended. This may involve anything from failing to show up at the scheduled time or leaving early, to momentary lapses of monitoring that resulted in injury to the consumer. The liability risk in failing to show up for work is illustrated by the following cases:

- **Weekend no-show for fractured hip**. In *Rosenthal v. Bologna*,[64] the client had contracted with the defendant home health care agency to provide services seven days a week while he recovered from a fractured hip, but his home care attendant did not appear at work the first weekend because he mistakenly believed his services were required only five days a week. Over the weekend the client attempted to move on his own from his wheelchair to his walker and refractured his hip.[65] The agency argued that the plaintiff's negligence claim was barred by a waiver provision in the contract between the agency and the client, but the appellate court refused to enforce the waiver, holding that the purported waiver violated public policy: "This aspect of the contract warrants judicial rejection here because of the state's interest in the health and welfare of its citizens and also because of the highly dependent (and thus unequal) relationship between patient and health care provider."[66]

- **Emergency arising while unattended**. In *Walker v. EHCCI*, a multiple sclerosis patient did not receive timely emergency care because she had been left unattended

---

[61] *Id.*

[62] *Id.* at 1229.

[63] See also Rogers v. Crossroads Nursing Service, Inc., 13 S.W.3d 417, 418 (Tex. Ct. App. 1999), discussed in Section II.A.2, *infra*, holding that "the question of how to place a heavy supply bag in a patient's home so as not to injure the patient is not governed by an accepted industry standard of safety within the health care industry, but rather is governed by the standard of ordinary care."

[64] 620 N.Y.S.2d 376 (N.Y. App. Div. 1995).

[65] *Id.* at 377.

[66] *Id.* at 378.

by her home care worker.[67] The defendants argued "that their only obligations to plaintiff were 'cooking, cleaning and other household tasks.'"[68] However, in affirming the trial court's denial of the defendants' motion for summary judgment, the appellate court noted that the home care worker had been instructed regarding the patient's medical condition and the circumstances under which she might need emergency care.[69] Based on this evidence, the court found that "[c]learly, defendants owed a duty of care to plaintiff beyond contractual obligations to cook and clean."[70]

These two cases point to the same conclusion: the "state's interest in the health and welfare of its citizens"[71] argues in favor of a duty of care which encompasses not just the duty of ordinary care in the performance of specified personal assistance services, but also the duty to exercise ordinary care to protect the consumer in any situation that threatens the consumer's health or safety. *Rosenthal* reflects a perspective on the duty of personal attendants that is very significant in assessing risk -- namely, that courts are likely to see the duty of attendants as much broader than merely performing a list of specified personal assistance services. Rather, it may also include a duty to exercise ordinary care to provide protective oversight in many situations that threaten the consumer's health or safety. Leaving the consumer alone risks violating that duty. The *Walker* case similarly suggests that an attendant's duty includes ordinary care in responding to medical emergencies -- that is, responding in a common sense fashion based on the worker's knowledge of the consumer's medical condition -- and, perhaps, ordinary care in dealing with a variety of unanticipated situations which are incidental to the provision of personal assistance services.

Two cases illustrate the dangers of leaving a consumer unattended by virtue of leaving work early. In both cases, home health care agencies were sued for injuries sustained when a fire broke out during a worker's scheduled work hours, but the worker was not present to protect or rescue the client because the worker had left work early.

- **Early departure fire 1**. In *Willis v. City of New York*, the agency moved for summary judgment, arguing that it did not owe a duty to rescue, that the plaintiff's injuries were not foreseeable, and that the aide's early departure was not a proximate cause of the injury.[72] The trial court's denial of the agency's motion was sustained by the appellate

---

[67] 621 N.Y.S.2d 301 (N.Y. App. Div. 1995).

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] Rosenthal, 620 N.Y.S.2d at 378.

[72] 697 N.Y.S.2d 656 (N.Y. App. Div. 1999). There was a factual dispute in this case as to whether the aide has been given permission to leave work early. *Id.* at 657.

court, which held that "[w]here a defendant is responsible for caring for an individual, the defendant's abandonment of that individual can result in liability."[73]

- **Early departure fire 2**. In *Villarin v. Onabango*, both the client, who was severely disabled and bedridden, and his daughter, who was trying to rescue him, died in a house fire. Surviving family members filed suit to recover for personal injuries (apparently sustained by the surviving family members themselves) and for wrongful death, claiming that the agency's employee had breached his duty when he left the house an hour before the end of his scheduled shift.[74] The trial court granted the agency's motion to dismiss, but the appellate court reversed, citing *Willis*.[75]

Finally, *Esposito v. Personal Touch Home Care* demonstrates the risk of momentary lapses by an attendant in which a consumer is left unattended.[76]

- **Unattended in the bathroom**. In *Esposito*, the plaintiff sustained injuries when he fell in the entrance to his bathroom while under the care of his home health aide.[77] The plaintiff, a multiple sclerosis patient who used a walker and a wheelchair, argued that the aide was negligent in leaving him in the bathroom unattended.[78] As in *Willis*, the appellate court ruled that "[w]here a defendant is responsible for caring for an individual, the defendant's abandonment of that individual can result in liability," and reversed the trial court's decision granting summary judgment to the defendant.[79]

While this decision and others sometimes use the term "abandonment" to describe the defendant's conduct, the phrase is used in its common meaning suggesting negligence and is not equivalent to the tort of abandonment, which has been recognized by some courts as a separate cause of action.[80]

---

[73] *Id.* at 658.

[74] 714 N.Y.S.2d 90 (N.Y. App. Div. 2000).

[75] *Id.*

[76] 733 N.Y.S.2d 468 (N.Y. App. Div. 2001).

[77] *Id.*

[78] *Id.*

[79] *Id*. See also Eaton v. Comprehensive Care America, Inc., 649 N.Y.S.2d 293 (N.Y App. Div. 1996), in which a stroke patient who was severely burned when her home health care aide left her "alone in a room for a few minutes with an absorbent pad tied around her neck and a cigarette and cigarette lighter at her disposal," filed a negligence action against the agency which employed the aide. This case is discussed in greater detail in Section A.1 of Appendix A.

[80] See generally Annotation, C. T. Drechsler, *Liability of Physician Who Abandons Case,* 57 A.L.R.2d 432 (1958).

Negligent Administration of Care

All the above examples involve failure to be there, that is, sins of omission. At the opposite end of the spectrum are cases that involve errors in administration of care. For example, several cases have been brought against home health care agencies by clients who were severely injured when their personal care workers bathed or showered them in scalding water, a type of injury that certainly could occur in the context of consumer-directed personal assistance services. In these cases, and in many other cases involving alleged negligence in the provision of home care services, both the existence of a duty to the plaintiff and causation were not seriously contested. Instead, pretrial motions and post-trial appeals typically focused on issues of whether the defendant was negligent or even reckless in caring for the plaintiff:

- **Shower scalding**. In *Lee v. Health Force, Inc.*, a mentally retarded and physically handicapped child who was severely burned while being given a shower by a personal care aide filed a negligence action against the aide and the agency which employed her.[81] After filing suit, the plaintiff moved to amend the complaint to add a claim for punitive damages based, *inter alia*, on the aide's allegedly reckless care.[82] The trial court's decision granting this motion was reversed by the appellate court, which noted that the aide had given prompt and appropriate first aid when the shower water unexpectedly became very hot.[83]

Home care agencies have also been sued for alleged negligence in helping a patient perform other tasks:

- **Elevator slip**. For example, in *Calick v. Double A Property Associates*, the client was injured when she slipped on a puddle in an elevator while being assisted by her home care attendant.[84] The attendant argued that she was not negligent because she looked into the elevator, as was her practice, and saw no puddle.[85] The trial court agreed and granted the defendant's motion to set aside the jury's verdict for the

---

[81] 702 N.Y.S.2d 108 (N.Y. App. Div. 2000).

[82] *Id.* at 109.

[83] *Id*. See also Keel v. West Louisiana Health Services, 803 So.2d 382, 385 (La. Ct. App. 2001), in which the appellate court sustained a judgment for the plaintiff, based on the finding of a medical review panel that the certified nurse assistant employed by the defendant home health care agency "breached the [professional] standard of care by failing to safely assist [the patient] in his shower" when the CNA "inadvertently bumped the water faucet handle," conduct which could also be found by a jury to be a breach of ordinary care by a non-professional care provider; and Gaylord v. Homemakers of Montgomery, Inc., 675 So.2d 363 (Ala. 1996), in which the plaintiff claimed that she had sustained severe burns on her legs and required hospitalization after being given a bath by an employee of the defendant home health care agency. Both these cases are discussed in greater detail in Section A.1 of Appendix A.

[84] 674 N.Y.S.2d 694 (N.Y. App. Div. 1998).

[85] *Id.*

plaintiff, but the appellate court reversed, holding that "the reasonableness of the attendant's actions and her failure to see what was on the floor of the elevator was a factual question for the jury" to determine.[86]

Virtually any task can be negligently performed, but the reported case law provides only occasional examples that reach appellate review. Again, the import of these cases is that they are judged by standards of ordinary negligence and not by a professional standard of care. This fact may be viewed as both a plus and a minus for personal care attendants -- a plus because attendants are held to a duty of only ordinary care, and not to a higher duty by virtue of their chosen work. Simultaneously, this is a minus, because allegations of negligence can be sustained by a jury of ordinary citizens. Expert testimony is not required.

2. Negligence in Non-Caregiving Matters

Workers can also cause injuries to consumers in ways that are not directly related to the provision of personal assistance services. The worker will necessarily be in the consumer's home on a regular basis and may unwittingly -- and negligently -- create a hazardous condition that results in injury to the consumer. Two lawsuits against home care agencies illustrate the possibilities for such claims:

- **Falling supply bag**. In *Rogers v. Crossroads Nursing Service, Inc.*, the plaintiff was receiving home health care services from the defendant agency while he recovered from back surgery.[87] He sued the agency alleging that "a Crossroads employee negligently placed a heavy supply bag on a table close to him that fell and re-injured his back."[88] The agency argued that the case fell under the state's Medical Liability and Insurance Improvement Act and that the case should be dismissed because the plaintiff had failed to provide the expert report required under that Act, a defense similar to that in the *Headley* case.[89] But also as in *Headley*, the defense was ultimately unsuccessful -- although the trial court dismissed the action, the appellate court reversed, reasoning that "the question of how to place a heavy supply bag in a patient's home so as not to injure the patient is not governed by an accepted industry

---

[86] *Id.* However, the appellate court upheld the decision setting aside the verdict against the building management company, which was also a defendant. The appellate court noted that the son of the building's porter had returned with a mop less than a minute after he saw the puddle, and, thus, there was insufficient evidence that the management company failed to remedy a dangerous condition. *Id.* at 695-696. See also Headley v. Maxim Healthcare Services, Inc., 716 N.E.2d 1241 (Ohio Ct. of Common Pleas 1999), discussed at page 26, *supra*.

[87] 13 S.W.3d 417 (Tex. Ct. App. 1999).

[88] *Id.*

[89] *Id.*

standard of safety within the health care industry, but rather is governed by the standard of ordinary care."[90]

- **Burning magazines**. The critical issue in *Daniels v. Senior Care, Inc*., was whether the negligence of a home care worker who acted as a live-in companion caused a house fire that killed both the worker and the elderly woman for whom she provided care.[91] The children of the deceased woman filed a wrongful death action against the agency that had employed the worker, arguing that she was responsible for the fire either because she "allowed the decedent to accumulate papers and magazines on the heater, when she was under a duty to prevent the decedent from doing so, or, alternatively, [because she] placed these combustibles on the heater herself."[92] The trial court rejected these arguments and granted the defendant's motion for summary judgment, but the appellate court disagreed.[93] Citing testimony from the fire marshal regarding the likely cause of the fire, the appellate court held that "Plaintiffs submitted a probative factual scenario showing that Defendant's breach of its duties to decedent was a proximate cause of her death."[94]

These cases illustrate a critical point: an injury is unlikely to result in a lawsuit unless there is a potential defendant who has a "deep pocket." In both these cases and in all the cases discussed in the preceding section, the plaintiff asserted a claim against the home health care agency which employed the negligent employee, and in most of the cases, the plaintiff did not name the individual employees involved in the plaintiff's care as additional defendants. The reason for this is obvious: the agency is likely to have significant assets and/or liability insurance, whereas home care agency employees who provide personal care services, rather than skilled medical care, are low-wage workers who are likely to have few assets. In the consumer-directed personal assistance services model, no such agency "deep pocket" is readily available to compensate a consumer for injuries caused by a personal assistant, making recovery of compensation for such injuries problematic unless the personal assistant has significant assets or liability insurance that covers torts committed in the course of the personal assistant's work. On the other hand, workers who do have significant assets, but who are not protected by insurance, risk serious financial consequences if they are sued for allegedly negligent care. However, most CDPAS workers do not have significant assets, and the familial relationship between many, if not most, consumers and workers further reduces the likelihood that a legal action will be brought against a worker who negligently, but unintentionally, causes an injury to the consumer.

---

[90] *Id.* at 418.

[91] 21 S.W.3d 133 (Mo. Ct. App. 2000).

[92] *Id.* at 138.

[93] *Id.* at 139.

[94] *Id.*

3. Abuse or Neglect

Under limited circumstances, personal assistance workers also face the risk of liability under state adult protective services (APS) laws. These laws, which are in effect in all fifty states and the District of Columbia, provide the framework for government intervention in cases of suspected abuse, neglect or financial exploitation of vulnerable adults. There are two ways CDPAS workers may become liable under such laws: (1) if they are mandatory reporters and they fail to report suspected abuse or neglect; and (2) if they provide substandard care which constitutes abuse or neglect. Note that these risks are no different for CDPAS workers than they are for employees of home care agencies. However, as a practical matter, a worker employed directly by the consumer or the consumer's representative, especially if the worker is a family member, may have greater social or emotional barriers to reporting, such as fear of retaliation, compared to agency-employed workers, who have less personal entanglement with the family.

a. Failure to Report Abuse or Neglect

Under many APS laws, personal assistance workers are "mandatory reporters" -- that is, they are legally required to report suspected abuse and can face significant criminal and civil penalties if they fail to do so. The coverage of APS statutes -- that is, the legal definition of the persons protected by the statutes -- varies greatly from state to state. Although the APS statutes in several states protect only the elderly,[95] the APS laws in most states apply to both older and younger adults who are vulnerable due to physical and/or mental impairment.[96] Typical of such states is Florida, which defines "vulnerable adult" as "a person 18 years of age or older whose ability to perform the normal activities of daily living or to provide for his or her own care or protection is impaired due to a mental, emotional, physical, or developmental disability or dysfunctioning, or brain damage, or the infirmities of aging."[97]

Because they are in the consumer's home on a regular basis, CDPAS workers are in an excellent position to observe abuse. Most consumers of personal assistance services are elderly and/or have physical and/or mental impairments that place them within the protection of their state's APS statute, so the critical issue in determining whether a worker

---

[95] For example, Oregon protects only persons age 65 or older, and Connecticut, Massachusetts, Nevada and Rhode Island protect only persons age 60 or older. *OR Rev. Stat.* §§124.050(5) and 124.060 (2001); *CT Gen. Stat. Ann.* §§17b-450 and 17b-451 (West 1998 & Supp. 2003); *MA Gen. Laws Ann*. Ch. 19A, §§14 and 15(a) (West 2002); *NV Rev. Stat. Ann*. §§200.5092(5) and 200.5093(4) (Michie 2001 & Supp. 2001); and *RI Gen. Laws* §42-66-8 (1998).

[96] According to the National Center on Elder Abuse, "in most jurisdictions, these [APS] laws pertain to abused adults who have a disability/vulnerability/impairment as defined by state law, not just to older persons." National Center for Elder Abuse, *Elder Abuse Laws*, at: www.elderabusecenter.org/default.cfm?p=backgrounder.cfm (last visited October 1, 2003).

[97] *FL Stat. Ann*. §415.102(26) (West Supp. 2003).

is required to report abuse is the scope of the mandatory reporting provision. Only six states do not mandate reporting of suspected abuse.[98] The other forty-four states and the District of Columbia include mandatory reporting provisions in their statutes. Seventeen of these states require "any person" to report suspected abuse, and in these states CDPAS workers would, of course, be mandatory reporters.[99]

The other 27 states and the District of Columbia list categories of individuals, such as social workers and health care providers, who are mandated to report. Many of these states include categories that would cover CDPAS workers. For example, Alabama, Alaska, Nebraska and South Carolina identify "caregivers," both paid and unpaid, as mandatory reporters.[100] Three other states require reporting by persons who have assumed responsibility for the care of a vulnerable adult.[101] Several other states mandate reporting by paid care providers only. For example, Pennsylvania requires reporting by "any person who is employed or who enters into a contractual relationship to provide care to a care-dependent individual for monetary consideration in the individual's place of residence."[102] Because mandatory reporting provisions are amended occasionally to add

---

[98] The six states whose APS statutes do not provide for mandatory reporting are Colorado, New Jersey, New York, North Dakota, South Dakota and Wisconsin.

[99] These states are Delaware, *DE Code Ann*. tit. 31, §3910(a) (Michie 1997); Florida, *FL Stat. Ann*. §415.1034(1)(a) (West Supp. 2003); Indiana, *IN Code Ann*. 12-10-3-9(a) (Michie 2001); *KY Rev. Stat. Ann*. §209.030(2) (Michie 1998); Louisiana, *LA Rev. Stat. Ann*. §14:403.2(C) (West Supp. 2003); Mississippi, *MS Code Ann*. §43-47-7(1)(a) (LexisNexis Supp. 2002); *MO Stat. Ann*. §660.255 (West 2000); New Hampshire, *NH Rev. Stat. Ann*. §161-F:46 (LexisNexis Supp. 2002); New Mexico, *NM Stat. Ann*. §27-7-30(A) (Michie 1999); North Carolina, *NC Gen. Stat*. §108A-102(a) (LexisNexis 2001); Oklahoma, *OK Stat. Ann*. tit. 43A, §10-104(A) (West 2001); Rhode Island, *RI Gen. Laws* §42-66-8 (Lexis 1998); South Carolina, *SC Code Ann*. §43-35-25(A) (West Supp. 2002) (South Carolina mandates reporting only by any person "who has actual knowledge" of abuse); Tennessee, *TN Code Ann*. §71-6-103(b)(1) (LexisNexis Supp. 2002); Texas, *TX Hum. Res. Code Ann*. §48.051(a) and (c) (Vernon 2003); Utah, *UT Code Ann*. §62A-3-305 (LexisNexis Supp. 2002); and Wyoming, *WY Stat. Ann*. §35-20-103(a) (LexisNexis 2001). Some of these "any person" states somewhat redundantly also list categories of individuals who are required to report suspected abuse.

[100] *AL Code* §§38-9-8(a) and 38-9-2(3) (LexisNexis Supp. 2002); *AK Stat*. §§47.24.101(a)(14) and 47.24.900(3) (LexisNexis 2002); *NE Rev. Stat. Ann*. §§28-372(1) and 28-353 (Michie 1995 & Supp. 2002); and *SC Code Ann*. §§43-35-25(A) and 45-35-10(2) (West Supp. 2002).

[101] Arizona mandates reporting by any "person who has responsibility for the care of an incapacitated or vulnerable adult," *AZ Rev. Stat. Ann*. §46-454(A) (West 1997); California by "[a]ny person who has assumed full or intermittent responsibility for care or custody of an elder or dependent adult, whether or not that person receives compensation," including "any elder or dependent adult care custodian," *CA Welf. & Inst. Code* §15630(a) (West Supp. 2003); and Maine by "any other person who has assumed full, intermittent or occasional responsibility for the care or custody of the adult, whether or not the person receives compensation," *ME Rev. Stat. Ann*. tit. 22, §3477(1)(B) (West Supp. 2002).

[102] 35 *PA Cons. Stat. Ann*. §§10225.103 and 10225.701(a)(1) (West 2003). See also Idaho, *ID Code* §39-5303(1) (Michie Supp. 2001) ("home care workers"); Iowa, *IA Code Ann*. §235B.3(2)(e)(3) (West Supp. 2003) ("an in-home homemaker-home health aide"); Maine, *ME Rev. Stat. Ann*. tit. 22, §3477(1)(A)(22) (West Supp. 2002) ("unlicensed assistive personnel"); Ohio, *OH Rev. Code Ann*. §5105.61(A) (Anderson 1998) ("any senior service provider"); and Virginia, *VA Code Ann*. §63.2-1606(A) (LexisNexis 2002) ("any person providing full-time or part-time care to adults for pay on a regular scheduled basis").

new categories of reporters, the scope of the reporting obligation in any particular state can be determined only by referring to the current statutory language.

It is important to note that even if a worker is a mandatory reporter, the worker may nonetheless be very reluctant to make a report, despite the possibility of a criminal penalty for failure to do so.[103] Recent statistics on the prevalence of elder abuse indicate that abuse of vulnerable adults is perpetrated most often by family members.[104] The majority of the CDPAS workers in the Cash and Counseling states are also family members and are therefore likely to confront conflicting loyalties if they observe abuse.[105] A daughter/worker may not want to report her father's emotional abuse of her mother/consumer. A daughter-in-law/worker may be afraid to report abuse of her mother-in-law/consumer by a husband who is also abusive to her, or she may be benefiting from her husband's financial abuse of his mother.[106] While there are no ready answers to these conflicts, workers who are mandatory reporters should be made aware of their reporting obligation and the risks they run for failure to report (in addition to criminal penalties, the APS laws in a few states provide for a civil cause of action for failure to report abuse of a vulnerable adult).[107]

b. Abuse or Neglect by the Worker

Many APS statutes provide for criminal and/or civil liability for engaging in abuse, neglect or financial exploitation of a vulnerable adult. Thus, a second, but less likely, basis

---

[103] The typical statutory penalty for failure to comply with a mandatory reporting provision is a misdemeanor. See Seymour Moskowitz, "Saving Granny from the Wolf: Elder Abuse and Self-Neglect -- the Legal Framework," 31 *Conn. L. Rev*. 77, Appendix E (1998).

[104] The research findings in the 2000 Survey of State Adult Protective Services Agencies include a finding that the perpetrators in 61.7% of the substantiated reports were family members, with spouses accounting for 30.2% and adult children 17.6%. National Center On Elder Abuse, *A Response to the Abuse of Vulnerable Adults: The 2000 Survey of State Adult Protective Services* 34 (2003).

[105] For example, in New Jersey, 63% of the consumers hired relatives as providers, and in Florida, 59% of the consumers hired relatives as providers. Leslie Foster, et al., *Cash and Counseling: Consumers' Early Experiences in New Jersey Part II: Uses of Cash and Satisfaction at Nine Months* 12 (2002); and Leslie Foster, et al., *Cash and Counseling: Consumers' Early Experiences in Florida Part II: Uses of Cash and Satisfaction at Nine Months* 14 (2002).

[106] Although all APS statutes provide some form of immunity for reporters of suspected abuse, such provisions do not address the emotional aspects of reluctance to comply with reporting requirements.

[107] Examples include Arkansas, Iowa, and Michigan. In each of these states, the mandatory reporter is liable only for the damages proximately caused by the failure to report. The Arkansas APS statute provides that "[a]ny person or caregiver required by this chapter to report a case of suspected abuse, neglect, or exploitation who purposely fails to do so shall be civilly liable for damages proximately caused by the failure." *AR Code Ann*. §5-28-202(b) (Michie 1997). The Iowa APS statute provides in relevant part that "[a] person required by this section to report a suspected case of dependent adult abuse who knowingly and willfully fails to do so... is civilly liable for the damages proximately caused by the failure." *IA Code Ann*. §235B.3(10) (West Supp. 2003). The Michigan APS law provides that "[a] person required to make a report pursuant to section 11a who fails to do so is civilly liable for the damages proximately caused by the failure to report...." *MI Comp. Laws Ann*. §400.11e(1) (West 1997).

for worker liability under an APS statute is substandard care that reaches the level of abuse or neglect (and although this standard may not be clearly defined in the statute or case law, it is clearly considerably higher than the ordinary care standard that creates the potential for tort liability). Two cases, one involving a paid caregiver who provided personal assistance services and one involving a home care agency, illustrate the extreme degree of neglect required to support a finding of criminal liability:

- **Prosecution of caretaker neglect**. In *Commonwealth v. Waskovich*, the defendant, Charles Waskovich, had entered into a care arrangement with Kenneth Andrews, an elderly gentleman who had been living alone.[108] Under the arrangement, Waskovich and his wife would live in Andrews' home and provide him with personal assistance services, and the value of those services (set at $7.00 an hour) was to be applied toward the purchase of Mr. Andrews' house.[109] After Mr. Andrews died from "pneumonia and severe infection associated with bedsores,"[110] Maskovich was convicted on charges of neglect of a care dependent person resulting in serious bodily injury.[111] Under Pennsylvania law, a "caretaker is guilty of neglect of a care-dependent person if he... [i]ntentionally, knowingly or recklessly causes bodily injury or serious bodily injury by failing to provide treatment, care, goods or services necessary to preserve the health, safety or welfare of a care-dependent person for whom he is responsible to provide care."[112] "Caretaker" is defined as including a person "who has an obligation to care for a care-dependent person for monetary consideration... in the care-dependent person's home."[113] On appeal, Waskovich argued that the evidence did not support a finding that he was a "caretaker," but the appellate court disagreed and upheld his conviction, citing the following key facts:

  > Appellant performed health-related duties (such as taking Mr. Andrews to the doctor, giving him a bath, changing his dressing, and attending to him during the night). Nurse Reede testified that Appellant introduced himself as Mr. Andrews' sole caregiver. Appellant controlled Nurse Reede's visitation of Mr. Andrews, and Appellant refused additional [Medicare] services for Mr. Andrews' benefit.[114]

---

[108] 805 A.2d 607 (Pa. Super. Ct. 2002), *aff'd*, 815 A.2d 1042 (Pa. 2003).

[109] 805 A.2d at 609.

[110] *Id.* at 610.

[111] *Id.*

[112] *PA Cons. Stat. Ann*. tit.18, §2713(a)(1) (West 2000).

[113] *PA Cons. Stat. Ann*. tit.18, §2713(f)(3) (West 2000).

[114] 805 A.2d at 610-11.

- **Prosecution of agency neglect**. In *Caretenders, Inc. v. Commonwealth of Kentucky*, a client, who had been receiving home care from the defendant agency since September 1987, was observed on January 15, 1988, by her treating physician to have developed several decubitus ulcers.[115] The client was admitted to the hospital on February 9, 1988 with "'multiple, extensive' decubiti on her body. The area over her sacrum was larger and extended to her bone. [A doctor at the hospital] reported that she appeared unwashed and smelled of necrotic material."[116] The agency and three of its nurses, but not the employees who were involved in the direct care of the client, were indicted under Section 209.090(2) of the Kentucky APS statute, which provides that "[a]ny caretaker who knowingly abuses or neglects an adult is guilty of a Class C felony."[117] Kentucky defines "abuse or neglect" in pertinent part as "the infliction of physical pain, injury or mental injury, or the deprivation of services by a caretaker which are necessary to maintain the health and welfare of an adult."[118] "Caretaker" is defined as "an individual or institution who has the responsibility for the care of the adult as the result of a family relationship, or who has assumed the responsibility for the care of the adult voluntarily, or by contract, or agreement."[119] The jury convicted the agency, but not the three nurses, and the jury's verdict was upheld on appeal.[120]

B. Consumer Liability Risk

At first blush, claims by workers against consumers may appear to be a matter of little concern because Medicaid recipients are almost by definition judgment proof. All Medicaid recipients must meet certain income and asset limitations in other to qualify,[121] and it should be emphasized that these income and asset limitations make it unlikely that a worker would consider it worthwhile to pursue a potential claim against a consumer. There are, however, at least three situations in which it might make economic sense to bring such a claim:

---

[115] 831 S.W.2d 83, 85 (Ky. 1991).

[116] *Id*.

[117] *KY Rev. Stat. Ann*. §209.990(2) (Michie 1999). Many APS statutes contain similar criminal provisions. See Moskowitz, *supra* note 103, at Appendix D. Only a few authorize a civil action for abuse of a vulnerable adult. See, e.g., *AZ Rev. Stat. Ann*. §46-455(B) (West Supp. 2002); *CA Welf. & Inst. Code* §15657.3 (West 2001); and *FL Stat. Ann*. §415.1111 (West Supp. 2003).

[118] *KY Rev. Stat. Ann*. §209.020(7) (Michie Supp. 2002).

[119] *KY Rev. Stat. Ann*. §209.020(6) (Michie Supp. 2002).

[120] 821 S.W.2d at 85. See also Trujillo v. Superior Court of Los Angeles, No. B155860, 2002 WL 1558830 (Cal. Ct. App. 2002) (reversing trial court's dismissal of elder abuse claims against a home health care agency that had failed to visit a patient and treat her decubitis ulcers, allegedly resulting in the patient's death from sepsis).

[121] American Bar Association, *Legal Guide for Older Americans* 78-9 (1998).

- First, the Medicaid asset tests permit recipients to retain their home as an asset,[122] and particularly in the case of older Medicaid beneficiaries, these homes may have substantial value.[123] At the same time, state debtors law may protect the homestead.

- Second, claims against a consumer who is a homeowner or renter, or who resides with a homeowner or renter, may be covered by the liability provisions of an insurance policy on the house or rental unit or by a separate "umbrella" liability policy. This is important because the most likely claim by a worker is for an injury resulting from alleged negligence in providing a safe workplace, the workplace being the consumer's residence.[124]

- The third, and perhaps most significant, way a worker could recover is by naming someone other than the consumer as a defendant. Some consumers live with family members who have substantial incomes and assets. Particularly in the case of injuries in the home, the worker is likely to sue such family members in addition to or instead of the consumer, as is illustrated in the premises liability cases discussed in Section II.B.1. Another possibility is that a worker will name the consumer's authorized representative as a defendant on the theory that the representative is the joint employer of the worker.[125] In cases where the representative independently (that is, without consultation or direction from the consumer) performs most of the functions of an employer (hiring the worker, setting the worker's hours, assigning the tasks to be performed by the worker, etc.), as is likely to be the case if the consumer suffers from dementia, the representative may well be found to be a joint employer, or even the sole employer.[126]

Thus, from the standpoint of consumers and their family members and representatives who are *not* judgment proof, the possibility of liability to workers is a real concern.[127] Conversely, in cases where the consumer and any other likely defendants *are*

---

[122] *Id.* at 79.

[123] These individuals qualify for Medicaid as "medically needy." They are people who otherwise make too much to qualify for Medicaid but become eligible for assistance by incurring medical expenses, such as nursing home costs, that bring their income and assets down to the appropriate level. *Id.* at 78-9.

[124] Note that two duties of care may be involved here. The consumer, as an employer, has a duty to provide a reasonably safe workplace. Torts, *supra* note 30, at 1097. The owner of the premises where the provider works, who may or may not be the consumer, will also have a duty under premises liability law, discussed in Section II.B.1 *infra*.

[125] "That a worker can simultaneously be the employee of two persons is well-recognized in the law." Evans v. Webster, 832 P.2d 951, 954 (Colo. Ct. App. 1991).

[126] Indeed, the sole employer function performed by the consumer may be to provide the funds to pay the provider through the consumer's Medicaid benefit.

[127] This concern is mitigated by the fact that many, if not most, CDPAS workers are family members and, thus, as a practical matter, this reduces likelihood that a worker/family member will seek compensation for personal injuries in the courts.

judgment proof or lack sufficient assets or insurance to provide compensation for injuries and other work-related claims, the worker has a very serious concern. This is especially true if the worker is not covered by workers' compensation.

Because in some cases, there will be an economic incentive for such a claim, there is good reason to explore the potential for personal injury claims by workers against consumers. The three most likely bases of liability are discussed below: (1) negligence in maintaining the worker's workplace, that is, the consumer's home; (2) negligent and intentional injuries caused by consumers with a mental impairment; and (3) wrongful discharge and other employment law claims.[128]

1. Negligence in Maintaining the Workplace (i.e., the Home)

There are no reported lawsuits by workers against consumers of CDPAS. Nevertheless, numerous actions for negligence have been brought against consumers by other home care providers, and these cases provide a good picture of the claims that are likely to arise in the context of CDPAS. Significantly, most of these cases were brought by individual independent providers who were not employed by agencies. The reason for this is undoubtedly the fact that agency providers are covered by workers' compensation and therefore can receive compensation for workplace injuries without bringing a negligence action or proving negligence by the employer.[129] Conversely, most privately employed individual providers are not covered by workers' compensation and, thus, their only recourse is to seek tort damages.[130] In some of these cases, the actual recipient of the

---

[128] It is important to note that a consumer could also be sued both for negligence unrelated to premises liability and for intentional torts, such as assault, that are not the result of the consumer's mental impairment. However, the lack of case law involving such claims indicates that they are not likely to occur. One of the rare cases that falls outside the three categories listed in the text is *Hayes v. Moss*, 527 So.2d 373 (La. Ct. App. 1988), although the case could also be characterized as one involving failure to maintain a safe workplace. In *Hayes*, a home care attendant sued her employer and her employer's mother, both of whom were invalids, for back injuries she sustained when she attempted to lift her employer's mother while the mother was visiting her daughter. *Id.* at 374. When the mother, who had spent the night at her daughter's house, called out for help getting up from the floor, the attendant tried to locate another employee to help her but could not do so. *Id.* The employee then told the mother she would go get a mechanical lift, but the mother responded, "'No, Ella, I insist on you getting me off the floor because you're big and strong, you can get me off the floor.'" *Id.* The attendant did so and immediately felt back pain. *Id.* After a jury verdict awarding $232,583 to the plaintiff, the employer's insurer appealed. *Id.* at 375. The plaintiff defended the jury's verdict by arguing that the employer was negligent in not having a second person available to take care of her mother, "[t]hereby making the house unsafe because of [the mother's] condition." *Id.* at 375. The appellate court disagreed, noting that the evidence did not establish that the mother had a propensity for falls, that the daughter therefore did not have "an obligation to have two people on duty when her mother was there," and, in any case, the daughter's home was equipped with a mechanical lift, which, if used, could have prevented the plaintiff's injury. *Id.*

[129] See the brief discussion of the workers' compensation system in Section I.D, *supra*.

[130] The issue of workers' compensation coverage for consumer-directed personal assistance providers, including the extent to which providers are currently covered by state workers' compensation laws, is extensively analyzed in a report prepared by Susan Flanagan for the Cash and Counseling Demonstration, *Accessing Workers' Compensation*

home care services either was not a defendant or was not the primary defendant. Instead, recovery was sought from a relative of the recipient (usually a son or daughter) who was the actual employer of the provider and/or owned the premises where the provider worked. These cases reinforce the concern that family members of judgment proof CDPAS consumers who have significant assets are at some risk of being identified as "deep pockets" and named as defendants in claims for on the job injuries.

About half of the reported decisions alleging that a homeowner or renter was negligent are standard slip and fall cases -- that is, cases that allege that the consumer negligently created or allowed a condition to exist in the consumer's home that caused the worker to slip and fall and sustain injury. The rest of the reported cases involve a variety of alleged hazards -- defective furniture or appliances, pets that bite or otherwise endanger workers, and the like. The fact patterns are typical of those in premises liability claims, and the fact that the injury occurred in the context of the provision of home care services rarely is a factor in determining the consumer's liability.

To clarify the legal principles that operate in these lawsuits, a brief summary of the law of premises liability law is necessary. Under traditional common law, the duty of a landowner (or possessor of land) to an entrant on the property was determined by the status of the entrant, and the landowner's duty therefore varied according to whether the entrant was a trespasser, a licensee or an invitee.[131] In recent years, a substantial number of jurisdictions have rejected this approach and simply apply the duty of ordinary care, at least as to some categories.[132] However, in the case of care workers, who are categorized as invitees,[133] the legal standard is the same whether or not the traditional common law approach is followed. This is because the "landowner owes to the invitee a duty of care to make operations on the land reasonably safe and to conduct his active operations with reasonable care for the invitee whose presence is known or reasonably

---

Insurance for Consumer-Employed Personal Assistance Workers: Issues, Challenges and Promising Practices (forthcoming).

[131] Torts, *supra* note 30, at 591.

[132] *Id.* at 592 and 616. According to Dobbs, a 1998 decision by the North Carolina Supreme Court "counted 11 jurisdictions that had adopted the reasonable care standard across the board and 14 more that had done so for licensees and invitees. That list includes some states that merely shifted social guests from the licensee to the invitee category, but in any event something close to half the states have now modified the traditional rule in favor of a reasonable care standard for most cases." *Id.* at 620, citing Nelson v. Freeland, 507 S.E.2d 882 (N.C. 1998).

[133] Torts, *supra* note 30, at 602. Section 332(3) of the *Restatement (Second) of Torts* (1965) defines invitees as including "business visitors," which in turn are defined as persons who are "invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land."

foreseeable."[134] Given this "duty of reasonable care, the invitee's suit is an ordinary negligence case and the ordinary rules of negligence apply."[135]

The following "slip and fall" cases illustrate the risk a consumer runs if the consumer fails to maintain reasonably safe conditions in the home:

- **The hazardous doormat**. In *Dapp v. Larson*, a home health aide was injured when she fell down the porch steps at the client's residence.[136] The aide sued the client for personal injuries, claiming that a brown plastic doormat on the porch constituted a dangerous condition that caused her fall.[137] The trial court granted the defendant's motion for summary judgment on the ground that the plaintiff had failed to demonstrate either the existence of a dangerous condition or that the defendant had notice of that condition.[138] However, the appellate court ruled that regardless of whether the plaintiff had alleged sufficient facts on these issues, the case should be dismissed because the plaintiff had failed to submit evidence that the accident was caused by the allegedly dangerous condition.[139]

- **The icy sidewalk**. The plaintiff in *Rolfe v. Betts*, made the novel argument that his contract with the defendant to provide home health care services enhanced the duty of care owed by the defendant.[140] The plaintiff had fallen on an icy sidewalk outside the defendant's house, and under Connecticut premises liability law, the defendant did not owe a duty of care to remove the ice until a reasonable time after the end of the storm.[141] In response to the defendant's motion for summary judgment, the plaintiff argued both that the defendant was liable because the ice he slipped on pre-dated the storm, and that even if the ice did not pre-date the storm, the in-home

---

[134] Section 343 of the *Restatement (Second) of Torts* (1965), Dangerous Conditions Known To Or Discoverable By Possessor, describes the duty of the possessor of land as follows:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
> (c) fails to exercise reasonable care to protect them against the danger.

[135] Torts, *supra* note 30, at 603.

[136] 659 N.Y.S.2d 130 (N.Y. App. Div. 1997).

[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] No. CV 970327101S, 1998 WL 310826 (Conn. Super. June 5, 1998).

[141] *Id.* at *1.

services contract constituted "unusual circumstances" justifying a departure from the normal rule.[142] The court denied summary judgment because there was a factual dispute as to whether the plaintiff's "claimed injuries resulted from new ice or old ice,"[143] but the court also noted that there was nothing in the contract to "support the proposition that the plaintiff was entitled to an enhanced duty of care, or suggest that the defendants agreed to become absolute insurers of the plaintiff's safety."[144]

Home care workers have also asserted claims of liability for injuries caused by allegedly hazardous furnishings and appliances and by household pets:

- **The collapsing chair**. In *Baxter v. Cramco, Inc.*, a home care worker sought compensation for injuries she suffered when she sat on a chair that collapsed.[145] Her suit named her employer, her employer's husband, and the manufacturer of the chair as defendants.[146] On appeal of a jury verdict finding that the husband's negligence had caused her injuries, the appellate court reversed, because although there was evidence that the chair had been repaired, there was no evidence as to who had authorized or conducted the repairs.[147]

- **The dog bite**. In *Singer v. Superior Court of Los Angeles County*, a nurse who was privately employed was bitten twice by her employer's dog and then was fired after she complained about the incidents.[148] The primary issue on appeal was whether the

---

[142] *Id.*

[143] *Id.*

[144] *Id.* at *2. See also Lewis v. Oubre, 461 So.2d 523, 524 (La. Ct. App. 1985), in which the plaintiff, who was employed by the defendant in his home to assist him with medication, personal hygiene and related household tasks, slipped on the carport floor, which had a smooth finish and had become moist or damp due to humid weather conditions; Meeks v. Rosa, 988 S.W. 2d 216, 217 (Tex. 1999), in which a home health care worker who slipped and fell on some beans that had fallen out of the client's refrigerator was found by the appellate court to have presented insufficient evidence "to establish that beans on the floor were a condition that posed an unreasonable risk of harm;" and Sudduth v. Young, 579 S.E.2d 7 (Ga. Ct. App. 2003), in which the plaintiff, an overnight sitter for an elderly woman, unsuccessfully claimed that she fell and injured herself because the defendant's floor was heavily waxed and extremely slippery and constituted a dangerous condition. These cases are discussed in greater detail in Section B.1 of Appendix A.

[145] 425 S.E.2d 191 (W.Va. 1992).

[146] *Id.* at 192.

[147] *Id.* at 193. See also Castille v. Wal-Mart Stores, Inc., 815 So.2d 973 (La. Ct. App. 2002), in which an in-home caregiver who sustained injuries in a kitchen fire sued her employer for negligence, based on the argument that the defendant had installed an air conditioner filter in the stove hood, rather than a filter specifically designed for the stove hood; and Holmes v. Harper, 786 So. 2d 245 (La. Ct. App. 2001), a lawsuit that could well be characterized as frivolous, in which a home care provider sought compensation from her employer (the patient's daughter) for injuries she sustained when she banged her foot on a leg of the patient's bed while running to assist the patient, who had called out to her during the night. Both cases are included in Section B.1 of Appendix A.

[148] 83 Cal.Rptr.2d 355 (Cal. Ct. App. 1999).

potential damages in her law suit for personal injury and wrongful discharge were sufficiently great to satisfy the $25,000 jurisdictional threshold for an action in superior court.[149] The appellate court found that she did meet the jurisdiction limit, based both on her claim for lost earnings and on the potential for a substantial award in connection with the dog bites: "For one thing, plaintiff experienced pain and emotional suffering both as the result of the two dog bites and as a result of defendants' failure to advise whether [the dog] had been inoculated against rabies."[150]

Although it should be apparent that the claims in many of these cases rest on very unusual facts, consumers and family and friends with whom they reside may want to consider obtaining insurance against such claims.

2. Injuries Caused by the Consumer's Mental Impairment

In all the cases discussed in the preceding section, the mental capacity of the defendant, and the extent to which impaired capacity might affect liability, were not issues. However, many CDPAS consumers are to varying degrees mentally incapacitated as a result of dementia, developmental disabilities, and other conditions. In recent years, both the courts[151] and legal commentators[152] have grappled with the issue of the extent to which mentally impaired patients, particularly patients with Alzheimer's disease, should be found responsible for negligent and intentional torts that cause injury to their care providers. In the context of assaults on care providers by patients in residential care facilities, the courts have generally concluded that they should not.

Although none of the leading cases have dealt with assaults on home care workers, both the increase in home care services and the increasing incidence of Alzheimer's

---

[149] *Id.* at 356.

[150] *Id.* at 358. See also Associated Home Health Agency, Inc., v. Lore, 484 So.2d 1389 (Fla. Dist. Ct. App. 1986), in which a licensed practical nurse employed by a home health care agency sought workers' compensation in connection with serious injuries she sustained when she was attacked by a client's dog while working at the client's home; and Burton v. Landry, 602 So.2d 1013 (La. Ct. App. 1992), in which a woman who was employed by the defendant to care for his elderly mother in his home claimed damages for injuries she sustained when she fell on some brick stairs at his residence, a fall that was allegedly caused when the defendant's cat ran by. The appellate court affirmed summary judgment for the defendant, commenting that a "cat owner is not guilty of negligence when a cat accidentally gets in the way or underfoot." *Id.* at 1014. Both cases are discussed in greater detail in Section B.1 of Appendix A.

[151] See, e.g., Herrle v. Estate of Helen I. Marshall, 53 Cal. Rptr. 2d 713 (Cal. App. 1996); Anicet v. Gant, 580 So.2d 273 (Fla. Dist. Ct. App. 1991); and Gould v. American Family Mutual Insurance Co., 543 N.W.2d 282 (Wisc. 1996).

[152] See, e.g., Sarah Light, "Reflecting the Logic of Confinement: Care Relationships and the Mentally Disabled under Tort Law," 109 *Yale L. J.* 382 (1999). Additional commentators are cited by Light and in the cases cited in note 151 *supra*.

disease[153] make it inevitable that more such claims will be made in the future. In each of the leading cases, it was important, if not critical, to the court's holding that the defendant was confined to a secure institution and that such confinement minimized the risk of injury to "innocent" parties. This rationale clearly does not apply to a patient with dementia or other mental disability who has elected, or whose family or authorized representative has elected, to have care provided in the home. It is unclear whether the second rationale in these cases -- that the care worker is not an "innocent" member of the public, but, instead, has knowingly taken on the risks and responsibilities associated with caring for potentially violent patients -- would be considered sufficient to relieve the defendant of liability to a home care worker.

Vinccinelli v. Musso,[154] the only reported decision that specifically addresses the issue, albeit in the context of an injury caused by a slip and fall, rather than by an assault on the worker, suggests that at least some courts may refuse to impose liability on defendants with mental disabilities. Two other cases, one involving a home care recipient and the other a resident of an assisted living facility, also suggest that mentally impaired home care consumers may be relieved of liability, at least in some circumstances.[155] However, before discussing these cases, it is helpful to review three of the leading cases that articulate the legal principles and policy considerations regarding liability that have arisen in institutional settings:

- **Mental illness and the duty to refrain from violent conduct**. In the first such case, *Anicet v. Gant*, the Florida District Court of Appeal considered whether a violent mental patient who was confined to the locked ward of a state mental hospital should be liable for injuries he inflicted on a hospital attendant. Critical to the court's conclusion were the following facts: that "[a]mong the most severe features of [the defendant's] illness" was "an inability to control himself from acts of violence which specifically included throwing rocks, chairs and other objects at persons nearby;"[156] that in large part for this reason he had been "confined to the hospital ward designed for the lowest functioning and most dangerous patients;"[157] and that the plaintiff's duties as a "unit treatment specialist" "specifically included the treatment and, if possible, the control of patients like Anicet, of whose dangerous tendencies he was

---

[153] See the statistics cited on the website of the Alzheimer's Association at http://www.alz.org/AboutAD/Statistics.htm (last visited October 1, 2003) ("By 2050, the estimated range of Alzheimer's disease prevalence will be 11.3 million to 16 million Americans, with a middle estimate of 13.2 unless a cure or prevention is found").

[154] 818 So.2d 163 (La. Ct. App. 2002).

[155] Maher v. Scollard, No. C-910687, C-910720, 1993 WL 19615 (Ohio App. Jan. 29, 1993); and White v. Muniz, 999 P.2d 814, 815 (Colo. 2000).

[156] Anicet, 580 So.2d at 274.

[157] *Id.*

well aware."[158] In determining liability, the court cited two policies that support the usual rule, which is reflected in the Restatement (Second) of Torts,[159] that a mentally disabled plaintiff is "liable in the same generalized way as is an ordinary person for both 'intentional' and 'negligent acts'"[160] -- "that as between an innocent injured person and an incompetent injuring one, the latter should bear the loss,"[161] and that imposing such liability encourages placement of the disabled person in an institution so as to prevent harm to others.[162] The court concluded, however, that neither of the reasons for the general rule applied in this case and that the defendant therefore was not liable -- first, Anicet's relatives had already done as much as they could to prevent injury to the innocent by confining him to a mental hospital,[163] and, second and probably more significant, "Gant was not an innocent member of the public unable to anticipate or safeguard himself.... [H]e was employed to encounter, and knowingly did encounter, just the dangers which injured him."[164] The court emphasized that its holding was not based on assumption of risk, but "[r]ather we conclude that no *duty* to refrain from violent conduct arises on the part of a person who has no capacity to control it to one who is specifically employed to do just that."[165]

- **Alzheimer's disease and the duty to refrain from violent conduct**. The Wisconsin Supreme Court reached a similar conclusion in *Gould v. American Family Mutual Insurance Company*, a case brought by the head nurse of a dementia unit against a patient institutionalized with Alzheimer's disease who had knocked her to the floor.[166] The court held that "an individual institutionalized as here, with a mental disability, and who does not have the capacity to control or appreciate his or her conduct cannot be liable for injuries caused to caretakers who are employed for financial compensation."[167] The court considered the same policy rationales for imposing liability despite mental incapacity as in *Anicet*, but also relied on a third rationale for imposing liability that had not been considered in that case, that the Restatement rule discourages tortfeasors from simulating mental incompetence. The court found that this rationale did not apply because it was hard to imagine that

---

[158] *Id.*

[159] *Restatement (Second) of Torts* §238B (1965).

[160] 580 So.2d at 275.

[161] *Id.*

[162] *Id.*

[163] *Id.* at 276.

[164] *Id.* at 275-6.

[165] *Id.* at 277.

[166] Gould, 543 N.W. 2d at 283.

[167] *Id.*

someone would "feign the symptoms of a mental disability and subject themselves to commitment in an institution in order to avoid some future civil liability."[168]

- **Alzheimer's disease and primary assumption of risk**. In *Herrle v. Estate of Helen I. Marshall*, the California Court of Appeal found "the reasoning in *Anicet*... and *Gould* persuasive" and held that an Alzheimer's patient owed no duty of care to a certified nurse's aide employed by a convalescent hospital who was seriously injured by the patient.[169] Like the plaintiff in *Anicet*, Herrle "knew her job exposed her to patients suffering from mental illnesses which made them violent, combative and aggressive. She also knew of prior instances where aides were struck by patients."[170] The court concluded that there was no duty of care under the doctrine of "primary assumption of risk," which applies "'where, by virtue of the nature of the activity and the parties' relationship to the activity, the defendant owes no legal duty to protect the plaintiff from the particular risk of harm that caused the injury.'"[171]

In each of these three cases involving institutionalized patients, the courts refused to find the plaintiff legally responsible for conduct that was a product of the plaintiff's mental impairment. Although the courts differed somewhat in the legal theories they applied to reach this result, in each of these cases it was critical that the plaintiff had been hired to manage the very risks that resulted from the impairment. In the following three cases, the court considered whether liability should be imposed on mentally impaired defendants who were *not* living in a secure institution, and in each case, either found no liability or reduced the plaintiff's liability:

- **Alzheimer's and the spilled ice cream**. The plaintiff in *Vinccinelli v. Musso* had been hired by the client's son to work as a sitter/companion to his mother, who had Alzheimer's disease.[172] The plaintiff was injured when she slipped and fell on a small amount of ice cream on the kitchen floor that the mother had spilled about an hour earlier when she went to get herself something to eat.[173] On review of the trial court's decision granting fifty percent compensation to the plaintiff (the award was reduced by fifty percent for her comparative negligence), the appellate court characterized the "primary issue" on review as "whether, under the particular facts and circumstances of this case, the patient owed a duty to her caregiver to protect against such an accident."[174] The court held that she did not because:

---

[168] *Id.*

[169] Herrle, 53 Cal.Rptr.2d at 719.

[170] *Id.* at 715.

[171] *Id.* at 715-6

[172] 818 So.2d at 164.

[173] *Id.*

[174] *Id.* at 165.

> [the plaintiff] knew that Mrs. Musso might get ice cream on her own, and she knew that if she spilled some, she would not pay attention to the spill because of her disease.... [T]he risk the plaintiff encountered was one of the types of risks she was contractually obligated to guard against. Because of the special status and job responsibilities of the plaintiff in this case, the risk from a small spill occasioned by the patient was not unreasonable vis-à-vis this particular plaintiff.[175]

The court explained its decision by citing *Herrle, Gould,* and other cases that have reached the same conclusion:

> Even in those jurisdictions that follow the Restatement rule, courts have held that Alzheimer's patients who have no capacity to control their conduct do not owe a duty to protect caregivers from injuries suffered in attending to them, because the factual circumstances negate the policy rationales that would otherwise support the rule.... The caregiver is in the superior position to prevent injury and to avoid the risks associated with the responsibilities of that position.[176]

- **The violent home care patient**. *Maher v. Scollard* is an unreported decision in which a registered nurse who was providing home care was twice physically assaulted by her patient. The case suggests that assumption of risk or similar defenses may be available and convince a court to reduce the defendant's liability, if not relieve the defendant of liability altogether. In Maher, the patient, "in a confused state," grabbed the nurse "forcefully by the wrists and fingers and threw her against a window frame and radiator."[177] Two months later, the patient "again injured Maher's wrists, slamming them against the bed rails."[178] There is no indication in the opinion that the patient suffered from dementia or other mental disability, and the defendant apparently did not argue that there was no duty of care. However, the appellate court did find that the trial court had properly instructed the jury on the affirmative defenses of comparative negligence and assumption of risk,[179] and it therefore upheld a verdict that had reduced the judgment for the plaintiff based on the jury's finding that the plaintiff did "'assume the risk/commit an act of negligence which directly and proximately caused' five percent of her injury."[180]

---

[175] *Id.* at 166.

[176] *Id.* at 166-7.

[177] *Id.* at *1.

[178] *Id.* at *1.

[179] *Id.* at *2

[180] *Id.* at *1.

- **Alzheimer's and intent to harm**. Finally, a decision by the Supreme Court of Colorado in a lawsuit against a resident of an assisted living facility suggests an alternative defense to intentional tort claims that could apply in the home care setting. In *White v. Muniz*, the defendant, an eighty-three year old woman who had been placed in an assisted living facility by her granddaughter, began displaying agitated and aggressive behavior soon after admission.[181] A few weeks later, when a shift supervisor tried to change the defendant's adult diaper, the defendant "struck Muniz on the jaw and ordered her out of the room."[182] The next day, the defendant was diagnosed with dementia caused by Alzheimer's.[183] Perhaps because the defendant had not previously been identified as a patient with aggression caused by mental disability, the court did not discuss *Anicet, Gould* or *Herrle*, nor did the court consider the issue of whether the defendant was owed a duty of care. Instead, the court held that in Colorado, to prevail on a claim of the intentional tort of battery, the plaintiff must show that the defendant intended to commit the act *and* that the defendant "intended the act to result in a harmful or offensive contact."[184] Because the trial court's instructions to the jury were consistent with this standard, the court upheld the jury's verdict in favor of the defendant.[185]

These cases suggest that it is quite possible that a CDPAS worker injured by a mentally disabled patient will have difficulty recovering damages. The court may find that the mentally impaired defendant did not owe the worker a duty of care (*Vinccinelli)*, or that because of the defendant's mental impairment, the defendant did not have the required intent (*White*), in which case the worker will be barred from any recovery; or the court may find liability, but reduce the damage award based on assumption of risk, comparative negligence or other defenses (*Maher*). The possibility that the worker may not be able to prevail in a tort action reinforces the need to make compensation for on the job injuries available through the workers' compensation system.

3. Wrongful Discharge and Other Employment Law Claims

The philosophy behind consumer-directed personal assistance services requires not only that consumers have the authority to select and hire their CDPAS workers, but also that they be able to discharge workers whenever they are unhappy with their care. In most

---

[181] 999 P.2d at 815.

[182] *Id.*

[183] *Id.*

[184] *Id.* The court noted, however, that "[m]ore recently, some courts around the nation have abandoned this dual intent requirement in an intentional tort setting... and have required only that the tortfeasor intend a contact with another that *results* in a harmful or offensive touching." *Id.* at 817.

[185] *Id.* at 815-816 and 819.

situations and in most states the consumer can lawfully discharge the worker at will, unless: (1) the employee has a contract or some other evidence of a guarantee of continued employment; or (2) the employer's reason for the discharge is unlawful.[186] If there is no job guarantee and no unlawful motivation, the consumer can discharge the worker for no reason or for any reason at all.

Although real, as we explain in subsections II.B.3.a and II.B.3.b, the threat of claims for wrongful discharge and other employment law violations should not discourage consumers from discharging workers who are not meeting their needs. Instead, consumers can be advised to: (1) avoid making any representation, either written or verbal, that implies that a worker is guaranteed employment for a definite period of time or that the worker will only be terminated for cause; (2) if the consumer and the worker enter into a written agreement, as has been the practice in Arkansas and Florida, include in the agreement language specifying that the worker's employment is terminable at will by the consumer; and (3) exercise great care in making statements about the reason for employment decisions, so as to avoid any possible claim that the reason was unlawful or that the consumer's statements were defamatory.

a. Discharge in Violation of an Employment Contract

In both Arkansas and Florida, the state developed a consumer-worker agreement that listed the responsibilities of both parties. Although the Florida "Employer/Employee Agreement" required the worker to agree "to give my employer two weeks written notice if I decide to terminate my employment agreement," the agreement did not contain language regarding the consumer's right to terminate the worker.[187] The Arkansas' IndependentChoices "Personal Care Assistant Agreement" specifies both that "This agreement may be terminated by the Participant/Representative due to unsatisfactory Assistant performance or by the Assistance [sic] with notice" and that "The provisions of this agreement represent the entirety of the agreement between the parties. It may be amended only in writing with all parties consenting by their signature."[188] Neither agreement provides that the consumer can discharge the worker "at will," that is, without cause -- the first agreement is silent on whether cause is needed to terminate, and the second could be read to imply that unsatisfactory performance is required in order to terminate.

Litigation by home care workers against home health care agencies demonstrates the importance of including language in the consumer-worker agreement that permits the

---

[186] James M. Fischer, *Understanding Remedies* 627 (1999).

[187] Consumer Directed Care Research Project Consultant Training Materials, Florida Department of Elder Affairs (1999).

[188] IndependentChoices Personal Care Assistant Agreement, Arkansas Department of Human Services, Division of Aging and Adult Services (1998), at 3.

consumer to discharge the worker at will. These cases also illustrate both the possibility that a discharged CDPAS worker will claim the existence of an implied contract of employment and the difficulty of proving such a claim. For example, in *McCullough v. Visiting Nurse Service of Southern Maine*, the plaintiff, a part-time visiting nurse who had been discharged after she made two errors in patient care, sued for wrongful discharge, even though she had signed two acknowledgements that the defendant "retained the right to terminate the employment relationship 'with or without cause and without notice at any time.'"[189] The plaintiff nonetheless claimed first, that written statements in an employee handbook created a contract of employment of definite duration, and second, that even if there was no contract of employment of definite duration, other written statements by the employer created a contract of employment terminable only for cause.[190] The trial court granted summary judgment for the defendant on both claims, and the appellate court agreed, because none of the statements cited by the plaintiff was clear enough to override her explicit acknowledgement of employment at will.[191]

It should be noted, however, that even if the worker is able to prove the existence of a contract or other guarantee of employment, the damages the worker can recover are limited to "the employee's lost expectancy, which is the compensation the employee would have earned over the contract term."[192] In the case of a CDPAS worker, these lost earnings will be relatively modest, making it unlikely that a lawsuit will be worthwhile. In addition, the discharged employee has the duty to mitigate damages by seeking approximately equivalent replacement employment, further reducing any possible damage award and making a legal action for lost wages even less attractive.[193]

b. Other Employment Law Claims

A discharged worker could also allege that the discharge was unlawfully motivated. The primary reasons why a discharge might be unlawful relate to violations of an anti-discrimination law (e.g., discharge based on sex, race, religion, or national origin) or reasons of public policy (e.g., discharge of a whistleblower). With one exception, federal anti-discrimination laws apply only to employers who employ a specified minimum number of employees and therefore would not apply to CDPAS consumers. For example, Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment based on

---

[189] 691 A.2d 1201, 1202-3 (Me. 1997).

[190] *Id.* at 1203-4.

[191] *Id.* See also Ashman v. Associated Health Services, No. 22059-8-II, 1998 WL 310687 at *5 (Wash. Ct. App. June 12, 1998), in which a home health aide manager unsuccessfully alleged that her job description and statements in the defendant's employee manual had impliedly modified the at will employment relationship, the court finding that "there were no genuine issues of material fact regarding whether AHS's policies or Ashman's job description created an implied contract of employment by promising specific treatment in specific situations."

[192] Fischer, *supra* note 186, at 628.

[193] John F. O'Connell, *Remedies in a Nutshell* 294 (1985).

race, color, religion, sex, and national origin,[194] applies only to an employer "who was fifteen or more employees for each working day in each of twenty or more calendar weeks.[195] Although Section 1981 of the Civil Rights Act of 1866,[196] which, *inter alia,* prohibits racial discrimination in employment agreements,[197] does not contain such a jurisdictional threshold, there is no administrative enforcement mechanism for Section 1981, making it an unlikely basis for a claim by a plaintiff who does not have the resources to retain an attorney. Unlike federal laws, state anti-discrimination laws often extend to smaller employers and in some cases cover all employers, regardless of the number of employees, making a lawsuit against a consumer a possibility.[198] Many states laws also prohibit kinds of discrimination that are not prohibited under federal law, such as discrimination on the basis of marital status or sexual orientation.[199]

To avoid any possible claim of violation of state anti-discrimination laws, consumers and their authorized representatives can be advised as to whether they are covered by their state law. If the consumer is covered, the consumer can be informed about the kinds of discrimination prohibited under that law. The consumer might be further advised to avoid even the appearance of a discriminatory motivation in all employment related decisions, but particularly in hiring and discharge decisions. This is important because within the privacy of their own homes, consumers understandably are likely to feel free to make comments and express attitudes that could be interpreted as discriminatory.

It is also quite possible that a CDPAS worker could be discharged for reasons that violate public policy. A worker might be discharged in retaliation for reporting elder abuse or suspected Medicaid fraud. The law varies considerably from state to state regarding the extent to which "whistleblowers" and other plaintiffs allegedly terminated for reasons that violate public policy are protected against retaliatory discharge.[200] To minimize the

---

[194] 42 U.S.C. §2000e-2(a) (2000).

[195] 42 U.S.C. §2000e(b) (2000).

[196] 42 U.S.C. §1981 (2000).

[197] The Supreme Court has held that the racial discrimination Congress intended to prohibit in the post-Civil War anti-discrimination laws is broader than the modern concept of racial discrimination, and, thus, that groups such as Arab-Americans may bring an action under Section 1981. *St. Francis College v. Al-Khazraji*, 481 U.S. 604, 613 (1987) ("we have little trouble in concluding that Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics").

[198] "Although Title VII and the ADA [Americans with Disabilities Act] cover only employers with 15 or more workers, some state statutes cover employers with only one worker. Other states make no provision for a minimum number of employees needed to determine coverage." 8A *Lab. Rel. Rep*. (BNA) 451-1 (2002).

[199] *Id.* at 55-57 and 115.

[200] See American Bar Association, *Fundamentals of Employment Law* 131-236 (Karen E. Ford et al. eds., 2d ed. 2000). See also Spierling v. First American Home Health Services, Inc., 737 A.2d 1250 (Pa. Super. Ct. 1999) (termination of a supervisor of staff nurses for a home health care agency after she reported evidence of suspected fraud to the Medicare fraud hotline did not violate Pennsylvania's narrow public policy exception to the doctrine of employment at will); and Clark v. Texas Home Health, Inc., 971 S.W.2d 435 (Tex. 1998) (three home health care agency nurses who

possibility of such a claim, it may be wise to advise consumers to be avoid discharging a worker in circumstances that could be interpreted as retaliatory.

Finally, if the discharged worker has a factual basis for alleging one or more of a variety of employment related torts in addition to wrongful discharge, the worker may be able to obtain a substantial damage award. As explained in an American Bar Association handbook on employment law:

> There has been a steady increase of new claims and causes of action in connection with wrongful discharge cases over the last several years. The new claims an employer can expect to see coupled with a claim for wrongful termination or discrimination include defamation, invasion of privacy, intentional infliction of emotional distress, fraud, loss of consortium, interference with prospective economic advantage, false imprisonment, and assault and battery. These "tag-along torts" are beneficial to plaintiffs because they enable a disgruntled employee to recover large tort awards, including punitive damages, which are not normally available in a breach of contract case.[201]

- **Tag-along torts**. *James v. In Home Services, Inc.,* a case with several such "tag-along torts," is particularly interesting. In *James*, all the claims most directly related to the plaintiff's employment were dismissed, yet the Court of Appeals of Minnesota nevertheless remanded the case for trial of related tort claims that could result in significant liability.[202] The plaintiff, a nurse who worked for a home care agency, was terminated from employment after her employer was told by a sheriff's deputy that she had been arrested and incarcerated for a period of time.[203] The agency discharged her because it believed that she was a convicted felon and that she had falsified her employment application.[204] Although the appellate court sustained the lower court's decision granting the defendant summary judgment on her claims of breach of contract, discrimination based on disability, and retaliation for seeking workers' compensation benefits, the court reversed the lower court and remanded for trial her claims for defamation, intentional infliction of emotional distress and punitive damages.[205] These claims were reinstated because the agency "took no steps to

---

participated in a peer review committee investigating an alleged medication error by one of the agency's licensed vocational nurses, and who were discharged immediately after they told their employer that they intended to report the incident to the Texas Board of Vocational Nurse Examiners, were protected from retaliation under the Texas Nurse Practice Act).

[201] American Bar Association., *supra* note 200, at 237.

[202] No. C3-95-482, 1995 WL 479647 (Minn. Ct. App. Aug. 15, 1995).

[203] *Id.* at *1.

[204] *Id.*

[205] *Id.* at *2-4.

verify the information which the deputy provided, even though it could easily have done so."[206]

While the kinds of employment law claims discussed in this section are much less likely to occur in the context of consumer-directed personal assistance services than in the context of agency care, the following steps can be taken to protect consumers:

- The consumer and the worker can sign an employment agreement that includes a provision that specifies that the consumer may terminate the worker at will.

- If a state anti-discrimination law applies to the consumer, the consultant can explain the terms of that law as part of the consumer's training in how to hire a worker. The consultant may further advise the consumer to avoid even the appearance of discrimination in employment decisions, including the need to be careful about candid comments that might be misinterpreted.

C. Claims Involving Third Parties

There are three situations in which claims against consumers and workers may result from interactions with third parties:

- The first situation, and probably the most common, is an injury to the worker caused by a third party while the worker is acting within the scope of employment. In this situation, the worker can bring a tort action against the third party if the worker can allege that the third party is at fault, and if the worker is covered by workers' compensation, the worker can collect benefits regardless of who is at fault.

- The second situation, which is also quite common, is an injury to a third party caused by the worker while acting within the scope of employment. In this situation, the third party may seek compensation from both the worker *and* the consumer, arguing that under the doctrine of respondeat superior, an employer is vicariously liable for any tort committed by an employee within the scope of employment.[207]

- The third situation is a claim by a third party that an injury inflicted by a consumer was caused by the negligent care or supervision of the worker, thus making the worker

---

[206] *Id.* at *3. See also Kuechle v. Life's Companion P.C.A., 635 N.W.2d 214 (Minn. Ct. App. 2002), upholding a trial court decision finding for the plaintiff, a nurse employed by a home health care agency, on claims of defamation, disability discrimination under the Americans with Disabilities Act, and reprisal under the Minnesota Human Rights Act.

[207] See discussion of the doctrine of respondeat superior in Section I.D, *supra*.

liable for damages. Although not unknown, such claims are rare and are likely to be dismissed for failure to prove that the worker owed a duty of care to the third party.

The issues that arise in the first situation are illustrated by *Smith v. Ford*:

- **Third-party injures worker**. In *Smith v. Ford*, an employee whose duties included personal care of her employer argued that she was entitled to workers' compensation.[208] The employee had been injured in an accident with another car "while driving home after picking up her employer's dog at the veterinarian's office."[209] Instead of or in addition to seeking recovery from the car's driver, the employee filed a claim for workers' compensation.[210] On appeal of a workers' compensation order awarding disability benefits to the employee, the appellate court held that the employee was a domestic servant excluded from coverage under the Florida workers' compensation law.[211]

The opinion in *Ford v. Smith* does not indicate whether the plaintiff asserted a claim against the driver of the other car. Whether or not the employee was covered by workers' compensation, the employee could have brought a personal injury claim against the driver because the exclusive remedy provision in workers' compensation laws usually does not bar an employee's claims against third parties.[212] It is quite possible that the driver was not at fault or was uninsured and judgment proof,[213] or that there were other obstacles to a successful tort claim. The fact that a worker may not be able to recover for on the job injuries inflicted by a third party, even when the third party is at fault, is yet another reason why it is important to require that CDPAS workers be covered by workers' compensation.

The second situation, injury to a third party caused by a worker in the scope of the worker's employment, is probably more likely to occur in the context of consumer-directed personal assistance services than in the context of personal care services provided by an agency. This is because the range of services performed by a CDPAS worker is broader and therefore will more often bring the worker into contact with third parties.

- **Worker injures third-party**. *Schmidt v. County of Kern*, a case involving a worker who provided of personal assistance services under the California In-Home

---

[208] 472 So.2d 1223 (Fla. Dist. Ct. App. 1985).

[209] *Id.* at 1225.

[210] *Id.*

[211] *Id.* at 1227.

[212] See Torts, *supra* note 30, at 1104 and the discussion of workers' compensation in Section I.D, *supra*, p. 15.

[213] In which case, the provider's potential damages would not be large enough to induce an attorney to take the case on a contingency fee basis.

Supportive Services (IHSS) program, suggests the possibilities for such claims:[214] In *Schmidt,* the IHSS worker was taking the consumer to an appointment with her physician when the consumer began experiencing problems with her oxygen.[215] The worker then drove to the hospital emergency room and parked the car and left it running while he sought medical assistance.[216] An emergency room physician and the worker were both injured when the car started rolling and the consumer, who was still in the car, "accidentally pushed the accelerator instead of the brake in attempting to stop the car."[217] The physician subsequently sued the county, claiming that the county was the employer of the worker and, therefore, was vicariously liable for his negligence.[218] The jury found that the county was not liable because it was not the worker's employer, and the appellate court upheld the verdict.[219]

It is fair to assume that the *Schmidt* plaintiff chose to sue the county, rather than the worker and/or the consumer, because the worker and the consumer had limited assets, whereas the county was a "deep pocket."[220] However, in the absence of another potential defendant with a deeper pocket, both consumers and workers are at risk of claims by third parties injured by the worker in the scope of the worker's employment.[221]

Finally, a New York case provides an example of the circumstances under which a third party might try to assert a claim against a worker for injuries inflicted by a consumer, but the court's ruling for the defendant suggests that there is little risk that the worker would be found liable:

- **Consumer injures third-party and worker is sued**. In *Leifer-Woods v. Edwards*, the plaintiff was injured when she was struck by a motorized wheelchair operated by a patient who had multiple sclerosis.[222] She filed suit against the home health aide who

---

[214] No. F035536, 2001 WL 1338407 (Cal. Ct. App., Oct. 30, 2001).

[215] *Id.* at *2.

[216] *Id.*

[217] *Id.*

[218] *Id.*

[219] *Id.* at 5. See also Patrick v. Macon Housing Authority, 552 S.E.2d 455 (Ga. Ct. App. 2001), in which a personal care attendant who worked in a building in which other tenants employed personal care attendants, sued a home care agency which employed one of the other attendants, claiming that the other attendant was responsible for injuries the plaintiff sustained when she slipped in a puddle of water in the laundry room of the apartment building. This case is discussed in greater detail in Section C of Appendix A.

[220] See Section V.D, *infra,* for a discussion of the risk that the state or county may be found to be the employer of a CDPAS provider.

[221] If a provider or consumer has significant assets that could be jeopardized by such a claim (or any of the other possible bases for liability discussed in this section), the provider or consumer should consider obtaining a personal liability umbrella policy or similar insurance against such claims.

[222] 722 N.Y.S.2d 43 (N.Y. App. Div. 2001).

was caring for the patient at the time and against the agency that employed the aide.[223] The defendants moved for summary judgment on the ground that they had no duty to control the patient's conduct.[224] The trial court granted the motion and the appellate court affirmed, noting that "[a]bsent a special relationship between a defendant and a third person, there is no duty on the part of the defendant to control the conduct of the third person so as to prevent him or her from causing physical harm to another."[225] Although the aide and the agency had a duty to provide care to the patient, they did not have custody of the patient and they did not have a duty to control his use of the wheelchair.[226]

It is likely that other courts would reach the same conclusion in a case involving a CDPAS worker because in the consumer-directed model of care, the consumer controls the relationship and the worker certainly does not have "custody" of the consumer. However, as we discuss in Section II.D, under limited circumstances, a parent or authorized representative of the consumer might be liable for injuries caused by the worker's failure to supervise the consumer.

D. Potential Liability of Authorized Representatives

Authorized representatives are subject to several potential risks of liability. As discussed in Section II.B, the representative may be liable as the joint employer, or even the sole employer, of the worker. This can include liability for on the job injuries, as well as claims by third parties injured by the worker in the course of performing the worker's duties. In states that provide for a civil cause of action for abuse of a vulnerable adult, the representative may also be liable to the consumer if the representative abuses, neglects or exploits the consumer. Such conduct could also result in criminal penalties.[227] If the representative is subject to a reporting obligation, the representative may also be subject to civil or criminal penalties for failure to report suspected abuse, neglect or exploitation to adult protective services.[228]

---

[223] *Id.*

[224] *Id.*

[225] *Id., citing, inter alia, Restatement (Second) of Torts* §315 (1965).

[226] *Id.*

[227] See discussion in Section II.A.3.b.

[228] See discussion in Section II.A.3.a. The authorized representative may be liable for on the job injuries to the provider if the authorized representative is also the owner or renter of the home in which the consumer resides and the provider works, as will often be the case. See Section II.B.1, *supra*. However, in this case, the authorized representative's liability will stem from the representative's status as the owner or renter, rather than the representative's status as the authorized representative.

In addition to these specific bases for liability, the representative owes a duty of care to the consumer in carrying out his or her functions as a representative, creating the potential for liability to the consumer if the representative is negligent in performing those duties.[229] Moreover, although there is as yet no case law on this point, the courts are likely to find that the representative has a fiduciary relationship to the consumer, in which case the representative will owe the consumer a higher duty than the negligence standard of "ordinary care" with respect to health and financial decisions. Finally, an authorized representative might be liable for injuries or property damage caused by the worker's failure to supervise the consumer if the authorized representative knew or had reason to know that the consumer was likely to cause such damage or injuries and the authorized representative was negligent in hiring the worker.

Breach of Fiduciary Duty

Most courts recognize both "formal" fiduciary relationships and "informal" fiduciary relationships:

> Formal fiduciary relationships are those well-settled cases -- such as trustee-beneficiary, guardian-ward, partner-partner, director-shareholder, and attorney-client -- where fiduciary duties apply as a matter of course. Informal fiduciary relationships -- often referred to as "confidential relationships" -- are those in which the court imposes fiduciary duties based on a qualitative evaluation of the relationship.[230]

Because the authorized representative relationship is closely analogous to a guardianship, there is good reason to believe that a court making a "qualitative evaluation of the relationship" would impose fiduciary duties on the representative.[231]

If the representative is a fiduciary, the representative owes a very high duty to the consumer, both in the oversight of the consumer's spending plan and in the supervision of the consumer's CDPAS workers. A fiduciary owes a duty of care,[232] but more importantly, "[t]he duty that is distinctive of fiduciaries arises out of a concern that the fiduciary will take

---

[229] See Torts, *supra* note 30, at 582-4.

[230] D. Gordon Smith, "The Critical Resource Theory of Fiduciary Duty," 55 *Vand. L. Rev.* 1399, 1412-3 (2002).

[231] The authorized representative would also seem to fall within the theory of fiduciary relationships proposed by Professor Smith. Under Smith's theory, "fiduciary relationships form when one party (the 'fiduciary') acts on behalf of another party (the 'beneficiary') while exercising discretion with respect to a critical resource." *Id.* at 1402. Here, the authorized representative acts on behalf of the consumer while exercising discretion with respect to the consumer's Medicaid consumer-directed care benefit, which is a "critical resource."

[232] *Id.* at 1409.

advantage of the beneficiary. It is not a concern about inadvertent behavior, but about self-interested behavior."[233]

The most obvious example of a potential breach of fiduciary duty by a representative is "unjust enrichment" -- that is, use of the consumer's Medicaid benefit or personal assistance services for the representative's own benefit. However, in most cases, representatives will be relatives or friends whose caregiving commitment ensures a high level of integrity in performing their duties. Program interviewees in this study often noted that it takes a high level of commitment for anyone to take on the task of representative in managing personal care. Nevertheless, individuals who are considering becoming representatives should be given complete information regarding their responsibilities, including the associated liability risks.

Liability for Negligent Hiring of a Worker

There is concern in the disability community that a parent or other legally responsible person might be vicariously liable for personal injuries or property damage caused by a disabled consumer, particularly consumers with developmental disabilities. In the context of consumer-directed personal assistance services, there is the additional concern that if a worker fails to supervise or care for the consumer competently, a parent or other person who is acting as the consumer's authorized representative could be vicariously liable for any resulting injuries or damage to third parties. While there do not appear to be any reported decisions addressing the issue in the context of consumer-directed care, the case law on negligent hiring and parental liability strongly suggests that the authorized representative would be liable only if the representative: (1) knew or should have known that the consumer was likely to cause such damage or injuries; and (2) the authorized representative was negligent in hiring or supervising the worker.

There are two theories under which an authorized representative could be held liable for injuries to third parties -- negligent hiring of the worker and, in the case of a consumer who is a minor, parental liability rules. With regard to the first theory, "An employer who negligently hires or retains in his employ an individual who is incompetent or unfit for the job 'may be liable to a third party whose injury is proximately caused by the employer's failure to exercise due care.'"[234] The plaintiff in such a case must prove two elements: that the employer "knew or had reason to know of the particular unfitness, incompetence or dangerous attributes of the employee and could reasonably have foreseen that such qualities created a risk of harm to other persons;"[235] and that "through the negligence of the

---

[233] *Id.* at 1408.

[234] Lingar v. Live-In Companions, 692 A.2d 61, 65 (N.J. Super. Ct. App. Div. 1997).

[235] Di Cosola v. Kay, 450 A.2d 508, 516 (N.J. 1982).

employer in hiring the employee, the latter's incompetence, unfitness or dangerous characteristics proximately caused the injury."[236]

Although a negligent hiring action has not been brought in the context of CDPAS, it is likely that liability can be avoided if the authorized representative: (1) gives a potential worker candid and complete information regarding dangers and risks that may be caused by the consumer; (2) obtains assurances (by checking references and the like) that the worker will be competent to supervise the consumer and ensure that such dangers and risks do not materialize; and (3) is careful to supervise and give instructions to the worker on how to prevent the dangers and risks.

Alternatively, in cases where a parent is the authorized representative for his or her minor child, two theories of parental liability would potentially apply.[237] First, "[e]very state legislature has enacted, in some form, a parental liability statute."[238] Although these statutes "impose liability on parents without regard to the parents' fault,"[239] the amount of damages that can be recovered under such statutes is typically quite limited.[240] Alternatively, a tort claim could be brought under Section 316 of the Restatement (Second) of Torts, which places no limit on damages. Section 316 provides:

> Duty of Parent to Control Conduct of Child
>
> A parent is under a duty to exercise reasonable care so to control his minor child as to prevent it from intentionally harming others or from so conducting itself as to create an unreasonable risk of bodily harm to them, if the parent:
>
> a. knows or has reason to know that he has the ability to control his child, and
> b. knows or should know of the necessity and opportunity for exercising such control.[241]

It is important to stress that the duty described in Section 316 "is only a duty to exercise reasonable care under the circumstances, not a duty to guarantee protection.... [T]he defendant is expected to act only if he knows or should know of his power to do so

---

[236] *Id.*

[237] Although various arguments can be made for holding parents liable for injuries caused by their adult children, these theories have not been accepted. See Joan Morgridge, "When Does Parental Liability End?: Holding Parents Liable for the Acts of Their Adult Children," 22 *Loy. U. Chi. L. J*. 335 (1990)

[238] *Id.* at 336.

[239] *Id.* at 337.

[240] *Id.* at 337-8. See also Andrew C. Gratz, "Increasing the Price of Parenthood: When Should Parents Be Held Civilly Liable for the Torts of Their Children," 39 *Hous. L. Rev*.169, 190-195 (2002).

[241] *Restatement (Second) of Torts*, §316 (1965).

and knows of the need."[242] In the context of consumer-directed care, this means that a parent who is his or her child's authorized representative and who has knowledge (or should have knowledge) that the child is likely to cause injury or damage must exercise reasonable care in hiring a worker. As with a claim for negligent hiring, liability under Section 316 can probably be avoided by carefully hiring and supervising the worker.

It is important to note that state law varies,[243] and that the theories of liability discussed above have not been applied in the context of CDPAS. However, even if these theories of apply, there is little risk of liability if parents and other authorized representatives are conscientious in hiring and supervising workers who will be responsible for consumers who are likely to engage in dangerous or risky behaviors.

[242] Torts, *supra* note 30, at 892.

[243] See generally Gratz, *supra* note 240, and Morgridge, *supra* note 237.

III. LIABILITY RISK OF FISCAL AGENTS

The role of fiscal agents (also called fiscal intermediaries) in the Cash and Counseling programs, and in similar consumer-directed personal assistance programs that use fiscal agents, is limited. Private agencies that contract with a state or county to provide such services have a correspondingly limited risk of liability. The primary function of a fiscal agent (FA) is to issue paychecks to workers based on time sheets prepared and submitted by the consumer, after calculating all required payroll deductions.[244] If the FA fails to pay the worker, or makes a mistake in the amount of payment to the worker, this could result in claims of liability both by the consumer (under either a tort theory or a contract theory) and by the worker (under a tort theory), especially if the missing or incorrect payment results in the loss of the worker's services. These are claims based on direct corporate liability. However, as we explain in Section III.A and Section III.B below, any such claims would encounter significant legal obstacles and problems of proof and, thus, pose minimal risk to agencies that act as fiscal agents.

Another possible source of liability is failure to detect overspending or other misuse of the consumer's allowance (Section III.C). In some consumer-directed personal assistance programs, fiscal agents are responsible for monitoring time sheets for problems, such as services in excess of a consumer's cash allowance, and reporting any such problems or discrepancies either to the consultant who advises the consumer or to the state or county agency administering the program. Although simple errors in monitoring should not give rise to liability, negligence or failure to adhere to the ordinary standard of care in conducting such monitoring could result in liability. However, a consumer who brings a legal action alleging that the fiscal agent was negligent in monitoring problems is likely to have great difficulty proving that any compensable harm resulted. Fiscal agents can also protect themselves from such liability, and from liability for nonpayment and other errors, by implementing an effective quality management program.[245]

A third possible source of liability arises from state adult protective services laws (Section III.D). If a fiscal agent becomes aware that the consumer is a victim of abuse or exploitation, the fiscal agent may be legally obligated to report such abuse or exploitation

---

[244] Fiscal agents also pay invoices for goods and services included in the consumer's spending plan. Doty and Flanagan, *supra* note 3, at 6. Failure to pay such invoices is not likely to have serious consequences to the consumer, but if it does, the legal analysis in Section III.A and Section III.B would apply to a claim arising from the fiscal agent's error.

[245] The quality management program should include measures to ensure compliance with instructions and standards contained in documents such as training manuals and contractual agreements between the fiscal agent and the state. As we discuss in the introduction to Section IV, *supra*, such instructions and standards may be cited by a plaintiff in a negligence action as evidence of the relevant standard of care.

and potentially liable for criminal and civil penalties if the FA fails to do so. Because it is quite easy to comply with the reporting requirements in state APS laws, here, too, there is little real risk of liability.

It should be noted that consumers in the Cash and Counseling Demonstration were given the option of calculating and submitting payroll deductions themselves, rather than using the services of the fiscal agent.[246] In such cases, the liability risks discussed in Section III.A and Section III.B would not apply, and it is less likely that the fiscal agent would have information regarding abuse or neglect that would require the fiscal agent to file a report with adult protective services. However, in states where the fiscal agent has monitoring responsibilities, the analysis in Section III.C would still apply.

Fiscal agents may also be concerned that they could be deemed the worker's employer and therefore vicariously liable for the worker's torts. In Section V.D, which addresses the issue of whether the state can be considered the worker's employer, we explain that under the Cash and Counseling model, the consumer (or the consumer's representative) is clearly the managing employer of the worker, and that it is unlikely that any other person or entity would be found to be the employer for purposes of tort liability. This is because neither the state nor the fiscal agent exercises control over the worker, such as the right to hire, fire, assign and schedule tasks, or supervise the daily work of the worker. For purposes of employee tax and benefit obligations, the federal Internal Revenue Service recognizes that in this situation, the Medicaid recipient and/or his or her representative is the employer, and that the fiscal agent acts only as the employer's agent.[247] Fiscal agents are therefore very unlikely to be vicariously liable for torts committed by workers, although they could face significant penalties if they fail to comply with their obligations under IRS regulations.[248]

Finally, the fact that some fiscal agents are the conduit for large sums of money obviously creates the potential for fraud. However, because the potential for such fraud in CDPAS is not unique or different in character from other situations in which a private agency disburses Medicaid or other government funds, we do not discuss this as a separate basis for liability.

---

[246] Lessons Report, *supra* note 21, at 26.

[247] See discussion of "fiscal agent service organizations" in Doty and Flanagan, *supra* note 3. Under Section 3504 of the Internal Revenue Service Code and IRS Revenue Procedures 80-4 and 70-6, a fiscal employer agent is the "agent" of the common law employer (the consumer or his or her representative) for purposes of filing federal taxes. Under Section 3504, the agent is neither the common law employer nor the statutory employer.

[248] Although there is a Pennsylvania worker's compensation decision finding a fiscal agent to be the employer of a consumer-directed care provider, see Flanagan, *supra* note 39, this administrative decision is an anomaly. See IRS Rev. Proc. 70-6.

With regard to the potential tort claims against fiscal agents, it is important to note that not only is the risk of liability limited, but the amount of damages a consumer or worker is likely to be able to recover is also very limited. This makes it unlikely that a consumer or worker will find it worthwhile to pursue a legal action against a fiscal agent. Perhaps for this reason, there are no reported cases involving claims against a fiscal agent by either consumers or workers. Because of this absence of reported decisions, the discussion of possible claims that follows is necessarily based on predictions about how courts might apply general principles of tort and contract law and is much more speculative than the analysis in Section II.

Although fiscal agents do not have a significant risk of liability, there are steps a fiscal agent may wish to take to further reduce its potential exposure to lawsuits. In addition to implementing a quality management program, the fiscal agent can obtain liability insurance to provide protection against the possibility of a large claim. To protect against claims resulting from loss of a worker's services, the fiscal agent might also seek assurances from the county or state agency that administers the CDPAS program that effective procedures are in place to ensure that consumers prepare and maintain an adequate back-up plan.

A. Potential Liability to Consumers for Breach of Contract

It is probably inevitable that even a well run fiscal services agency will occasionally fail to issue a payment to a worker or underpay a worker.[249] The most likely result of any such error is a telephone call from the consumer or the worker (or the consumer's consultant, after being contacted by the consumer about the problem) and prompt correction of the error by the fiscal agent.[250] However, if the error is not corrected quickly and the worker terminates services to the consumer as a result, and if the loss of services results in serious injury to the consumer,[251] the consumer may in theory bring a breach of contract action against the fiscal agent.[252]

---

[249] In Florida, it "may take a month or more for the system to process an employee paycheck," a lengthy delay that could induce a provider to quit work. Consumer Directed Care Project Director, Florida Department of Elder Affairs, to Sandra L. Hughes, Consultant, ABA Commission on Law and Aging (October 27, 2003) (on file with authors).

[250] In the New Jersey Cash and Counseling program, the fiscal agent maintains a toll-free number and pager/voice mail system for off-hours so problems can be brought to its attention immediately. E-mail, from William Ditto, Executive Director, New Jersey Office on Disability Services, to Sandra L. Hughes, Consultant, ABA Commission on Law and Aging (March 6, 2003) (on file with authors). While such a system is clearly helpful in ensuring quality care, it also provides protection against liability by increasing the likelihood that errors will be corrected promptly, before there are serious consequences.

[251] For examples of the types of injuries that might occur, see the discussion in Section II.A.1, *supra,* of cases alleging provider liability for abandonment or failure to work as scheduled.

[252] The provider cannot assert a contract claim because the contract is between the consumer and the FA, not the provider and the FA -- that is, the consumer contracted with the FA to provide payroll services, whereas the

However, there are serious legal obstacles to such a lawsuit. A breach of contract claim would be based on the agreement between the consumer and the fiscal agent that the fiscal agent will provide payroll services in exchange for a payment to be deducted from the consumer's cash allowance.[253] If the fiscal agent has indeed made a mistake and failed to pay the worker, there would be no difficulty proving a breach of the contract, but there would be considerable difficulty proving that the fiscal agent is legally responsible for the injuries to the consumer. The damages the consumer would seek -- damages to compensate for injuries caused by the worker's failure to work -- are consequential or special damages for breach of contract, defined as damages that "are claimed to result as a secondary consequence of the defendant's nonperformance."[254] Such damages are available only when certain specific conditions are met. Two of these conditions would be extremely difficult to meet: (1) the breach of contract must be the cause in fact of the damages;[255] and (2) the harm to the plaintiff must be "shown to be within in the contemplation of the parties at the time the contract was made."[256]

Plaintiffs in the Cash and Counseling program, and in other consumer-directed personal assistance programs that require the consumer to develop emergency "back-up plans" as an essential component of the program,[257] are likely to encounter considerable difficulty proving causation. The purpose of such a "back-up plan" is to provide uninterrupted care on the inevitable occasions when a worker will fail to work as scheduled -- because the worker is sick, has car trouble, quits without notice, or for any other reason. If the consumer has developed a sound back-up plan, someone will be available to fill the gap caused by the loss of the worker's services. If a consumer suffers an injury after a worker quits work, the immediate cause is arguably the failed back-up plan. In this context,

---

provider contracted with the consumer to perform specified services at a specified pay rate. From the provider's point of view, it is the provider/consumer contract that is breached by the failure to pay the provider.

[253] Such an agreement need not be in the form of a written agreement. All that is required is an agreement between the consumer and the FA that the FA will provide payroll services in exchange for compensation by the consumer. In Florida, the consumer is primarily responsible for payment of the fiscal agent's services, whereas in Arkansas the state is primarily responsible, and in New Jersey, both are responsible. University of Maryland Center on Aging, Cash and Counseling, A Second Glance (2002) at http://www.inform.umd.edu/AGING/CCDemo/secondglance.html (last visited October 1, 2003). In states where the consumer does not pay the fiscal agent, the consumer's remedy would be limited to the tort claims discussed in Section III.B.

[254] Dan B. Dobbs, *Law of Remedies: Damages -- Equity -- Restitution* 776 (2d Ed. 1993) (abridged edition) [hereinafter Dobbs, Remedies]. The primary consequence of the fiscal agent's breach of contract was that a paycheck was not issued to the provider, as required by the agreement between the fiscal agent and the consumer.

[255] *Id.*

[256] *Id.* at 776-7.

[257] The requirement of such plans in consumer-directed care programs is the norm. "Four Core Functions of Quality Management," *Consumer Choice News* (Nat'l Ass'n of State Units on Aging and Nat'l Council on Aging, Washington, D.C.), January 2003, at 9 ("Each state waiver is expected to have a system in place for ensuring emergency back-up in the event that providers of critical services and supports are not available.").

a court is likely to find that the "cause in fact" of the consumer's injury was the failure of the back-up plan, not the fiscal agent's failure to pay the worker.

A fiscal agent can also defend a contract claim by arguing that the failure of the back-up plan and the resulting injury to the consumer were not "within the contemplation of the parties at the time the contract was made."[258] Under New York law, for example,

> Contemplation can be express or implied. The courts take the "commonsense approach" where contemplation is implied. The commonsense approach involves considering the nature, purpose and particular circumstances known by the parties to determine what the parties intended, and "what liability the defendant fairly may be supposed to have assumed consciously, or to have warranted the plaintiff reasonably to suppose that it assumed, when the contract was made."[259]

Here, the consumer and the fiscal agent almost surely did not expect that a worker who was having trouble getting a paycheck would elect to quit work (with the result that he or she is out of work), rather than remain on the job and attempt to correct the payroll problem with the fiscal agent. The consumer and the fiscal agent also undoubtedly did not expect the consumer's back-up plan to fail. For this reason too, the consumer is unlikely to prevail on a contract claim.

B. Potential Tort Liability to Consumers and Workers for Failure to Pay Worker

Both consumers and workers who suffer injuries in connection with the failure of a fiscal agent to issue payments have the option of seeking compensation by bringing a tort claim. However, because similar, although not identical, concepts of causation and foreseeability as described above also apply to tort claims arising from a fiscal agent's failure to pay a worker, any such tort claim is unlikely to be successful.

In the case of a claim by a consumer, even if a court found that the fiscal agent had a duty of care to the consumer, and that the fiscal agent was negligent in performing that duty, the plaintiff consumer would still have to establish that the fiscal agent's negligence

---

[258] Dobbs, Remedies, *supra* note 254, at 776-7.

[259] Sha-shana N.L. Crichton, "Distinguishing Between Direct and Consequential Damages under New York Law in Breach of Service Contract Cases," 45 *How. L. J.* 597, 599-600 (2002).

caused the harm (the serious medical injury to the consumer).[260] The fiscal agent could argue that not one, but two intervening causes were responsible for the plaintiff's injury: (1) the worker responded to the error in the paycheck by quitting work, rather than remaining on the job while trying to get the error corrected; and (2) the consumer's back-up plan failed. The test of whether an alleged "intervening cause" is sufficient to relieve a defendant of liability is foreseeability: "The ultimate inquiry is merely whether the intervening cause is foreseeable or whether the injury is within the scope of the risk negligently created by the defendant."[261] If the fiscal agent convinces the court that at least one of these "intervening causes" was not foreseeable, it will be successful in defeating the negligence claim.

Another defense the fiscal agent could assert against the consumer is contributory negligence -- that is, that the plaintiff consumer's negligence in developing an ineffective back-up plan was at least partially responsible for the injury. Although in most states this defense would not completely relieve the fiscal agent of liability,[262] the defense could result in a significant reduction of the damage award.

Tort claims by workers are at least as problematical as tort claims by consumers. Even assuming the worker can establish that the fiscal agent owed the worker a duty of care, which is itself quite problematic,[263] the worker will have no economic incentive to bring such a claim unless the worker has damages that extend beyond lost wages. Most, if not all, states have a wage payment law that provides a mechanism by which workers can

---

[260] Torts, *supra* note 30, at 443 ("To prevail in a negligence action, the plaintiff must bear the burden of showing that the defendant's negligent conduct was not only a cause in fact of the plaintiff's harm, but also a proximate or legal cause.") The tort test for causation is somewhat more liberal than the contract test of whether the harm was within the contemplation of the parties. Fischer, *supra* note 186, at 112 ("One of the advantages of being able to frame a dispute as sounding in tort rather than in contract is the less restrictive role causation plays in tort. The general tort causation test is based on 'foreseeability,' which in turn has been subdivided into several approaches. Historically, the most influential tests were the 'direct consequences' and the 'foreseeable risk' tests.").

[261] Torts, *supra* note 30, at 462.

[262] See discussion of contributory and comparative negligence in Section I.D, *supra*.

[263] A court might well find that the fiscal agent did not owe the provider a duty of care that encompasses the provider's economic loss. "Among strangers -- those who are in no special relationship that may affect duties owed -- the default rule is everyone owes a duty of reasonable care to others to avoid physical harm." Torts, *supra* note 30, at 578. When parties do not have a contractual relationship, many courts hold that the "economic loss rule" operates to bar recovery in negligence for the provider's purely economic losses: "Absent conduct on the defendant's part resulting in or causing bodily injury or property damage to the plaintiff, there is no independent duty or obligation flowing from general public policy which would warrant tort-based remedies being applied to remedy any economic loss caused by or resulting from defendant's negligence." Fischer, *supra* note 186, at 115.

recover lost pay.[264] Because these laws often include provisions for attorney's fees,[265] enforcement through administrative proceedings,[266] and damages and penalties in addition to the lost wages,[267] including criminal penalties,[268] they are a very effective remedy for workers who seek to recover unpaid wages.

Thus, it will be worthwhile for a worker to file suit only if the worker can claim damages above and beyond unpaid wages. It may be that the lost pay triggered a series of financial disasters for the worker -- for example, the worker was unable to pay the mortgage and lost the family home. But as with a claim by a consumer, the worker would encounter difficulty establishing both causation and that there was no contributorily negligence. Presumably none of the financial disasters would have occurred if the worker had remained on the job and persisted in attempts to correct the fiscal agent's error. The fiscal agent can argue that the worker was contributorily negligent, and in large part responsible for the financial disaster for which damages are claimed, because the worker chose to quit employment with the consumer precipitously, before the worker had obtained other employment. Similarly, it can be argued that this decision, perhaps coupled with other instances of financial mismanagement by the worker, was the proximate or legal cause of the worker's catastrophic damages.

As an alternative to a claim based on negligence, a consumer or worker might allege an intentional tort such as intentional infliction of emotional distress.[269] Here, too, the plaintiff is likely to encounter problems proving liability, causation,[270] and damages. To establish liability for an intentional tort, the plaintiff must prove that the defendant acted intentionally or at least recklessly -- a standard a CDPAS consumer or worker is very unlikely to be able to meet.[271]

---

[264] See generally 51B C.J.S. *Labor Relations* §1290, *et seq.* (XIV. Wages and Hours Regulations, E. Actions for Wages, Damages, or Penalties, 4. Damages and Amount of Recovery) (2002). "In actions by an employee under a statute regulating wages or the payment thereof, the plaintiff is entitled to recover earned wages and any additional sum provided for by the statute." *Id.* at §1290.

[265] See, e.g., *NE Rev. Stat. Ann*. §48-1231 (LexisNexis 2002).

[266] See, e.g., *ID Code* §45-617 (Michie Supp. 2002).

[267] See, e.g., *ID Code* §45-607 and 608(4) (Michie Supp. 2002); *NE Rev. Stat. Ann*. §48-1232 (LexisNexis 2002).

[268] See, e.g., *UT Code Ann*. §34-28-12 (LexisNexis 2001); *WA Rev. Code Ann*. §49.48.020 (West 2002).

[269] See Section III.C, *infra*, for a discussion of the difficulties in proving a claim of negligent infliction of emotional distress.

[270] Although the causation principles that apply to a claim for negligence do not apply to intentional torts, the concept of "loss causation" may require the plaintiff to prove that the loss was caused by the fiscal agent's failure to pay the provider, rather than by some other factor such as the consumer's negligent preparation of the back-up plan or the provider's preexisting indebtedness. See Fischer, *supra* note 186, at 122-3. "A mere cause and effect relationship between the occurrence and the defendant's legal wrong may not be sufficient to impose liability for all succeeding losses." *Id.* at 122.

[271] For example, to prove a claim of intentional infliction of emotional distress, the *Restatement (Second) of Torts* requires that the plaintiff show that "(1) the defendant cause[d] severe emotional distress, (2) intentionally or

C. Potential Liability to Consumers for Failure to Monitor Expenses and/or Detect Problems

In two of the three Cash and Counseling states, fiscal agents have some responsibility for monitoring expenses and detecting problems.[272] In New Jersey, the fiscal agent will not cut checks beyond a consumer's allowance. Moreover, if inappropriate requests are made, the fiscal agent alerts the state agency. Either the consultant or the state agency staff itself would investigate the situation.[273] In Arkansas, where the fiscal agent and consultant functions are performed by the same agency, the fiscal agent and consultant both monitor for problems and address them at regular meetings. As in New Jersey, the Arkansas fiscal agent may not cut checks that exceed a consumer's allowance and will alert the consultant to investigate the problem. In isolated instances, a client can elect to overspend in one month but if the client does so, the next month's allowance would automatically be adjusted to account for the funds. If problems persist, the state is notified.[274]

If the fiscal agent has responsibility for monitoring the consumer's expenditures, the courts are likely to find that the consumer is owed a duty of care.[275] But establishing a duty of care is not the same as establishing liability. In Arkansas, if the consumer persists in having problems keeping spending within the cash allowance, the consumer can be dis-enrolled from the CDPAS program and transferred to traditional agency home care. It is unclear whether dis-enrollment would also result from overspending that was belatedly detected because of the fiscal agent's negligent monitoring, but even if it did, the consumer would still face two major obstacles in any lawsuit against the fiscal agent. First, the fiscal agent could argue that the consumer was contributorily and, indeed, primarily negligent, because the consumer was responsible for the overspending and the fiscal

---

recklessly, (3) by extreme and outrageous conduct." Torts, *supra* note 30, at 826.

[272] In Florida, the consultant is responsible for fiscal monitoring, and the fiscal agent is responsible only for preparing monthly expenditure reports to consultants and consumers. "The reports are the main tool used to monitor the level and appropriateness of consumer reports." State of Florida, Department of Elder Affairs, *Final Narrative Report, Consumer Directed Care Project* 7 (2002). For CDPAS program that assign consultants the responsibility for fiscal monitoring, the analysis of potential liability in this section would apply.

[273] Ditto e-mail dated March 6, 2003, *supra* note 250.

[274] E-mail from Sandra Barrett, Assistant Director, Arkansas Division of Aging and Adult Services, to Sandra L. Hughes, ABA Commission on Law and Aging (March 5, 2003) (on file with authors).

[275] The question of whether a duty of care exists is a legal question that is decided by the judge, not the jury. Torts, *supra* note 30, at 582-3. As a general matter, decisions regarding the existence of a duty of care are "constructed by courts from building blocks of policy and justice." *Id.* at 582. Where the state, as a matter of policy, has attempted to protect CDPAS consumers by giving the fiscal agent the responsibility of monitoring the consumer's expenditures, it seems consistent with both policy and justice to require a fiscal agent to exercise ordinary care in discharging that responsibility.

agent was responsible only for failing to detect the overspending. Second, it is unclear what damages, if any, the plaintiff can prove resulted from removal from the CDPAS program.[276]

Alternatively, the consumer might consider bringing a claim for negligent infliction of emotional distress against the fiscal agent, but the consumer would have considerable difficulty establishing the elements of that claim. "Most courts today do allow many recoveries for stand-alone [that is, unaccompanied by personal injury] emotional harm," if "the defendant was negligent and emotional harm was foreseeable and caused in fact by his negligence."[277] However, "most courts [also] hold that a plaintiff can recover only if a normally constituted person would suffer, and the plaintiff in fact suffered severe distress."[278] Even if a plaintiff could convince the court that for a normally constituted disabled person, dis-enrollment from a consumer-directed personal assistance services program results in serious damage to the disabled person's sense of control and autonomy, causing severe and foreseeable distress, many states have adopted additional restrictions on such claims which would make success unlikely.[279] In addition, in at least some states, the consumer's contributory negligence could be a defense to a claim of intentional infliction of emotional distress.[280]

Finally, as a government contractor, the fiscal agent could try to establish entitlement to an immunity defense. In some circumstances, governmental "immunity from liability is shared by private parties who contract with the public body for performance of public work."[281] Although this immunity has most typically been applied to companies that manufacture products for the government in accordance with government specifications,[282]

---

[276] In an action against the fiscal agent, the consumer cannot seek reinstatement to the program as a remedy because the fiscal agent does not have the authority to reinstate the consumer.

[277] Torts, *supra* note 30, at 836.

[278] *Id.* See also *id.* at 851-2.

[279] *Id.* at 836-839.

[280] Compare Meredith v. Hansen, 697 P.2d 602, 604 (Wash. Ct. App. 1985) (in action by stepsons against driver for negligent infliction of emotional distress caused by witnessing the defendant's car strike and kill their stepfather, court refused to impute the stepfather's contributory negligence to the plaintiffs); and Sorrells v. M.Y.B. Hospitality Ventures of Asheville, 424 S.E.2d 676, 671 (N.C. Ct. App. 1993) (also holding that negligence of decedent driver could not be imputed to plaintiffs in their action for negligent infliction of emotional distress); to Godfrey v. Steinpress, 180 Cal. Rptr. 95, 106 (Cal. Ct. App. 1982) (in action for negligent infliction of emotional distress, court finds California authority "persuasive on limiting contributory negligence to simple negligence cases").

[281] A.E. Korpela, Annotation, *Right of Contractor with Federal, State or Local Public Body to Latter's Immunity from Tort Liability*, 9 A.L.R.3d 382, 385 (1966). In some states, the wording of the state's tort claims act may be such that it provides a basis for claiming that state law has extended immunity to at least some private agencies that perform governmental-type functions. For example, the Indiana Tort Claims Act extends immunity to "community action agencies." See Greater Hammond Community Services v. Mutka, 735 N.E.2d 780 (Ind. 2000).

[282] Torts, *supra* note 30, at 737-41.

or that construct buildings, highways and other public works,[283] more recently some state courts have extended this derivative immunity to professionals who provide services under contract to the government.[284] However, even in states that recognize such immunity, it is available only for allegedly negligent acts that resulted from a contractor's compliance with specifications mandated by the contracting government agency.[285] Because it is highly unlikely that an injury to the consumer resulted from the fiscal agent's compliance with government specifications regarding precisely how the fiscal agent should perform its monitoring duties or avoid overpayments, this defense almost certainly will not be available to an fiscal agent who is sued for failure to monitor expenses or detect problems.[286]

D. Potential Liability Under State Adult Protective Services Laws

It is possible that a fiscal agent will become aware that the consumer is being abused or neglected, particularly if the abuse is financial in nature[287] and being inflicted by a worker, a family member, or the consumer's authorized representative.[288] If the fiscal agent is operating in one of the seventeen states that require "any person" to report suspected abuse,[289] the fiscal agent must report the suspected abuse and may risk significant civil and criminal penalties if it fails to do so. In the states that do not provide for universal mandatory reporting, but, instead, list occupational categories which are required to report, the categories typically listed in the statutes -- medical professionals, social workers, public safety employees and the like -- are unlikely to cover employees who work

---

[283] See generally, Korpela, *supra* note 281.

[284] See Jeffrey L. Janik and W. Wayne Siesennop, "Governmental Immunity for Professional Independent Contractors," *WI Lawyer*, March 1998, at 14.

[285] See, e.g., Vanchieri v. New Jersey Sports and Exposition Authority, 514 A.2d 1323, 1326 (N.J. 1986) ("When a public entity provides plans and specifications to an independent contractor, the contractor will not be held liable for work performed in accordance with those plans and specifications."); and Estate of Theresa E. Lyons v. CNA Insurance Companies, 558 N.W. 658, 663 (Wisc. Ct. App. 1996) (government contractor "entitled to common law immunity when: (1) the governmental authority approved reasonably precise specifications; (2) the contractor's actions conformed to those specifications; and (3) the contractor warned the supervising governmental authority about the possible dangers associated with those specifications that were known to the contractor but not to the governmental officials.").

[286] It is much more likely that an injury or damages resulted from the FA's *failure* to comply with government specifications.

[287] Awareness of financial abuse requires more than knowledge or suspicion of accidental or unintentional misspending or misuse of funds by the provider, family member or authorized representative. The National Center on Elder Abuse defines "exploitation" as "illegal taking, misuse, or concealment of funds, property or assets of a vulnerable elder." National Center on Elder Abuse, "FAQ's on Elder Abuse," at www.elderabusecenter.org/default.cfm?p=faqs.cfm#one (last visited October 1, 2003).

[288] For a more complete discussion of state laws protecting vulnerable adults see Section II.A.3, *supra*.

[289] See note 99, *supra* listing these states and the citations for their mandatory reporting laws.

for a fiscal services agency. However, because there are exceptions,[290] and because state APS laws are frequently amended, fiscal agents should check the laws in their states to determine whether they are subject to a mandatory reporting requirement.[291]

[290] For example, in Ohio, mandatory reporters include "any senior service provider," which is defined as "any person who provides care or services to a person who is an adult as defined in subdivision (B) of section 5101.60." *OH Rev. Code Ann.* §5101.61(A)(1) (Anderson 1998). Subdivision B defines "adult" as "any person sixty years of age or older within this state who is handicapped by the infirmities of aging or has a physical or mental impairment which prevents the person from providing for the person's own care or protection, and who resides in an independent living arrangement." *OH Rev. Code Ann.* §5101.60(B) (Anderson 1998).

[291] The FA may also have a contractual obligation to report abuse. For example, in Arkansas, the contracts with the two agencies that provide consultant and fiscal agent services require that the agencies report suspected abuse. See discussion in Section IV.E, *infra*.

IV. LIABILITY RISK OF CONSULTANTS

One of the distinctive features of the Cash and Counseling Demonstration during its experimental phase was the use of private agencies and individuals to advise and guide the consumer through the process of developing a spending plan and hiring, training and supervising CDPAS workers.[292] Consultants also have primary responsibility for monitoring the consumer's experience in consumer-directed care. The state typically retains the responsibility for deciding whether applicants are eligible to participate in the program and for approving the care plans that are translated into the consumers' monthly cash allowances.[293] In Arkansas and New Jersey, these services are provided by consultants[294] employed by private agencies that contract with the state[295] to provide consultant services. Florida contracts with both agencies and individuals to serve as consultants.[296] Because the consultants' responsibilities are so critical to the program, consultants face the greatest liability risk of any of the individuals and entities involved in consumer-directed care -- the risk of liability is proportionate to the scope of the responsibilities assigned to consultants. These responsibilities typically include the following:

- The consultant helps determine whether an authorized representative is needed and participates to varying degrees in the selection of an authorized representative, where the consumer is unable to direct the consumer's care or if the consumer elects not to do so. If the consultant fails to obtain the consumer's designation of a representative where one is needed, or if the representative fails to act in the consumer's interest (for example, by ignoring care problems or misusing the

---

[292] The experimental phase of the three programs refers to the approximately 18 months between the time each state began enrolling consumers to the time of the on-sight evaluation by Mathematica Policy Research, Inc. Enrollment began in December 1998 for Arkansas, November 1999 for New Jersey, and June 2000 for Florida. Lessons Report, *supra* note 21, at 3.

[293] To the extent that consumer-directed personal assistance services programs in other states allocate responsibilities between the state and consultants differently, the legal analysis of the liability risks associated with each responsibility would essentially be the same. However, if the state performs a function that is discussed in this section, the state may be able to assert a governmental immunity defense that would not be available to private agencies and individual consultants.

[294] As discussed in Section I.A, the term "consultant" is used by Florida and New Jersey, whereas Arkansas uses the term "counselor." In this article we use "consultant" because it best reflects the advisory role that the consultants play in consumer-directed care.

[295] Throughout this report, the term "state" is used to refer collectively to any governmental entity, other than the Federal Government, that has responsibility for administering the Cash and Counseling program (e.g., state administrative departments, counties, etc.).

[296] E-mail from Lou Comer, Consumer Directed Care Project Director, Florida Department of Elder Affairs, to Sandra L. Hughes, Consultant, ABA Commission on Law and Aging (June 2, 2003) (on file with authors).

consumer's cash allowance), and injury to the consumer results, the consumer may consider a damage action alleging that the consultant was negligent (Section IV.A).

- The consultant helps the consumer develop an acceptable written plan for spending the cash allowance, including a back-up plan. If an injury results from a defect in the spending plan or the back-up plan, the consumer may consider suing the consultant for: negligent authorization of a spending plan that provides for inadequate care or services; negligent failure to include in the plan services that the consumer contended were necessary; or negligent failure to help the consumer develop an adequate back-up plan (Section IV.B). Whether the state ultimately may be liable for negligent approval of a plan is discussed in Section V.E.

- The consultant is responsible for advising the consumer about hiring, training and supervising CDPAS workers. If a consumer is subsequently injured by an incompetent worker, the consumer may claim that the consultant was negligent in performing these tasks and that the consultant is therefore liable for the consumer's injuries (Section IV.C).

- The consultants are responsible for monitoring consumer satisfaction, safety, and use of funds through initial home visits, telephone calls, reviews of receipts and worker's time sheets, and periodic reassessments, and for initiating action to correct problems where necessary. If the consultant is not conscientious in the performance of these responsibilities, and the consumer is injured as a result of inadequate care, the consumer could assert a claim for negligent failure to detect or report the inadequacy of services provided by the care worker (Section IV.D).

The above scenarios are all based on theories of direct liability. The role of the consultant in assisting in the development of a services plan and monitoring that plan could theoretically give rise to a claim that the consultant is the *de facto* employer of the worker and, thus, vicariously liable for any injury negligently caused by the worker. However, the limited case law, such as the *Reeder* case discussed below, suggests that the likelihood of success of such a claim is quite low, as long as the consumer retains the key employer functions of hiring/firing, assigning and scheduling tasks, and supervising care.

Finally, in addition to the consultant's responsibility for monitoring safety as part of the consumer-directed care program, the consultant may also have a legal responsibility under the state's adult protective services law to report abuse or neglect of the consumer (Section IV.E).

Despite the broad scope and importance of the consultant's role in consumer-directed care, the liability risk can be minimized by taking the following steps:

- The extent and limitations of the consultant's functions can be clearly communicated to the consumer and well documented. The role is quite different and more limited than that of a case manager.

- The consultant should be careful to follow all written procedures or instructions regarding the consultant's activities and should perform all his or her responsibilities conscientiously and with reasonable care.

- Although the consultant can and should answer questions and facilitate decision-making by presenting options, it is also advisable to make it clear that it is the role of the consumer, not the consultant, to make all decisions regarding the consumer's care.

- If the consultant believes a consumer's decision is not just unwise but potentially dangerous (for example, a decision regarding the spending plan or the hiring of a particular worker), the consultant can communicate the concern to the consumer, while making it clear that the consultant is only giving the consumer advice and that the decision is ultimately the consumer's. If the consumer disagrees with the consultant's advice, the consultant should document the fact that the advice was given and that the consumer elected to disregard that advice. Of course, if the consumer's or representative's actions indicate an inability to self-manage care, then the assessment process for determining eligibility for the program can be re-applied.

- Agencies and individuals that provide consultant services should consider carrying general liability insurance.

Taking care to follow all written procedures or instructions is particularly important because a court may look to those procedures or instructions as providing the relevant standard of care in a negligence action.[297] *Caulfield v. Kitsap County*, a case discussed in greater detail in Section IV.D and Section V.C, illustrates this point.[298] In *Caulfield*, a county was found liable for negligence in supervising the home care provided to a severely disabled consumer. Among other arguments, the plaintiff cited language in the interagency agreement between the county and the state department of social and health services as support for his claims. The court noted that the interagency agreement "incorporates the Aging and Adult Services Field Manual, which enumerates minimum requirements for COPES [the home care program] case managers. *The contract thus*

---

[297] For this reason, states should take great care in drafting regulations, procedures, contractual agreements, and any other documents that describe the duties and responsibilities of consultants and fiscal agents in CDPAS. Such duties and responsibilities should be specific and be consistent with the philosophy of consumer direction and the limited role of consultants and fiscal agents under the Cash and Counseling model. Any language that suggests that the state, the consultant and/or the FI is responsible for the consumer's safety should be avoided.

[298] 29 P.3d 738 (Wash. Ct. App. 2001).

provides evidence of the reasonable standard of care for caseworkers managing COPES in-home placements."[299]

Similarly, in the Cash and Counseling states, training manuals for consultants and contractual agreements between the states and consultants contain statements that can be cited as evidence of the standard of care. For example, Florida has issued a document entitled "Guidelines for Consultants" that describes how consultants should handle problems and when and how they should intervene. Consultants are given directions on how to develop a "corrective action plan."[300] Florida's "Quality Management Plan" provides that the consultant "approves" both the spending plan and the back-up plan. The document specifically states that "the consultant fulfills a monitoring role for the state to ensure that the CDC allowance is used to meet the long-term care needs of the consumer and to assure the needs of a vulnerable population are met."[301]

On the other hand, program documents may also contain statements that can be helpful to a consultant in defending a claim of negligence, particularly where they clearly define rules and expectations. For example, the agreement that must be signed by both the consumer and the consultant in Florida lists the respective responsibilities of each party. The consumer's responsibilities include: "write a purchasing plan;" "train workers about their job duties and what you expect from them;" and "contact your consultant if you have concerns about something, so small problems don't become big problems." The consultant's responsibilities to the consumer include: "provide training;" "review... [the] purchasing plan and backup plan;" and "review... monthly budget reports from the project bookkeeper." The agreement also lists "What the Consultant will *not do*," including "interview, hire, train or supervise your workers;" "find back-up or emergency workers;" and "write your purchasing plan."[302]

In sum, although the responsibilities of the consultants are critical to the success of consumer-directed care, the risk of liability can be minimized by clearly defining roles and following agreed upon procedures. Concerns about liability should not deter agencies and individuals from serving as consultants.[303]

---

[299] *Id.* at 746 (emphasis supplied).

[300] "Guidelines for Consultants," Florida Agency For Health Care Administration (December 1999).

[301] "Consumer Directed Care Research Project: Quality Management Plan," Florida Agency For Health Care Administration (December 1999).

[302] "Consumer Directed Care Research Project: Consumer/Consultant Agreement" Florida Agency For Health Care Administration (December 1999) (emphasis added), a copy of which is attached as Appendix C.

[303] It is also possible, although not likely, that the law in the consultant's state may extend governmental immunity to government contractors in some circumstances, thus providing consultants with additional protection against liability. See the discussion of this issue in Section III.C, *supra*.

A. Negligent Designation of an Authorized Representative

The procedures for appointment of an authorized representative create potential liability issues for both the states and consultants. In each of the three Cash and Counseling states, the state has elected to adopt relatively informal criteria and procedures for the selection of representatives. The procedures that are in place in Arkansas and New Jersey suggest that these states view the appointment of a representative as the consumer's right and responsibility and the role of the consultant as merely to explain and document the process. However, because the procedures in all three states are so informal, the consultant may, in fact, play a significant role, at least in some cases, which creates the risk that a consultant may be sued for negligence in connection with the designation of, or the failure to designate, a representative.[304] The procedures in each of the three states can be briefly described as follows:

- In Arkansas, "[t]he question of who to select as a representative was usually settled informally,"[305] and the final report on implementation of the Cash and Counseling Demonstration concluded that "[t]here was no need in Arkansas for a formal process to determine the need for a representative or identify one."[306] Although the state has not adopted formal criteria and procedures to determine whether a representative is needed and, if so, who should serve in that capacity, the state does use two forms in connection with the designation. The first form, the "IndependentChoices Designation of Authorized Representative," is signed by both the consumer and the representative and authorizes the representative to "use the IndependentChoices monthly allowance to purchase the services and items to meet my personal care needs as listed on the Cash Expenditure Plan and... assure that all items purchased and services received with the IndependentChoices allowance are paid."[307] In addition, the representative must review a list of "representative requirements" and then complete and sign the "IndependentChoices Representative Screening Questionnaire."[308] [See copy at Appendix D.] The representative is designated and the forms are usually completed under the supervision of the consultant.[309] These

---

[304] This informality also exposes the state to potential liability for failure to comply with due process standards, as we discuss later in Section V.B.

[305] Arkansas Implementation Report, *supra* note 19, at 91.

[306] *Id.* at 94.

[307] IndependentChoices Designation of Authorized Representative, Arkansas Division of Aging and Adult Services (October 1998).

[308] IndependentChoices Representative Screening Questionnaire, Arkansas Division of Aging and Adult Services (October 1998). The "representative responsibilities," which are listed in an attachment to the questionnaire, include: "show a strong personal commitment to the participant; show knowledge about the participant's preferences; agree to visit the participant at least weekly; be willing and able to meet all program requirements listed of the participant;" and "obtain the approval of other family members to serve."

[309] Arkansas Implementation Report, *supra* note 19, at 92.

procedures all add helpful clarity and deliberateness to the designation of a representative by a consumer. In addition, as a safeguard, the contracts between the state and the two agencies that provide consultant services require the agencies to engage in more intensive monitoring when a representative has been designated.[310]

- Similarly, in New Jersey, "[u]sually the choice of a person to serve as representative was obvious and grew out of the current relationships of the consumer." Like Arkansas, New Jersey formalizes the process to the extent of using "Designation of Authorized Representative" and "Representative Screening Questionnaire" forms that are similar to those in Arkansas.[311] [See copy at Appendix D.] However, the primary purpose of this questionnaire is apparently to help the prospective representatives decide "whether they wish[ ] to undertake this role,"[312] as is reflected in the state's description of "Procedures for establishment of an authorized representative:"

  > When a consultant determines that a representative is necessary for a participant to be successful, and the participant agrees, the potential representative will be given the *Representative Description* to review. The consultant will interview the potential representative and complete the *Representative Screening Questionnaire.* If the potential representative volunteers to serve, then the *Designation of Authorized Representative Form* will be signed and witnessed. A copy will be maintained in the participant file and the original forwarded to the State Program Office.[313]

- Florida does not use a representative screening questionnaire. Instead:

  > Initially, the consultant determines the desirability/necessity for a representative with input from the caregiver, the case manager, the case file and his or her personal observations. A caregiver or other

---

[310] The contracts require the agencies to "[d]emonstrate that the Contractor [i.e., the consultant agency] and any proposed subcontractor(s) will have a plan to ensure that representatives serving on behalf of participants are acting in the best interest of the participant and will develop a separate monitoring plan for each individual situation. Monitoring must be frequent enough to ensure the safety and well being of the participant. Monitoring for participants using a representative shall be, at least initially, more stringent than for participants who choose to self-manage." Contract for fiscal year 2003 between the State of Arkansas and the Phillips County Development Center, Attachment IV at 4-5; Contract for fiscal year 2003 between the State of Arkansas and Aspen Management Group, LLC, Attachment IV at 4-5.

[311] Both forms were issued by the New Jersey Department of Human Services, Division of Disability Services, Personal Preference Program, New Jersey Cash and Counseling Demonstration.

[312] New Jersey Implementation Report, *supra* note 18, at 116.

[313] The procedures were issued by the New Jersey Department of Human Services, Division of Disability Services, Personal Preference Program, New Jersey Cash and Counseling Demonstration. The "representative description" that is referred to in the procedures differs from Arkansas' list of "representative responsibilities."

person who is a potential representative attends the enrollment presentation and, if indicated and the individual agrees, his or her name is entered on the application as the consumer's representative.[314] The consumer has the right to appeal the consultant's appointment of a representative to the state.[315]

The consultant's involvement in the selection of an authorized representative is a matter of concern because of the potential for situations in which a representative is negligent in performing his or her responsibilities or otherwise fails to act in the consumer's best interest. In these situations, who is responsible for any resulting injury? For example, the representative's negligence may result in inadequate care by a worker that causes serious injury or damage to the consumer's health; the representative may intentionally misuse the consumer's allowance, also resulting in inadequate care and injury to the consumer; or the consultant may fail to secure the consumer's designation of a representative, even though one is needed. In each of these situations, the consumer may bring an action to seek compensation from the consultant, especially if the consultant is employed by an agency that is perceived as a "deeper pocket" than the representative, based on the claim that the consultant was negligent in investigating or approving the selection of the representative.

If the representative is the parent of a consumer who is a minor, or is the guardian of or holds a power of attorney from a consumer who lacks mental capacity, the representative will already have a legal relationship to the consumer that sanctions decision-making on the consumer's behalf by the representative. In such situations, there should be no basis for a claim that the consultant was negligent in approving the appointment of the representative. There also should be no potential liability if the consumer has capacity to direct his or her own services, but nevertheless elects to designate a representative.[316] If the consumer's designation later proves to be unwise and the consumer suffers injury as a result, the consultant should be able to defend against any potential claim of liability by pointing out that he or she acted consistent with the philosophy

---

[314] E-mail messages from Lou Comer, Consumer Directed Care Project Director, Florida Department of Elder Affairs, to Lori Simon-Rusinowitz, Research Director, Cash and Counseling Demonstration and Evaluation at the University of Maryland, Center on Aging (August 9, 2002, and October 29, 2003) (on file with authors).

[315] Comer e-mail dated June 2, 2003, *supra* note 296. Arkansas and New Jersey do not have a formal appeal procedure because selection of the authorized representative is assumed to be a matter of the consumer's choice. E-mail from William Ditto, Executive Director, New Jersey Office on Disability Services, to Sandra L. Hughes, Consultant, ABA Commission on Law and Aging (July 2, 2003) (on file with authors); and e-mail from Sandra Barrett, Assistant Director, Arkansas Division of Aging and Adult Services, to Sandra L. Hughes, Consultant, ABA Commission on Law and Aging (July 1, 2003) (on file with authors).

[316] For example, the consumer may not wish to assume the responsibilities associated with consumer-directed care. In Arkansas, about half the participants elected to designate an authorized representative. Arkansas Implementation Report, *supra* note 19, at 94.

of consumer-directed care by honoring the consumer's wishes, as long as the consumer's wishes were clearly expressed and documented.

The situation is quite different, however, in the case of a mentally or developmentally disabled consumer who may lack the capacity to designate a representative and who does not already have a legal surrogate in place. In these situations, the designation of a representative will determine who will have control over the development of the spending plan and the hiring, training and supervision of care workers.

There are no reported decisions in which a consultant or case manager has been sued in connection with the investigation or designation of a representative. However, cases alleging negligence in the placement of foster children provide an analogy, albeit imperfect. In foster care placement, as in designation of a representative, the state is making a critical decision regarding who will supervise the care of an extremely vulnerable citizen. Although most of the reported decisions regarding foster care placement have focused on issues of governmental immunity, there are a significant number of cases in which "the evidence of negligence by the placing agency established governmental tort liability or... the allegations of negligence were sufficient to state a cause of action against the government."[317]

Thus, for example, in *Bartels v. County of Westchester,* the appellate court upheld a trial court's refusal to dismiss an action brought by a child who alleged that she had been "severely scalded as a result of the unfitness and carelessness of [her] foster parents in bathing her."[318] The plaintiff's allegations included the charge that "the county acted negligently in the selection of foster parents."[319] In upholding the trial court, the appellate court held that the county was "required to exercise due care in the selection of foster parents and to oversee diligently the rendition of proper care by the foster parents."[320]

These cases and general principles of negligence law suggest that a court may well find that a consultant owes a duty of care in the investigation and selection of a representative. Therefore, if a plaintiff can prove that a consultant failed to adequately investigate the qualifications of a representative, or that the consultant approved selection of a representative who the consultant had reason to know was not qualified, there is a real risk that the consultant will be found liable for injuries caused by the representative. To avoid such liability, states should consider adopting procedures similar to those we

---

[317] Sonja A. Soehnel, Annotation, *Governmental Tort Liability for Social Service Agency's Negligence in Placement, or Supervision after Placement, of Children,* 90 A.L.R.3d 1214, 1218 (1979).

[318] 429 N.Y.S.2d 906, 907 (N.Y. App. Div. 1980).

[319] *Id.* at 909.

[320] *Id.* at 910. See also Babcock v. State of Washington, 809 P.2d 143 (Wash. 1991) (allegation that the state was negligent in its investigation of a foster parent prior to placement of four girls in his care; the foster parent, who was a convicted rapist, subsequently sexually abused each of the four girls).

describe in the next section of the report (Section V.B), which discusses the state's potential liability for failure to adopt adequate criteria and procedures for the selection of a representative.

B. Negligent Assistance in the Development of the Spending Plan and Back-up Plan

Another important responsibility of the consultants is to assist consumers in developing a spending plan and a back-up plan. Although most of the consumer's cash allowance typically is used to pay wages to CDPAS workers, consumers have the discretion to spend part of their allowance on a variety of goods and services that enable them to function more independently, such as equipment (for example, a micro-wave oven to heat pre-cooked meals) and home modifications (for example, installation of grab bars in the bathroom).[321] Within the constraints of that allowance, consumers also have discretion in setting the pay rate and scheduling the hours worked by workers.[322] An essential tenet of consumer-directed personal assistance services is that the consumer is the expert on the consumer's care needs, so the consultant's role in this aspect of the program is necessarily limited to advising the consumer regarding options for structuring the spending plan and the back-up plan.[323]

The consultant also has the primary responsibility for approving standard spending plans. In Arkansas, the state prepared a list of goods and services clearly covered by the cash benefit. "If all the uses of the cash were in the list of approved uses, the counselor could approve the cash plan."[324] Although during the demonstration, New Jersey required state approval of the plan, "[a]s of early 2003,... [t]he consultants would be allowed to approve spending plans that contained only items on a pre-specified list developed by the state based on its experience in the demonstration."[325] In Florida, consultants initially approve spending plans for all categories of consumers (elderly consumers, developmentally disabled consumers, physically disabled adults, and consumers with traumatic brain and spinal cord injuries), and final approval by the state is required only for some categories of consumers.[326]

---

[321] Arkansas Implementation Report, *supra* note 19, at xii and 28.

[322] *Id.* at 61, 64 and 119-20.

[323] Consultants are responsible for communicating to consumers that the consultant's role is primarily advisory, in this and all other aspects of consumer-directed personal assistance services. Consultant training in all three states emphasizes that the role of a consultant is quite different from that of a traditional case manager.

[324] Arkansas Implementation Report, *supra* note 19, at 74.

[325] New Jersey Implementation Report, *supra* 18, at 162.

[326] E-mail from Lou Comer, Consumer Directed Care Project Director, Florida Department of Elder Affairs, to Sandra L. Hughes, Consultant, ABA Commission on Law and Aging (October 29, 2003) (on file with authors).

If an injury results from an alleged defect in the spending plan or the back-up plan, it is conceivable that the consumer might sue the consultant claiming that the consumer received inadequate or incorrect advice. Because the consumer is the ultimate decision-maker regarding the spending plan and the back-up plan, a consumer would have some difficulty in proving that a defect in the plan was the fault of the consultant, rather than the consumer, *unless* the consultant either failed to alert the consumer to a clear defect or failed to provide the consumer with any advice at all.

There are no reported cases involving such claims against consultants in consumer-directed care. However, the following two lawsuits against case managers responsible for overseeing medical care in connection with a workers' compensation claim suggest that the consumer would need to prove that the consultant's negligence caused *additional* injury (that is, injury in addition to the medical condition(s) that created the need for CDPAS) in order to establish liability:

- **Case manager misdirects medical care**. In *Vakos v. Travelers Insurance,* an injured employee sued his employer's worker's compensation carrier, a medical management service company, and the medical case manager who handled his case, alleging that their negligence in directing him and advising him regarding his medical care caused additional injuries.[327] The plaintiff alleged that the medical case manager did not approve the chronic pain management program recommended by the plaintiff's doctor because it was "too costly," but she failed to recommend another more cost effective program.[328] The trial court dismissed the claim, finding that the suit was barred by the state workers' compensation law, but the appellate court reversed, noting that "[t]he acts of negligence [alleged by the plaintiff] were committed subsequent to and independent of the original injury" and allegedly occurred as a result of the defendant's negligent direction of the plaintiff's medical treatment.[329] The case was remanded for trial, but to prevail at trial the plaintiff would have to prove both that the defendants were negligent and that their negligence caused injuries *in addition to* the injury for which he was receiving workers' compensation. Similarly, a claimant against a CDPAS consultant would have to prove both that the consultant was negligent and that the consultant's negligence caused injuries in addition to the medical conditions for which the consumer was already receiving care.

- **Rehabilitation consultant urges premature return to work**. In *Gilchrist v. Trail King Industries,* an injured employee who was receiving workers' compensation sued his employer and the consultant hired to oversee his rehabilitation, claiming bad faith (that is, a violation of an insurer's duty of good faith and fair dealing) and

---

[327] 691 N.E.2d 499 (Ind. Ct. App. 1998).

[328] *Id.* at 501.

[329] *Id.* at 503.

intentional infliction of emotional distress.[330] Specifically, the plaintiff alleged that the rehabilitation consultant had "'hounded [his doctor] for an appropriate work release which was then used to terminate [him] from his job while he was still convalescing. This sent him spiraling downward emotionally and psychologically.'"[331] Like the court in *Vakos,* the Supreme Court of North Dakota held both that the rehabilitation consultant owed a legal duty to the plaintiff and that the plaintiff "must show that the consultant caused some additional injury."[332] The court found that the consultant had not caused additional injuries to the plaintiff because the state Department of Labor had concluded that he was "totally disabled and entitled to continued disability payments as a result of his work related depression."[333] In addition, the court rejected the plaintiff's claim for intentional infliction of emotional distress because he had not alleged the "extreme and outrageous" conduct which is an element of the tort.[334]

It is quite possible to envision circumstances in which approval of an inadequate spending plan or back-up plan could result in additional injury. For example, if the consumer is left unattended because the back-plan fails, and the consumer (who otherwise needs assistance) tries to get to the bathroom alone, but falls and breaks a hip, the consumer could claim that the inadequate back-up plan caused the injury. To minimize the liability risk to consultants, state agencies should consider providing clear guidance regarding the circumstances in which consultants are authorized to override a consumer's preference and withhold approval from spending plans and back-up plans that they believe are inadequate. State agencies should also consider developing clear and explicit minimum criteria for the approval of such plans, thus reducing the consultant's discretion and the attendant risk of liability.

C. Negligent Assistance in Hiring, Training and Supervising Workers

Consultants are also responsible for assisting consumers in the hiring, training and supervision of workers. The typical Medicaid recipient does not have experience as an employer, so the consultant's advice, assistance, and training can be critical in determining whether the consumer is able to hire satisfactory workers and receive the full benefit of consumer-directed personal assistance services. The experience in CDPAS

---

[330] 612 N.W.2d 10 (S.D. 2000).

[331] *Id.* at 17.

[332] *Id.* at 16.

[333] *Id.* at 17.

[334] *Id.*

has been that most of the workers hired are family and friends,[335] which reduces the risk of negligent care or financial exploitation by the worker. However, if the worker does injure or exploit the consumer, the consumer may claim that the consultant is liable because the consultant was negligent in assisting the consumer with the process of hiring, training and supervising the worker.

However, as with the spending plan, the consumer is the ultimate decision-maker regarding the hiring and supervision of workers. As long as that expectation is made clear and agreed to by the consumer, the consumer would have difficulty proving that it was the consultant's negligence, rather than the consumer's unwise decision-making, that caused the injury (and, at a minimum, the consultant would have a contributory negligence defense). The consultant is unlikely to be held liable unless the consultant failed to follow required procedures (for example, the consultant failed to advise the consumer of the availability of a criminal background check, and a worker with a criminal record subsequently financially exploited the consumer)[336] or failed to provide any assistance at all.

The only reported decision involving a claim of negligence in the hiring of a CDPAS worker suggests the difficulty of convincing a court that a consultant or state caseworker was negligent:

- **Who is responsible for negligent personal care aide**? In *Reeder v. State of Nebraska*, Randy Reeder, a consumer who had become paralyzed as a result of an automobile accident, located and hired Sheri Perales, a licensed practical nurse, to provide home care for him pursuant to the Nebraska's Aged and Disabled Medicaid Waiver program.[337] As required for workers hired directly by consumers, rather than chosen off a list of potential workers maintained by the state Department of Social Services ("DSS"), "Perales completed the documentation necessary to be approved by DSS as Medicaid service provider in the capacities of personal care aide (PCA) and LPN."[338] After Perales had been providing care for Reeder for about two months, he developed decubitis ulcers on his feet.[339] Although Reeder consulted a podiatrist and Perales followed the podiatrist's treatment orders, the ulcers did not

---

[335] For example, in Arkansas about 95% of the participants in IndependentChoices hired a family member or friend to act as a provider. Arkansas Implementation Report, *supra* note 19, at 81.

[336] In New Jersey, background checks are required for all providers except immediate family members. Cash and Counseling: A Second Glance, *supra* note 253. In Florida, background checks were required only in the program for developmentally disabled consumers. Comer e-mail dated October 29, 2003, *supra* note 326. In Arkansas, background checks are optional. Arkansas Implementation Report, *supra* note 19, at 99.

[337] 578 N.W.2d 435, 438 (Neb. 1998).

[338] *Id.* at 438.

[339] *Id.* at 439.

heal properly and Reeder's feet became infected.[340] As a result, "Reeder underwent a lengthy period of hospitalization and treatment" and faced the possibility that it would be necessary to amputate his feet.[341] Reeder filed suit against the state of Nebraska based on two theories of liability: "first, Perales was an employee of DSS, and DSS was vicariously liable for her negligence under the doctrine of *respondeat superior*; or, alternatively, DSS breached an independent duty to select and train a nurse who was competent to provide the services required by Reeder."[342] On appeal of the trial court's decision granting summary judgment on both theories to the state, the Nebraska Supreme Court reversed and remanded for trial the issue of whether Perales was an employee of the state or an independent contractor,[343] but it sustained the trial court's rejection of Reeder's argument that, "DSS 'had a separate, independent, and non-delegable duty to supply Reeder with a care provider fully capable of meeting all his daily nursing needs.'"[344] The supreme court disagreed with Reeder's contention that provisions in state law authorizing financial support for disabled persons created such a duty:

> [T]he statutory requirement that DSS review needs of aid recipients and develop standards for determining qualified programs is related to a statutory duty to provide compensation for health services, not a duty to provide the actual services. DSS caseworkers who serve clients receiving public assistance are not licensed health care professionals and are not authorized to make medical judgments. The fact that they maintain periodic contact with clients who receive health care benefits pursuant to the act and maintain a general interest in their welfare does not, in our judgment, amount to an undertaking to qualitatively access or intervene in health care provided to the clients.[345]

Although *Reeder* could also be characterized as a case in which the plaintiff alleged negligent monitoring, an issue which we discuss in the next section, Reeder's legal claim was that the state had breached a "non-delegable duty to select and train a nurse who was

---

[340] *Id.*

[341] *Id.*

[342] *Id.*

[343] *Id.* at 441. In Section V.D, *infra*, we discuss the supreme court's decision on this issue, along with a subsequent decision by the court on appeal reviewing the trial court's decision on remand. Reeder v. State of Nebraska. 649 N.W.2d 504 (Neb. Ct. App. 2002). On remand, the trial court found that Perales was an independent contractor and that the state therefore was not liable under the doctrine of respondeat superior. *Id.* at 510. The court of appeal upheld this ruling. *Id.* at 520.

[344] 578 N.W. 2d at 442 (quoting from appellant's reply brief).

[345] *Id.*

competent to provide the services" he required.[346] By holding that the state was liable only if it had notice that Perales was providing deficient care, the court implied that the state could not be liable simply because it delegated the hiring decision to Reeder and did not second-guess that decision. In other words, the consequences of a bad hiring decision are the responsibility of the consumer, not the state or its caseworkers.

D. Negligent Monitoring

In each of the three Cash and Counseling states, consultants are responsible for monitoring program quality for individuals and initiating action to correct problems identified in the course of monitoring.[347] As a result, the consultant is the individual who has the most frequent contact with a participant, and indeed, is likely to be the only CDPAS program official who has the opportunity to observe the consumer in the home and assess whether the spending plan and the workers selected by the consumer are delivering adequate care. Contracts and/or training manuals in each state specify the

---

[346] *Id.* at 439.

[347] Cash and Counseling: A Second Glance, *supra* note 253. In general, the state has the ultimate responsibility for taking the necessary action to correct serious problems. For example, in Arkansas,

> the counselor was responsible for helping a consumer identify and carry out his or her own wishes, but not for the consumer's well-being, even if that was adversely affected by the consumer's own decisions. A counselor who was concerned about consumer safety or well-being was to report these concerns to the state, which decided how to proceed. In such a situation, the state might (1) order intensive monitoring of the case to better access the situation, (2) or problem solving to resolve it, or (3) mandate that a consumer return to the traditional program. Thus, final responsibility for solving problematic situations rested with the state of Arkansas, not with counselors or counseling/fiscal agencies.

Arkansas Implementation Report, note 19 *supra*, at 78. See also New Jersey Implementation Report, note 18 *supra*, at 137 (consultants report suspected neglect or exploitation of the consumer to the state, which then assigns a Medicaid nurse to investigation the problem). The issue of the state's potential liability for failure to take appropriate corrective action is discussed in Section V.C, *infra*.

frequency of home visits and telephone calls by the consultant.[348] Especially in the case of consumers whose physical and/or mental disabilities have diminished their capacity to self-advocate regarding inadequate care, the consultant's failure to make these contacts or to detect and take action to correct problems may well result in liability. This potential for liability is graphically illustrated by the decision in *Caulfield v. Kitsap County,* discussed below.[349] Although much of the opinion deals with whether the defendant county was immune from liability under the public duty doctrine,[350] the holding in the case, that state and county caseworkers owed a duty of care to a severely disabled patient who was receiving home care, has significant implications for private agencies and individuals who contract to provide consultant services in consumer-directed personal assistance services.

In general, a defendant does not owe a duty to protect the plaintiff by controlling the conduct of a third person and thereby preventing harm to the plaintiff.[351] As set forth in Section 315(b) of the Restatement (Second) of Torts, there is an exception to this rule in the case of a "special relationship" between the defendant and the plaintiff:

> There is no duty to control the conduct of a third person so as to prevent him from causing physical injury to another unless:
>
> (b) a special relationship exists between the actor and the other which gives to the other a right to protection.[352]

---

[348] Arkansas Implementation Report, note 19 *supra*, at 34; E-mail from Lou Comer, Consumer Directed Care Project Director, Florida Department of Elder Affairs, to Sandra L. Hughes, Consultant, ABA Commission on Law and Aging (October 7, 2003) (on file with authors); and New Jersey Implementation Report, note 18 *supra*, at 39.

In some states, consultants may also be given responsibility for monitoring a consumer's expenditures to make sure they are consistent with the spending plan and do not exceed the consumer's budget. For example, in New Jersey, the training manual for consultants describes the "Consultant's Role in Monitoring" and states that consultants should check every three months and answer the following questions: "Are participants needs met?" "Does cash benefits level have to be adjusted?" "Is there any misuse of funds?" The Continuing Education and Professional Development Program, School of Social Work, Rutgers, the State University, Personal Preference: The New Jersey Cash and Counseling Demonstration, Training Manual at Tab C (1997). The discussion of the liability risks of fiscal agents in Part III is also applicable to consultants to the extent they have or share responsibility for monitoring financial aspects of the CDPAS program.

[349] 29 P.3d 738 (Wash. Ct. App. 2001).

[350] The public duty doctrine protects the state from lawsuits alleging a breach of a general duty owed to the public. One exception to the public duty doctrine is called the "special relationship exception," which is merely a term for identifying a situation in which the state has in fact assumed a responsibility and, thus, a duty with respect to the welfare of a particular individual.

[351] Torts, *supra* note 30, at 874-5.

[352] Restatement (Second) of Torts §315(b) (1965).

- **Case managers and the question of a "special relationship"**. In *Caulfield v. Kitsap County*, the Court of Appeals of Washington held that the county had such a special relationship with the plaintiff and owed him a corresponding duty of care. In Washington, the state's Department of Social and Health Services provided disabled persons with personal care from an in-home caregiver through the COPES program, a federally funded program.[353] The plaintiff, who suffered from multiple sclerosis and needed 24 hour care, had lived in a nursing facility until his DSHS caseworker arranged for his transfer to in-home care and hired a worker to care for him.[354] The caseworker failed to visit the plaintiff for more than a month after his transfer to home care, despite assurances that she would continue to be his caseworker, and when she did finally visit the plaintiff, she observed major changes in his condition and heard his complaints about his caregiver.[355] Pursuant to an interagency agreement between DSHS and Kitsap County, the DSHS caseworker transferred the case the next day to a county social worker who noted that there were problems that needed "immediate attention."[356] Nonetheless, the county social worker did not promptly contact or visit the consumer.[357] Eight days later, the worker called the county social worker because he was concerned about the consumer's condition, and the social worker told him to call 9ll.[358] Upon admission to the hospital, the plaintiff was suffering from:

  > urosepsis, pneumonia, saline depletion, contractures, was malnourished, suffered severe weight loss, and had severe bed sores that had cut through his flesh to his bone. And even though Caulfield had Multiple Sclerosis, he previously had some ability to function at levels that allowed an appreciable amount of independence and freedom. But because of the above conditions, he lost most of the ability to function with any independence.[359]

  At trial, the jury returned a verdict finding that the county, DSHS, and the worker were negligent and proximately caused consumer's injuries, and apportioned damages totaling $2,626.707.[360]

---

[353] 29 P.3d at 740. COPES is a Medicaid home and community-based waiver program.

[354] *Id.*

[355] *Id.*

[356] *Id.*

[357] *Id.*

[358] *Id.* at 740-1.

[359] *Id.* at 741.

[360] *Id.* The jury "allocated fault 40 percent to the County, 40 percent to DSHS, and 20 percent to Sellars [the care provider]." *Id.*

The main issue on appeal was the county's claim that as a government agency, it owed no duty to the plaintiff under the public duty doctrine. However, the court's reasoning in holding that the county did, in fact, owe a duty of reasonable care to the plaintiff would have equal force in an action against a private agency or individual with responsibility for monitoring the care of a child or vulnerable adult:

> Caulfield's relationship with his County case manager involved an element of "entrustment" by virtue of the dependent and protective nature of the relationship. Caulfield's case file showed that he could not get out of bed and could not reach the telephone for assistance. Given Caulfield's inability to take care of himself, the case manager's responsibility for establishing and monitoring his in-home service care plan took on great significance. COPES case managers were responsible for establishing Caulfield's service plans, monitoring his care, and providing crisis management, including terminating in-home care if it was inadequate to meet his needs. And the case managers were required to make assessment visits. This responsibility gave rise to a duty to protect Caulfield and other similarly vulnerable clients from the tortious acts of others, especially when a case manager knows or should know that serious neglect is occurring. This duty is limited by the ordinary care a case manager would take in similar situations and by the concept of foreseeability.[361]

Although the result in *Caulfield* may appear to conflict with the decision of the Nebraska Supreme Court in *Reeder*,[362] the difference can be explained by the contrasting findings of the two courts regarding the role of the caseworker. In *Reeder*, the court concluded that the caseworker's role was limited, despite the fact that the state agency had considerable involvement in approving the care plan, approving the worker, and monitoring services. It found that the program under which the caseworkers performed these functions established a duty "to provide compensation for health services, not a duty to provide the actual services."[363] Thus, the fact that caseworkers "maintain periodic contact with clients who receive health care benefits pursuant to the act and maintain a general interest in their welfare does not... amount to an undertaking to qualitatively assess or intervene in health care provided to the clients."[364]

---

[361] *Id.* at 745.

[362] Reeder v. State of Nebraska, 578 N.W.2d 435 (Neb. 1998).

[363] *Id.* at 442.

[364] *Id.* at 442.

The nature of the caseworker's role is also directly influenced by the level of dependence and functioning of the consumer. Reeder had hired his own worker, Reeder was apparently quite able to monitor the quality of his care, and the state apparently had no reason to believe the worker was not providing adequate care. In contrast, in *Caulfield,* the caseworker knew the consumer needed 24-hour care and was unable to make telephone calls or otherwise instigate complaints about his care. The caseworker had in fact initiated the transfer to consumer-directed care, had hired the care provider, and was aware of the serious threat to Caulfield's health. The transfer of responsibility to a county level caseworker, per program procedures, did not cause a break in this duty. Put another way, the caseworkers' roles in the two cases were defined differently by their programs' policies and procedures, and the caseworkers assumed differing responsibilities in fact. The risk of liability follows function, and function is defined both by program policies and procedures and by actual operation, which need to be consistent.

In the Cash and Counseling states, consultants are clearly assigned responsibility for monitoring client safety, as reflected in contracts, training manuals, and other documents. However, the extent of case monitoring can have many levels of intensity, so it is especially important that the limited scope of the monitoring role be spelled out clearly in program policies, communicated to the consumer in an understandable way, and implemented consistent with program policies.

E. Liability under State APS Laws

Because of their frequent contact with consumers, including home visits, consultants are in a very good position to detect abuse, neglect or exploitation (hereinafter referred to collectively as "abuse") of the consumer by a worker, consumer's representative, family member, or anyone else who has regular contact with the consumer. Depending on the state, consultants may have the obligation to report such abuse under either the state APS law[365] or the consultant's contract with the state, or both, and failure to report can result in liability.

If the consultant works in one of the seventeen states that require "any person" to report suspected abuse,[366] the consultant must report the suspected abuse and may be subject to significant civil and criminal penalties for failure to do so. In the states that do not provide for universal mandatory reporting, but, instead, list occupational categories that are required to report, some of the categories listed in the statutes are likely to cover consultants. For example, some consultants may be trained social workers and many states list "social workers" as mandatory reporters, although these states do not specify

---

[365] For a more complete discussion of state laws protecting vulnerable adults, see Section II.A.3, *supra*.

[366] See note 99, *supra,* listing these states and the citations for their mandatory reporting laws.

whether this requirement applies only to individuals who currently work as social workers or to anyone with training as a social worker.[367] Other states have general categories that are likely to be interpreted as covering consultants -- these states include Ohio ("senior service provider");[368] West Virginia ("social service worker");[369] Minnesota ("a professional or professional's delegate while engaged in... social services");[370] Maryland ("human service worker");[371] and Nebraska ("human services professional or paraprofessional").[372] Consultants should therefore check the laws in their states to determine whether they are subject to a mandatory reporting requirement.

Consultants may also be required to report suspected abuse under the internal policies of the consumer-directed personal assistance services program. In Arkansas, for example, both state law and the contracts between the state and the two agencies that provide consultant and fiscal agent services require the agencies to report suspected abuse. The Arkansas mandatory reporting law applies to "any social worker," "a case manager," and "a case worker."[373] The contracts provide that the agencies must:

> Demonstrate an effective plan to detect abuse, neglect and exploitation and report those instances immediately to DHS -- Adult Protective Services. According to Arkansas Criminal Law 5-28-203, Counseling/Fiscal Agency counselors are considered persons required to report abuse.[374]

Consultants should therefore be careful to check both the laws in their states and all contracts and other documents describing their responsibilities to determine whether they are subject to a mandatory reporting requirement.

---

[367] See, e.g., Alaska, *AK Stat*. §47.24.010(a)(9) (LexisNexis 2002); Arizona, *AZ Rev. Stat. Ann*. §46-454(A) (West 1997); and Arkansas, *AR Code Ann. St*. §5-28-203(a)(1)(I) (LexisNexis 2001).

[368] *OH Rev. Code Ann*. §5101.61(A) (Anderson 1998). "Senior service provider" is defined as "any person who provides care or services to a person who is an adult as defined in subdivision (B) of section 5101.60." *Id.* Subdivision B defines adult as "any person sixty years of age or older within this state who is handicapped by the infirmities of aging or has a physical or mental impairment which prevents the person from providing for the person's own care or protection, and who resides in an independent living arrangement." *OH Rev. Code Ann*. §5101.60(B) (Anderson 1998).

[369] *WV Code Ann*. §9-6-9(a) (LexisNexis Supp. 2002).

[370] *MN Stat. Ann*. §626.5572 subd. 16(1) (West 2003).

[371] *MD Code Ann., Fam. Law* §14-302(a) (Lexis 1999).

[372] *NE Rev. Code Ann*. §28-372 (LexisNexis 2002)

[373] *AR Code Ann*. §5-28-203(a)(1)(I)-(K) (LexisNexis 2001).

[374] Contract for fiscal year 2003 between the State of Arkansas and the Phillips County Development Center, Attachment IV at 4; Contract for fiscal year 2003 between the State of Arkansas and Aspen Management Group, LLC, Attachment IV at 4.

V. LIABILITY RISK FOR STATES AND OTHER GOVERNMENT ENTITIES

States that sponsor Medicaid consumer-directed personal assistance services programs, particularly programs structured like the Cash and Counseling Demonstration, face comparatively little exposure to liability as long as the state maintains a relatively limited role. This is because many, if not most, of the functions that are performed by the state[375] in connection with traditional Medicaid-funded home care services are transferred to consumers, fiscal agents and consultants. Two functions retained by the state -- determination of eligibility for Medicaid and determination of the level of care and services to be provided to the consumer -- are program eligibility functions and not unique to consumer-directed personal assistance services, and we therefore do not address potential liability in connection with these functions.

There are, however, three functions that are performed by the state, or by contractors for the state, that present some risk of liability to the state itself:

- In the three Cash and Counseling demonstration states, the states do not screen applicants to determine whether the applicant is a suitable candidate for consumer-directed personal assistance services. If the state fails to obtain the consumer's consent and agreement to participate in the program (or the agreement of a legal surrogate or authorized representative of a consumer who lacks capacity), and the consumer suffers injury because the consumer is unable to manage his or her care, the state may be liable for negligence (Section V.A).

- In the Cash and Counseling states, consultants have been given considerable discretion in the designation or validation of an authorized representative, as discussed in the previous section. The state also bears some risk. If the consultant designates or recognizes a representative who fails to provide adequate care for the consumer, and the consumer is injured as a result, the consumer could claim that the injury was caused by the state's failure to protect the consumer by adopting adequate criteria and procedures for appointment of a representative. The failure to adopt adequate criteria or procedures could be a basis for finding direct negligence and/or a denial of due process (Section V.B).

- The state usually has some responsibility for resolving serious problems that arise in consumer-directed personal assistance services, although the consultants perform

[375] For simplicity, the term "state" is used to refer to any state, county or local governmental entity that sponsors, pays for, or participates in a consumer directed personal assistance services program that is structured along the lines of the Cash and Counseling Demonstration.

this function, at least initially, on the front lines. Nevertheless, to the extent that the state itself gets involved in monitoring and problem resolution, it could be held directly liable if it fails to take appropriate action and the consumer is injured as a result (Section V.C).

We also discuss two other situations in which the state could be sued, even though under the Cash and Counseling structure, the risk of liability in these situations should be small:

- Claims of liability on the grounds that the state is, *de facto*, the employer of the CDPAS worker. Such claims can take two forms: that the state is liable for on the job injuries to the worker; and that the state is liable on a *respondeat superior* theory of liability for torts committed by the worker in the course of employment (Section V.D).

- Claims of liability for torts committed by the consultant or fiscal agent, either because the consultant or fiscal agent was acting as the employee of the state, rather than an independent contractor, or because the consultant or fiscal agent was executing a nondelegable duty of the state (Section V.E).

Finally, although under the Cash and Counseling Demonstration, the state did not have responsibility for providing back-up care to the consumer (it is the consumer's responsibility to develop the back-up plan), the Section 1115 and the Section 1915(c) waiver templates developed as part of the Independence Plus initiative of the Centers for Medicare and Medicaid Services take a different approach.[376] In addition to individual back-up plans, the waiver templates require that state programs have "a viable system in place for assuring emergency backup and emergency response capability in the event those providers of services and supports essential to the individual's health and welfare are not available."[377] The liability risks associated with this requirement are discussed in Section V.F.

A threshold question in any tort claim against the state or its officials is whether the claim is barred by governmental immunity. The rules regarding governmental immunity vary from state to state and even within a state depending on whether the defendant is the state itself, a unit of local government, or a government employee or official. In addition, in some states immunity is a matter of common law; in other states, common law principles

---

[376] As the three Cash and Counseling Demonstration programs convert into permanent consumer-directed programs, they are required to follow the Independence Plus template specifications referenced in the following footnote.

[377] Independence Plus, §1115 Demonstration Version, A Demonstration Program for Family or Individual Directed Community Services, at 16, and Independence Plus, 1915(c) Waiver Version, A Waiver Program for Family or Individual Directed Community Services at 12, available at: http://cms.hhs.gov/independenceplus/1115temp.pdf and http://cms.hhs.gov/independenceplus/1915temp.pdf.

have been supplanted by a tort claims act or similar legislation; and in yet other states immunity is a determined by a combination of common and statutory law.

For this reason, it is impossible to address in this report whether a claim would be barred by the governmental immunity law of a particular state. However, the following brief summary of governmental immunity law provides some guidance and will be referred to in our discussion of specific potential claims against the state.

State Immunity

Historically, with the exception of certain claims under federal law, the states enjoyed complete "sovereign immunity" from suit.[378] However, "[a]lmost all states have now enacted tort claims statutes waiving the blanket common law immunity of the state and its agencies."[379] Although some claims are permitted under these statutes, others are not. In some states, "discretionary," but not "ministerial," decisions are immune from suit.[380] However, many courts hold that where the discretion that is exercised involves a decision that can be judged under a professional standard of care, discretionary function immunity does not apply.[381] "Essentially the same idea is expressed by saying that the discretionary immunity only applies when a high degree of discretion is required and when it is applied, not merely to routine matters but to 'basic policy decisions.'"[382] For example, in *Nakahira v. State of Hawaii*, the plaintiff conceded that the decision of the Hawaii Army National Guard to adopt a program to train non-aviator personnel to conduct ground "run-ups" of helicopters was a discretionary policy decision, but he successfully argued that implementation of training of the non-military personnel was not discretionary and therefore was not immune from suit.[383]

Other states "utilize the distinction between planning and operational decisions, limiting immunity to cases of 'planning' and excluding it for actual operations or execution of decisions."[384] Examples of planning activities include "the assessment of competing priorities, weighing of budgetary considerations, [and] allocation of scarce resources."[385] In addition, many states follow the public duty doctrine, which holds that "when a state statute imposes upon a public entity a duty to the public at large, and not a duty to a

---

[378] Torts, *supra* note 30, at 715-716.

[379] *Id.* at 716.

[380] *Id.* at 717.

[381] *Id.* at 721.

[382] *Id.*

[383] 799 P.2d 959 (Haw. 1990).

[384] Torts, *supra* note 30, at 722.

[385] 57 Am. Jur. 2d *Municipal, County, School, and State Tort Liability* §78 (2001).

particular class of individuals, the duty is not one enforceable in tort."[386] The most common is example is that there is no liability for failure of the police to prevent or stop a crime because the duty of the police is to the public at large.[387]

Local Public Entity Immunity

At common law, municipalities were not considered sovereigns and therefore did not enjoy sovereign immunity.[388] However, the courts adopted a rule distinguishing between "governmental" and "proprietary" functions of the municipality, holding that only torts committed in connection with the latter were subject to suit.[389] For example, in a negligence action brought by a plaintiff who was injured when he attempted to dive into a gravel pit lake excavated upon land in a public park, the court held that although the operation of the park was a governmental activity, the government's activities in connection with operation of the gravel pit were proprietary and therefore were not immune from suit.[390] As with sovereign immunity, many states have now adopted statutes that modify the common law rules regarding local public entity immunity.[391]

State and Local Officers and Employees

Both state legislatures and state courts have developed immunity rules for officers and employees of public entities. The general rule is that officers and employees are given qualified immunity for discretionary acts (for example, "evaluating reports or employees' performances or deciding upon parole release"[392]), but not for ministerial acts (for example, "driving cars, posting warning signs, or moving office furniture"[393]). "The discretionary immunity is qualified or conditional because it is usually lost if the officer is guilty of bad faith, malice, corruption, wanton misconduct or the like."[394] Under some state statutes, "the employee is simply immune to claims for negligence committed within the scope of his employment."[395] State statutes may also provide that "the public entity must

---

[386] Torts, *supra* note 30, at 723.

[387] *Id.* at 724.

[388] *Id.* at 718.

[389] *Id.* The courts do not agree on a single test, but some of the tests applied to determine whether an activity is proprietary include: "(1) if it is carried on for profit, (2) if a fee is paid, (3) if the activity relates to public service, whether or not a fee is paid, (4) if the city is under no duty to carry it out, or (5) if the activity is historically one carried out by private enterprise." *Id.* at 718-9.

[390] Radloff v. State of Michigan, 323 N.W.2d 541 (Mich Ct. App. 1982).

[391] Torts, *supra* note 30, at 719.

[392] Chamberlain v. Mathis, 729 P.2d 905, 910 (Ariz. 1986).

[393] *Id.*

[394] Torts, *supra* note 30, at 735.

[395] 729 P.2d at 736.

or may defend the employee who is sued for acts committed within the scope of his employment," and that "the public entity may be permitted or required to indemnify the employee if he is held liable."[396]

Finally, it should be noted that if a state is concerned about potential liability in connection with its consumer-directed personal assistance services program, the state has the option of enacting legislation clarifying the extent to which functions and decisions regarding CDPAS are either immune from or subject to challenge.[397] This is the approach taken by California in its In-Home Supportive Services Program, discussed in Section VI.A.

A. Failure to Obtain the Consumer's Clear Agreement to Participate in CDPAS

In each of the three Cash and Counseling states, the state decided not to screen otherwise eligible participants (that is, participants who qualified for traditional agency provided personal assistance services) to determine whether the consumer would be able to manage the cash allowance and hire and supervise the consumer's personal assistant(s).[398] Instead, the states relied on "self-screening" by potential participants.[399] Athough practical considerations entered into this decision, such as the fact that the availability of a representative made possible the participation of consumers who were not capable of self-directing their care,[400] there was also a concern about possible liability. An attorney involved in the Arkansas program advised "that a structured process that denied participation might not be legally defensible. If the process was not legally defensible and the consumer chose to contest exclusion from the program, a state might be held liable for such exclusion."[401]

---

[396] *Id.* at 733.

[397] See Marshall B. Kapp, "Improving Choices Regarding Home Care Services: Legal Impediments and Empowerments," 10 *St. Louis U. Pub. L. Rev*. 441, 479 (1991) ("Governmental units that are apprehensive about potential tort liability to consumers or their representatives, on either a respondeat superior (employer/employee) or a corporate (direct) liability rationale, should consider the option of pursuing state legislation that would reinstate former or strengthen existing legislation creating partial or total immunity against civil damages for the governmental unit.") (hereinafter "Kapp, Improving Choices Regarding Home Care Services").

[398] New Jersey Implementation Report, *supra* note 18, at 27 (discussing decision in all three Cash and Counseling states). See also Arkansas Implementation Report, *supra* note 19, at 25-26.

[399] New Jersey Implementation Report, *supra* note 18, at 27 and 84. However, New Jersey did decide to exclude "PCA recipients who were not expected to be living in a community setting for at least six months ... on the grounds that consumers typically require several months to develop a spending plan and hire workers." *Id.* at 27.

[400] *Id.* at 26.

[401] *Id.* at 25.

However, states should fare well in litigation challenging exclusion from the program. The primary form of redress for consumers who disagree with any such determination is through the Medicaid appeals process, which may result in injunctive relief but not a damage award. Moreover, although personal injury and a claim for damages might result from wrongful *inclusion* in a CDPAS program, such injury would not result from wrongful *exclusion.*

In addition, even if the plaintiff is able to assert a claim under state law, a court is likely to defer to the state's decision that a particular consumer is not an appropriate candidate for consumer-directed personal assistance services:

- **Medical judgment**. For example, in *Couch v. Visiting Home Care Service of Ocean County*, the Appellate Division of the New Jersey Superior Court upheld the county health department's refusal to continue providing home care services to the plaintiff.[402] Both the county, and a home care agency which had been providing intermittent nursing services to him, had terminated their services because they believed the plaintiff needed more intensive care than they were able to provide.[403] The trial court entered an order requiring continuation of the services, and the county and the agency appealed.[404] On appeal, the county pointed "to the well recognized principle that actions of a public body, particularly within its field of expertise, are entitled to a presumption of validity."[405] However, the appellate court was "persuaded that the real issue is the right of these medical providers to withdraw from a case when in their professional opinion it would be improper and unsafe to continue,"[406] thus apparently viewing the county's decision as a medical decision, rather than a benefit eligibility decision. The appellate court ruled that if on remand the county and the agency still wished to withdraw their services, they should be permitted to do so.[407]

On the other hand, there may be a greater risk of liability for *including* a consumer who either is not a suitable candidate for consumer-directed personal assistance services

---

[402] 746 A.2d 1029 (N.J. Super. Ct. App. Div. 2000).

[403] *Id.* at 1031-2.

[404] *Id.* at 1032. The opinion does not contain any discussion of the legal basis for the lower court's order requiring the county and the agency to continue care.

[405] *Id.*

[406] *Id.*

[407] *Id.* at 1033. Note that the court's ruling seems to rely on the agreement by the county department of health at oral argument that it "accepted the responsibility for arranging continuing care" and the county's representation to the court that space for the plaintiff was available in a nursing home. *Id.*

or lacks the capacity to make a choice about participation in CDPAS.[408] An example of this kind of scenario might involve a consumer participant in the program who is injured during the course of care and then claims that, had he known the true extent of risk and responsibility to be incurred, he (or his authorized representative) would never have agreed to participation in the program. Experience to date suggests that this is an unlikely scenario, but nevertheless possible.

The decision to participate in CDPAS definitely results in exposure to a particular set of risks and responsibilities. To protect the state from liability and preserve the defense that the consumer knowingly assumed the risks associated with CDPAS, it essential that that either the consumer (or the consumer's properly designated legal surrogate or representative, in the case of a consumer who lacks capacity[409]) agree to participation in CDPAS. Agreement to participate involves three elements:

1. The consumer's choice to participate is voluntary. To ensure that decisions is truly voluntary, it is important to preserve the availability of traditional agency care as an option so that consumers are not pressured into enrolling or continuing in a consumer-directed personal assistance services program, even though CDPAS may be inappropriate or has become inappropriate. If traditional agency care is not an option, consumers will fear, with reason, that the only alternative to CDPAS is nursing home care, and they will be much more inclined to remain in CDPAS situations that place their health and well-being at risk. If choices do not "include the option *not* to direct one's own care," "it can be argued that the policy of consumer-directed care translates into a non-bargained for arrangement,"[410] and that the consumer's decision to participate was not voluntary.

2. The consumer is adequately informed about relevant information regarding the decision to participate in CDPAS (that is, all information needed to make a voluntary and intelligent decision). Most programs do this orally and in writing. A simple two-page agreement spelling out the respective responsibilities of the consumer and consultant in the Florida program is included at Appendix C. Florida also provides consumers with a much more extensive "Consumer Notebook" that is used by consultants to train participants about the details of the program.[411]

---

[408] A decision regarding suitability for participation in consumer-directed personal assistance services will typically involve the application of established rules or policies and therefore is likely to be considered ministerial or operational. Thus, a claim challenging an eligibility decision probably would not be barred by sovereign immunity.

[409] See the discussion in Section V.B of the appropriate procedures for selection of an authorized representative.

[410] *Id.* at 311.

[411] Florida Consumer Directed Care Research Project, *Consumer Notebook*, Florida Department of Elder Affairs (December 1999).

3. The consumer has the capacity to understand the relevant information and make a choice.[412]

If the state undertakes the responsibility for verifying the individual's agreement to participate and not the responsibility for screening for the appropriateness of the consumer's ability to self-direct, it is less likely to be found liable for a failure to screen someone who should have been found unsuitable. This approach is also consistent with the right of a person with disability to opt for consumer-directed services, even if using such services may present a greater risk to the consumer than either traditional agency care or care in a nursing home.

Finally, regardless of whether the state decides to screen CDPAS applicants, it is critical that the state adopt and follow an effective program of monitoring, which is the ultimate safety net for the program. The state will then be in a position to argue that by engaging in reasonable monitoring, the state has satisfied any duty it may have to make sure the consumer can safely participate in the program. Such monitoring will also protect the state by promptly alerting the state to situations in which action (which may include removal from the program) needs to be taken to prevent injury to the consumer.

B. Failure to Adopt Adequate Criteria and Procedures for Selection of an Authorized Representative

As described in greater detail in the previous section (Section IV.A), each of the original Cash and Counseling states elected to adopt relatively informal criteria and procedures for the selection of representatives. The lack of more formal criteria and procedures for the designation of a representatives does not raise significant liability concerns (1) where the consumer has the capacity to designate the representative[413] and is given the relevant information to make an informed decision about whether and who to appoint as the representative, or (2) if a guardian or other legal surrogate (for example, a parent in the case of a minor) is already in place. However, if the consumer does not have such capacity,[414] and the representative who is designated mismanages the consumer's

---

[412] For a discussion of the applicability of the concept of consent to consumer-directed personal assistance services, see Sabatino and Litvak, *supra* note 48, at 310-314.

[413] This includes the capacity to decide whether an authorized representative is necessary or desirable.

[414] An example is a consumer with relatively advanced dementia. In New Jersey, "[d]uring the early planning for the demonstration, the Alzheimer's Association was concerned that beneficiaries with cognitive impairment might be discriminated against by being excluded from the cash program. This concern was resolved when Personal Preference decided to allow those who could not manage the cash allowance (including those with Alzheimer's disease and other cognitive impairments) to participate if they had a representative to plan and arrange care services on their behalf." New Jersey Implementation Report, *supra* note 18, at 19-20.

care,[415] there is the potential for the claim that the state is liable because it failed to adopt more formal criteria and safeguards that would have ensured appointment of an appropriate representative.[416] Although none of the states have yet experienced problems with their relatively informal processes of representative selection, it is certainly possible that a representative could engage in negligence or misconduct that results in injury to a consumer. The consumer may then elect to pursue claims against both the consultant *and* the state.

Essentially, the consumer will argue that the state was negligent in adopting criteria and procedures for the designation of a representative that did not adequately protect the consumer. However, in most states, such a claim may be barred by governmental immunity because the decision to follow relatively informal procedures for the selection of a representative is arguably discretionary -- in other words, it is precisely the kind of policy decision that the governmental immunity is intended to protect from second guessing by the courts in negligence actions.[417] Because governmental immunity is likely to bar a negligence claim, a consumer might consider a claim under the United States Constitution, which would not be barred by state sovereign immunity.[418] The numerous decisions involving successful challenges to state guardianship procedures as violative of the due process clause of the Fourteenth Amendment suggest the potential for similar challenges to the criteria and procedures for appointment of a representative.[419] Appointment of a

---

[415] One situation in which this might occur is if the authorized representative also acts as a CDPAS provider, as has been permitted in the Florida program. However, "Florida is considering barring representatives from providing services because of the inherent potential conflict of interest." E-mail from Lou Comer, Consumer Directed Care Project Director, Florida Department of Elder Affairs, to Sandra L. Hughes, Consultant, ABA Commission on Law and Aging (June 9, 2003) (on file with authors).

[416] Such a claim is different from the claim that the consultant was negligent in discharging, or failing to discharge, the consultant's responsibilities in connection with appointment of an authorized representative. The issue of the consultant's potential liability is discussed in Section IV.A, *supra*.

[417] See Mahan v. New Hampshire Department of Administrative Services, 693 A.2d 79, 83 (N.H. 1997) (the discretionary function exception "applies and immunity attaches when a decision entails governmental planning or policy formulation, including the evaluation of economic, social and political considerations"); and Ross v. Consumers Power Co., 363 N.W.2d 641, 668 (Mich. 1984) ("the 'discretionary/ministerial' test... grants immunity to individuals only to the extent necessary to guarantee unfettered decision-making. 'Discretionary' acts have been defined as those which require personal deliberation, decision and judgment.").

[418] The supremacy clause, which is contained in the second clause of Article VI of the United States Constitution, provides that "This Constitution, and the laws of the United States which shall be made in pursuance thereof... shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding," U.S. Const. art. VI, cl. 2. Under the supremacy clause, state immunity rules cannot supersede or bar a claim under the United States Constitution.

[419] These cases have held that because guardianship involves the deprivation of both liberty and property interests, due process is required before a guardianship can be imposed. Constitutional deficiencies cited in these cases have included: failure to adopt stringent enough criteria for imposition of guardianship, Hedin v. Gonzales, 528 N.W.2d 567, 579 (Iowa 1995); failure to require proof of incapacity by clear and convincing evidence, Sabrosky v. Denver Department of Social Services, 781 P.2d 106, 108 (Colo. Ct. App. 1989), and State ex rel. Shamblin v. Collier, 445 S.E.2d

representative, like guardianship, is a legal mechanism for substitute decision-making, although the consequences of appointment of a representative for personal assistance services are certainly less far-reaching.

As a practical matter, an award of money damages in a constitutionally based action is unlikely. These actions are typically brought to change a practice that adversely affects a class of people. The usual remedy sought is injunctive and/or declaratory relief invalidating a policy or procedure -- in this case, the procedures regarding the selection of representatives. To avoid such a challenge, states may want to consider taking some or all of the following steps:

- If a consumer does have capacity to designate an authorized representative, procedures that utilize a representative screening questionnaire and a designation of representative form, similar to those in effect in Arkansas and New Jersey, should be sufficient to protect the consumer's interests. The Arkansas and New Jersey screening and designation of representative forms are included at Appendix D and Appendix E, respectively.

- Even where the consumer clearly has capacity, it would be prudent to have the consumer make an advance designation of a representative to serve if and when needed. This would protect against the possibility that the consumer subsequently loses capacity but is able to continue in CDPAS with the assistance of a representative. Any such designation should be reviewed and renewed periodically.

- If the consumer has questionable capacity to designate an authorized representative, the state should consider specifying the following procedures for cases in which there is no prior designation by the consumer and a legal surrogate is not in place:

  - **S** Require an assessment by the consultant or other professional that the consumer lacks capacity both to self-direct the consumer's care and to designate an authorized representative. A standard assessment tool should be developed and validated. Such a tool would focus on relevant functions (for example, Can the consumer give directions? Can the consumer review and sign a time sheet?).

  - **S** If the state has a statute that designates a default surrogate for medical decision-making, that surrogate can be designated as the representative, unless the consultant knows of contraindications.

736, 741 (W.Va. 1994).; and failure to place the burden of persuasion on the party seeking the guardianship, *Hedin*, 528 N.W.2d at 581.

- The consultant should assess reasonably available representatives. Relevant screening questions that the Cash and Counseling states already use include: Is the candidate willing? What is the candidate's relationship to the consumer? Does the candidate have any prior experience taking care of the consumer? Does the candidate understand the duties and responsibilities of a representative? Based on this information, the consultant should determine whether the candidate has demonstrated his or her ability and willingness to act as the representative. Candidates who are not selected may be provided with a right of appeal to the state.

- The state should require heightened monitoring for consumers whose care is being directed by a representative, as is currently the practice in Arkansas.[420]

C. Negligent Response to Problem or Complaint Regarding Consumer's Care

Although in each of the three Cash and Counseling states, consultants have the primary responsibility for monitoring the quality of consumer care, the state may become involved with serious allegations of abuse, exploitation, inadequate care or other problems. In New Jersey, "[w]hen a consultant reported that something might be amiss, the state Personal Preference office referred the case to a Medicaid nurse, who visited the home to make an assessment."[421] The state Personal Preference office then reviewed the nurse's report of the assessment.[422] "If it concluded that neglect or exploitation was likely, the case was referred to Adult Protective Services, and the consumer was disenrolled from Personal Preference and returned to traditional PCA [personal care assistance] if appropriate."[423] Similar state oversight procedures were adopted in Arkansas[424] and in Florida.[425]

These oversight procedures have the potential to result in liability if the state is not careful to take prompt and effective remedial action whenever it becomes aware of a

---

[420] See discussion in Section IV.A, *supra*.

[421] New Jersey Implementation Report, *supra* note 18, at 137.

[422] *Id.*

[423] *Id.* at 137-8.

[424] In Arkansas, both external reports of abuse or exploitation and cases of suspected exploitation identified by a counselor could result in an investigation by the state. Arkansas Implementation Report, *supra* note 19, at 112-3.

[425] In Florida, the "consultant management tools are: requiring a representative, replacing a representative, executing a corrective action plan, disenrollment. The state's role is to review and uphold or override the consultant's case actions and/or refer cases to Medicaid program integrity or Medicaid fraud." Comer e-mail dated June 9, 2003, *supra* note 415. These actions are preceded by discussing issues, counseling, and providing technical assistance to consumers. Comer e-mail dated October 29, *supra* note 326.

serious problem.[426] As elsewhere, the reality is that liability risk follows function, and the entity that assumes the function of investigating and evaluating problems of abuse or inadequacy of care also assumes the risk of liability for failure to take effective remedial action. The decision in *Caulfield v. Kitsap County*, a case that is described in detail in Section IV.D *supra*, graphically illustrates the harm and potential liability that can result from ignoring a serious complaint or problem in connection with consumer-directed personal assistance services.[427] In *Caulfield,* both state and county caseworkers failed to respond to information that indicated that a Medicaid recipient's home care worker was not providing adequate care and that the recipient's health was rapidly deteriorating. As a result, Caulfield sustained serious injuries, and a jury ultimately awarded him substantial damages.

In terms of state liability, the case is particularly significant because the appellate court rejected the government defendants' arguments that they were immune from liability under the public duty doctrine.[428] The court noted that Caulfield's suit was barred by the public duty doctrine unless he could "show that 'the duty breached was owed to the injured person as an individual and was not merely the breach of an obligation owed to the public in general (i.e., a duty to all is a duty to no one).'"[429] If a case falls within an exception to the public duty doctrine, the government will be found to owe a duty of care to the plaintiff.[430] Under Washington state law, the "special relationship" exception to the public duty doctrine applies where "(1) there is direct contact or privity [a legal term for mutuality of interest] between the governmental agency and the plaintiff 'which sets the latter apart from the general public, and (2) there are express assurances given by a public official [or agency], which (3) gives rise to justifiable reliance on the part of the plaintiff.'"[431] The court found that Caulfield's case fit these criteria "because (1) there was direct contact or privity between the DSHS [Department of Social and Health Services] and Caulfield which set Caulfield apart from the general public, and (2) there were express assurances given by DSHS caseworker, including case management and crisis intervention, which (3) gave

---

[426] It should be emphasized that there is little or no risk of liability where the state does not have knowledge of a problem. For example, in Reeder v. State of Nebraska 538 N.W.2d 732 (Neb. Ct. App. 1998), the facts of which are described in Section IV.C, *supra*, that court held that the state was not liable because there was "no evidence that DSS ever had knowledge that the nursing services provided by Perales posed any risk of injury to Reeder.... Under these circumstances,... DSS had no independent duty to take any affirmative action with respect to the nature or scope of health care services provided to Reeder." *Id.* at 442.

[427] 29 P.3d 738 (Wash. Ct. App. 2001).

[428] The public duty doctrine holds that "when a state statute imposes upon a public entity a duty to the public at large, and not a duty to a particular class of individuals, the duty is not one enforceable in tort." Torts, *supra* note 30, at 723.

[429] 29 P.3d at 742.

[430] *Id.* at 743.

[431] *Id.*

rise to justifiable reliance by Caulfield through his acceptance of the case manager's detailed duties."[432]

Several factors are likely to determine whether a court would follow the *Caulfield* case in a negligence action against a state program modeled on the Cash and Counseling Demonstration. The first is the state's immunity law, including whether the state follows the public duty doctrine and the extent to which the state recognizes exceptions to the public duty doctrine. The second is whether the court would see both the consultant and the state, or just the consultant alone, as having had direct contacts with the consumer, including assurances of "case management and crisis intervention," which "gave rise to justifiable reliance" by the consumer. The third is the specific facts in the case. In *Caulfield*, the government's negligence was blatant, Caulfield was totally dependent on care, and the consequences to Caulfield were catastrophic. Facts as dramatic as these frequently influence a court's determination of legal issues relating to liability.

Because the risk of liability is uncertain, state programs would be well-advised to adopt procedures to ensure timely and effective intervention whenever a serious problem is reported to or comes to the attention of the state.

D. Liability as Alleged Employer of Worker

At the inception of the Cash and Counseling program, one of the perceived advantages of the program's structure was that "the likelihood of successful liability actions against the state (and costly settlements) might be reduced because it was not the employer of record."[433] There are two kinds of tort claims that could potentially be asserted against the state as the alleged employer of a worker. The first is liability for injuries to the worker during the course of employment, which typically take the form of a claim against the state for workers' compensation. The second is *respondeat superior* liability (i.e., vicarious liability) for torts committed by the worker during the course of employment that result in injury to the consumer or to a third person.[434]

By carefully structuring and documenting the consumer-worker employment relationship, the Cash and Counseling states have minimized the likelihood of a credible claim that the state, rather than consumer, is the worker's employer, or even that the state is the joint employer of the worker for purposes of personal injury liability.[435] The precise standard used to determine the existence of an employment relationship can vary

---

[432] *Id.*

[433] New Jersey Implementation Report, *supra* note 18, at 4.

[434] See the discussion of the respondeat superior liability of consumers as employers in Section II.C, *supra*.

[435] See discussion of the concept of joint employer *supra* at note 123.

depending on the context (e.g., a claim for worker's compensation, an allegation of a violation of the federal Fair Labor Standards Act, etc.), but the central issue, in general terms, is always whether the alleged employer exercises control over the employee.[436] Indicia that an employment relationship exists include, for example, the "right to discharge the employee, payment of regular wages, taxes, workers' compensation insurance and the like, long-term or permanent employment, and detailed supervision of the work."[437] With respect to personal assistance services, there is no question that an employment relationship exists. Rather, the question is between whom -- is the worker employed by the consumer, by the agency that oversees the program, or by both?

In the Cash and Counseling model the state has no direct contact with the worker (although persons other than the consumer, such as the consultant, fiscal agent, and authorized representative, may have some involvement in employer functions), and therefore none of these indicia are likely to apply.[438] The cases discussed below support the conclusion that the state has a low risk of employer liability in a program structured like the Cash and Counseling Demonstration. These cases analyze whether an employer-employee relationship exists under differing laws, so it is important to recall that the criteria for such a relationship varies depending on the specific law or type of legal action involved. Nevertheless, all address variations on the question of who controls, and, thus, all are instructive in the context of tort liability.

- In *Pettit v. State of Nebraska*, the state workers' compensation court found that a chore provider in a Medicaid waiver program was not an employee of the state Department of Social Services ("DSS").[439] The plaintiff Ms. Pettit had injured her back while providing chore services to Mrs. Poels, an elderly and disabled Medicaid recipient.[440] The state supreme court held that the workers' compensation court's determination that the Medicaid recipient was the plaintiff's employer was not clearly erroneous, based on the following facts: (1) although the plaintiff "was recruited to work for Poels by DSS, ...for Pettit to work for Poels was contingent upon Poels' approval;"[441] and (2) "it was Pettit and Poels who set up the daily routine of how to

---

[436] Torts, *supra* note 30, at 917.

[437] *Id.* See also Restatement (Second) of Agency §220, Definition of Servant (1957), listing the factors in determining whether an employment relationship exists.

[438] The New Jersey consultant training manual notes that "By engaging a Vendor Fiscal ISO provider, the state can remove itself by one level from the DHE [Domestic Household Employee], thus reducing its risk of being deemed the DHE's employer." The Continuing Education and Professional Development Program, School of Social Work, Rutgers, the State University, Personal Preference: The New Jersey Cash and Counseling Demonstration, Training Manual, outline for Day Three at 4 (1997). In consumer-directed personal assistance services programs in other states, the "states commonly paid wages directly to workers." Arkansas Implementation Report, *supra* note 19, at 7.

[439] 544 N.W.2d 855 (Neb. 1996).

[440] *Id.* at 860.

[441] *Id.* at 861.

accomplish tasks involving Poels, and it was Poels who arranged her schedule for appointments and errands."[442]

- In *Reeder v. State of Nebraska,* discussed in Section IV.C and Section IV.D above, the plaintiff, a Medicaid recipient who had developed decubitus ulcers while receiving LPN services from Shari Perales, sued the state Department of Health and Human Services ("DHHS") for damages, claiming that DHHS was vicariously liable for the Perales's alleged negligence because DHHS was her employer in the context of her provision of LPN services to Reeder.[443] The Nebraska Court of Appeals held that the trial court's finding that Perales was an independent contractor, not an employee of DHHS, was not clearly erroneous.[444] In doing so, the court of appeals analyzed each of ten factors relating to employee status, and found that six of the factors supported the conclusion that she was an independent contractor and that the remaining four factors were either neutral or equivocal. The factors supporting independent contractor status included: (1) DHHS did not exercise a right of control over Perales (e.g., "DHHS does not oversee or direct the services a provider performs for a client because the physician's order determines the nature and extent or services"[445]); (2) "Perales' completion of her duties was not directly supervised by DHHS but was actually supervised by her client;"[446] (3) Perales was working as a skilled provider;[447] and (4) DHHS was not in the business of providing health care.[448]

Several cases have considered the employment status of workers in the California In-Home Supportive Services ("IHSS") program, a consumer-directed personal assistance services program that initially was structured quite differently from the Cash and

---

[442] *Id.*

[443] 649 N.W.2d 504 (Neb. Ct. App. 2002). Perales provided both LPN services and personal care services, but the case addressed the employment issue only with respect to the LPN services.

[444] *Id.* at 517.

[445] *Id.* at 513.

[446] *Id.* at 514.

[447] *Id.*

[448] *Id.* at 516. It should be noted that in both *Pettit* and *Reeder*, the holding of the reviewing court was that the factual determination was not clearly erroneous, and the reviewing court suggested that it might be possible to find on the same facts that the state was, in fact, the employer. *Pettit,* 544 N.W.2d at 861 ("Clearly, more than one reasonable inference that can be drawn from the facts as to whether Pettit was an employee or an independent contractor."); and *Reeder,* 649 N.W.2d at 517 ("we cannot say that the district court was clearly wrong in its conclusion"). However, in *Pettit,* there were indicia that the state was the employer that would not be present in the Cash and Counseling states (for example, the provider's "job tasks were set out in an agreement between Pettit and DSS," 544 N.W.2d 859), and in *Reeder,* the court did not consider the possibility that Perales was an employee of the consumer, rather than an independent contractor or an employee of the state, because neither party raised this issue before the court. Had the court analyzed the consumer-worker relationship, it would have had to conclude, if it reasoned properly, that the worker Perales was indeed an employee of the consumer Reeder.

Counseling Demonstration but now has strong similarities.[449] In two early decisions, the courts concluded that the state was an employer of the workers (for purposes of the federal Fair Labor Standards Act (FLSA) and eligibility for workers' compensation), whereas in two later cases, the court concluded that the Medicaid recipient (i.e., the consumer) was the employer for purposes of collective bargaining and for purposes of vicarious liability for torts committed by the worker:

- In a 1983 decision, *Bonnette v. California Health and Welfare Agency*, the United States Court of Appeals for the Ninth Circuit held that state and county public services agencies were "employers" of chore workers for purposes of the federal Fair Labor Standards Act.[450] Unlike the states in the Cash and Counseling Demonstration, at that time the state and the counties determined the rate of pay for workers and "exercised considerable control over the structure and conditions of employment by making the final determination, after consultation with the recipient, of the number of hours each chore worker would work and exactly what tasks would be performed."[451]

- In 1984, in *In-Home Supportive Services v. Workers' Compensation Appeals Board*, the California Court of Appeal reached a slightly different conclusion. In that case, an IHSS worker sought workers' compensation from the state. The court ruled in the worker's favor based on its finding that the worker was the employee of both the state and the recipient and that the state workers' compensation law recognized such joint employment relationships.[452] The court's characterization of the employment relationship with the state and the counties reflects a much greater degree of government involvement than in the Cash and Counseling states:

  > This scheme of engagement of individuals by the state, through its agents, to perform IHSS services for recipients required by state regulations establishes an employment relationship. The individual must do the chores listed in the county assessment of need. Payment for these services is provided by the state. The county, under the regulatory scheme, has the right to sufficient control over the IHSS provider to make the state chargeable, by virtue of the agency relationship with the state, as *an* employer. Even where provider payment is made via the recipient the county retains the right to change the payment made and thus exercises direct hiring and firing

[449] See the discussion of the California In-Home Supportive Services program in Section VI.A, *infra*.

[450] 704 F.2d 1465 (9th Cir. 1983).

[451] *Id.* at 1470.

[452] 199 Cal. Rptr. 697, 704 (Cal. Ct. App. 1984).

> control when it discerns that the work the state is paying for is not being performed in accordance with the assessment of need.[453]

In 1990 and 2001 decisions, the California Court of Appeals upheld findings by the lower court that the IHSS recipient, and not the county, was the employer of the IHSS worker.

- In *Services Employees International Union, Local 434, v. County of Los Angeles*, the plaintiff argued that the county was the employer of IHSS providers for purposes of collective bargaining.[454] The appellate court held that "substantial evidence supports the trial court's finding that the county does not exercise control over and direct the activities of the IHSS providers."[455] This evidence included: '[t]he county has no authority to screen providers, control who will be a provider, control the number of providers (which is unlimited), regulate their hours of work, vacations, hiring or termination."[456]

- In *Schmidt v. County of Kern*, which is discussed in greater detail in Section II.C, a doctor who was injured as the result of the negligence of an IHSS provider who was transporting the IHSS consumer to the hospital, sued the county for damages, alleging that the county was the employer of the worker.[457] The jury found that the county was not the worker's employer, and the appellate court upheld the decision.[458]

These decisions, which are based on established principles of employment law, support the conclusion that states sponsoring programs modeled on the Cash and Counseling Demonstration are at minimal risk of being deemed employers of CDPAS workers, as key control indicia remain in the hands of the consumer -- i.e., paychecks issued in the name of the consumer, and the right to hire, fire, assign tasks, and supervise the daily work of workers.[459]

---

[453] *Id.* at 703-4.

[454] 275 Cal. Rptr. 508 (Cal. Ct. App. 1990).

[455] *Id.* at 515.

[456] *Id.* at 511.

[457] No. F035536, 2001 WL 1338407 (Cal. Ct. App. October 30, 2001).

[458] *Id.* at *4.

[459] It should be noted that New Jersey has applied for and received a federal grant to develop a worker registry. New Jersey Implementation Report, *supra* note 18, at 127-8. While such registries can clearly be very helpful to consumers who are having difficulty locating and recruiting providers, any state that sponsors such a registry should be careful to avoid the appearance that it is significantly involved in the hiring process (e.g., the state should not recommend particular workers to particular consumers, and the state should make it clear that the consumer, not the state, has the responsibility for interviewing workers, checking their references and other credentials, and making the final hiring decision). This issue is discussed in greater detail in Section VI.A.3, *infra*.

E. Liability for Torts of Consultant or Fiscal Agent

There are two theories under which the state might be found liable for the negligent acts of consultants and fiscal agents, one based on vicarious liability and the other based on the concept of non-delegable duty:

1. Vicarious Liability for Consultant or Fiscal Agent's Negligence and Other Tortious Conduct

The theory of vicarious liability would apply where the state contracts with an individual to provide consultant or fiscal agent services,[460] and the individual is found to be an employee of the state, rather than an independent contractor. Of course, if the state chose to use state agency employees as consultants -- which states may choose under the "Independence Plus" waiver templates -- then vicarious liability would be a fixed reality of the program. However, the three demonstration states each used individual or agency contractors during the research stage of Cash and Counseling.

With individual consultant contractors, the state intends the individual to be an independent contractor. Yet, a court could find that there is in fact an employment relationship based on the totality of the facts, in which case the state will be vicariously liable for the individual's negligence and other tortious conduct. The critical issue for purposes of tort liability is whether the state exercises "a right of control over the manner, means, and details of the work" of the consultant or fiscal agent.[461] *Reeder v. State of Nebraska*,[462] which is discussed in the preceding section, illustrates the application of this test to a home care worker and the importance of structuring the relationship so that the consultant or fiscal agent is clearly an independent contractor, rather than an employee of the state.

The state can therefore protect itself from vicarious liability by carefully drafting its contracts with individuals who provide consultant or fiscal agent services. Specifically, the state's contracts with consultants and fiscal agents should not include any provision that could be interpreted as giving the state the "right to control the manner, means, and details of the work."[463] On the other hand, the state can specify in its contract what services the independent contractor is to provide, the ultimate outcomes expected, and the general

---

[460] For example, Florida contracts with both agencies and with individual support coordinators trained to be consultants. Comer e-mail dated June 2, 2003, *supra* note 296, and Comer e-mail dated October 29, 2003, *supra* note 326.

[461] Torts, *supra* note 30, at 917. See the more detailed discussion of the indicia of an employment relationship in Section V.D, *supra*.

[462] 649 N.W.2d 504 (Neb. Ct. App. 2002).

[463] Torts, *supra* note 30, at 917.

parameters for how those services are to be provided. For example, the contract can specify that the consultant is to make monthly phone calls to each consumer, but not the specific dates or times when these phone calls are to be made. Because there is no absolute assurance of a finding of no liability in our sometimes unpredictable system of justice, the state can further protect itself through the use of indemnity clauses in its contracts with fiscal agents and consultants.[464]

2. Liability Based on Nondelegable Duty

The state could also be liable if a tortious act is committed by the consultant or the fiscal agent while executing a "nondelegable duty" of the state. For example, if the state had a nondelegable duty to ensure the safety or welfare of a beneficiary, then the state could not escape that duty by transferring that function to an independent contractor.

It is possible that the state could be found to have certain nondelegable duties to consumers, such as a duty to monitor the quality of their care. This, at heart, is a public policy analysis:

> When courts conclude that as a matter of policy the enterprise should be responsible for the torts of independent contractors who are carrying out the work of the enterprise, they say that the enterprise had a nondelegable duty of care. What they mean by this is that the enterprise cannot discharge its obligation of reasonable care by hiring independent contractors to fulfill it.[465]

The rationale for applying this doctrine to government duties was explained as follows by the Court of Appeals of Georgia:

> It is against the public interest to allow statutorily defined duties, particularly those related to the protection of the health and safety of citizens, to be assigned away by contract in an attempt to relieve the state of liability for any breach of its duties.[466]

It is important to note, however, that before a plaintiff could argue that a duty was not delegable, the plaintiff would have to establish that the state had a duty of care in the first place.[467]

---

[464] The indemnity clause that Arkansas includes in its contracts with the two agencies that provide fiscal agent and consultant services to the state is discussed at the end of this section.

[465] Torts, *supra* note 30, at 920.

[466] Williams v. Department of Corrections, 481 S.E.2d 272, 276 (Ga. Ct. App. 1997).

[467] See the discussion in Section III.D and Section V.C, *supra,* of possible bases for the conclusion that the state owed a duty of care.

As with many other aspects of tort law, the states vary in how they approach this issue. In *Hinckley v. Palm Beach County Board of County Commissioners,* the plaintiffs' developmentally disabled adult daughter had been sexually molested by the driver of a bus operated by a company that had contracted with the county to provide transportation for mentally disabled individuals.[468] The court noted that "developmentally disabled persons are a particularly vulnerable population, and when an agency or entity undertakes to provide services for them, it stands in a special relationship with them with respect to the provision of those services."[469] This relationship, especially in the context of the "many state obligations and responsibilities toward its developmentally disabled citizens,"[470] created a duty to protect her from foreseeable harm in connection with the county-sponsored transportation services. "That duty was nondelegable,"[471] and the county therefore could be held liable for the negligence of the driver and the bus company.

In contrast, in the only case in which this theory was asserted in the context of a Medicaid funded consumer-directed personal assistance services program, the court refused to find the state liable -- in the two decisions in the *Reeder* case, both the Nebraska Supreme Court and the Nebraska Court of Appeals rejected the nondelegable duty theory and held that the state was not vicariously liable for the alleged negligence of Reeder's care provider.[472] As described earlier, the plaintiff, an individual paralyzed from the neck down, developed serious decubitis ulcers in his heels while being cared for by an LPN who had been provided under the state's Medicaid home care waiver program. The court relied on statutory provisions setting forth the responsibilities of the Department of Social Service (DSS) to find that the agency did not have a nondelegable duty to Reeder:

> We do not read [Nebraska statutes] §§68-1513 and 68-1519 as conferring a duty upon DSS to directly provide or ensure a certain level of nursing care to persons who qualify for public assistance. These sections are included in the Disabled Persons and Family Support Act,... pursuant to which DSS is authorized to provide financial support for equipment and services necessary to assist disabled persons in independent living situations.... Read in this context, the statutory requirement that DSS review needs of aid recipients and develop standards and procedures for determining qualified programs and services is

---

[468] 801 So.2d 193 (Fla. Dist. Ct. App. 2001).

[469] *Id.* at 195-6.

[470] *Id.* at 196.

[471] *Id.*

[472] Reeder v. State of Nebraska, 578 N.W.2d 435, 441-442 (Neb. 1998); and Reeder v. State of Nebraska, 649 N.W.2d 504, 519-520 (Neb. Ct. App. 2002). See the discussion of these cases in Section IV.C and Section V.D, *supra*.

related to a statutory duty to provide compensation for health services, not a duty to provide the actual services.[473]

Thus, whether there is reason to be concerned about potential vicarious liability for the negligence of a consultant or fiscal agent will depend on several factors: the court's view of the relevant public policy considerations; the content of statutes or regulations setting forth the state's responsibilities in connection with consumer-directed personal assistance services; and the case law in that particular state applying the nondelegable duty doctrine. As a practical matter, the vulnerability of the injured person influences the analysis heavily.

If a particular state does have reason to believe that it could be held liable on a nondelegable duty theory, the state can protect itself by negotiating an indemnification clause with the agencies that provide its consultant and fiscal agent services. The state of Arkansas has included such an indemnification clause in its contracts with the two agencies that provide both consultant and fiscal agent services,[474] and there is legal

---

[473] 578 N.W.2d 442. See also Thornton v. Commonwealth, 552 N.E.2d 601 (Mass. App. Ct. 1990) (the Massachusetts Department of Youth Services (DYS) did not have a nondelegable duty of care to a child committed to DYS, and the state therefore was not liable for the alleged negligence of an private agency that had contracted with DYS to conduct a residential program).

[474] Contract for fiscal year 2003 between the State of Arkansas and the Phillips County Development Center, Attachment III at 7-8; Contract for fiscal year 2003 between the State of Arkansas and Aspen Management Group, LLC, Attachment III at 7-8. The indemnification clauses, which are identical, provide as follows:

> The contractor agrees to indemnify, defend and save harmless the State, the Department, its officers, agents and employees from any and all damages, losses, claims, liabilities and related costs, expenses, including reasonable attorney's fees and disbursements awarded against or incurred by the Department arising out of or as a result of:
>
> - Any claims or losses resulting from services rendered by any person, or firm, performing or supplying services, materials, or supplies in connection with the performance of the contract.
> - Any claims or losses to any person or firm injured or damaged by the erroneous or negligent acts (including without limitation disregard of Federal or State regulations or statutes) of the Contractor, its officers or employees in the performance of the contract;
> - Any claims or losses resulting to any person or firm injured or damaged by the Contractor, its officers or employees by the publication, translation, reproduction, delivery, performance, use, or disposition of any data processed under the contract in a manner not authorized by the contract, or by Federal or State regulations or statutes;
> - Any failure of the Contractor, its officers or employees to observe local, federal or State of Arkansas laws, including but not limited to labor laws and minimum wage laws.
>
> The Contractor shall agree to hold the Department harmless and to indemnify the Department for any additional costs of alternatively accomplishing the goals of the contract, as well as any liability, including liability for costs and fees, which the Department may sustain as a result of the Contractor's or its subcontractor's performance or lack of performance.

authority that such indemnification clauses do not violate public policy.[475] However, such clauses will have practical value only if the agency providing consultant or fiscal agent services has insurance or assets sufficient to indemnify the state for the amount of the damages assessed against the state, which could be substantial. As an alternative, and also as a matter of sound policy, the state should consider protecting itself by adopting oversight and quality management measures designed to alert the state to any deficiencies in the performance of the agencies with which it contracts.

F. Liability for Failure to Provide Effective Emergency Back-up Care

During the Cash and Counseling Demonstration, the state did not have responsibility for providing back-up care to the consumer. Instead, the consumer alone had responsibility for developing an adequate back-up plan, although the consumer's consultant actively provided assistance with this process. Accordingly, if the back-up plan fails and the consumer suffers an injury as a result,[476] there is little liability risk to the state because the state had no role in developing back-up plans or in providing back-up care itself.[477] In other words, the usual rule that liability follows function applies.

However, the Section 1115 and the Section 1915(c) waiver templates developed in conjunction with the Independence Plus initiative of the Centers for Medicare and Medicaid Services require that state programs have:

> a viable system in place for assuring emergency backup and emergency response capability in the event those providers of services and supports essential to the individual's health and welfare are not available. While emergencies are defined and planned for on an individual basis, the State also has system procedures in place....[478]

---

[475] See, e.g., Fresh Cut v. Fazli, 630 N.E.2d 575, 578 (Ind. Ct. App. 1994) ("An indemnification clause in a lease is not void or voidable as against public policy simply because the indemnitee is charged with a nondelegable duty to the public or third persons.").

[476] The cases involving "abandonment" by a care provider that are discussed in Section II.A.1 illustrate the kind of injuries that can result when a care provider does not show up for work.

[477] The possibility that a consultant may be liable if he or she is negligent in providing assistance in the development of the back-up plan is addressed in Section IV.B.

[478] Independence Plus, §1115 Demonstration Version, A Demonstration Program for Family or Individual Directed Community Services, and Independence Plus at 16; 1915(c) Waiver Version, A Waiver Program for Family or Individual Directed Community Services at 12, at http://cms.hhs.gov/independenceplus/1115temp.pdf (last visited October 1, 2003) and http://cms.hhs.gov/independenceplus/1915temp.pdf (last visited October 1, 2003).

The template does not specify the kind of "system procedures" the state must have in place, and states are just beginning to develop plans to comply with the requirement. An example of one approach to a statewide system for emergency back-up is the plan Florida is considering:

- Florida has identified two primary reasons why consumers may need emergency back-up, the failure of CDPAS workers to report for work and natural or man-made disasters. To protect consumers, the state proposes to adopt a multi-layered approach to emergency back-up, using all of the following resources: the consumer's required emergency back-up plan; an informal family and friends network; back-up services provided by an agency or district; resource lists of emergency service providers and facilities available from consultants, area agencies on aging, and district offices; adult and child protective services; the Division of Emergency Management; and 911 for emergency telephone help in critical situations. As part of the statewide plan, consumers who do not currently include an enrolled Medicaid provider agency in their individual emergency back-up plans would be required add an "agency emergency back-up plan."[479]

It is important to note that although the method the state chooses to fulfill this requirement may affect the likelihood that emergency back-up will succeed or fail, and thus affects liability to an extent, the legal analysis is the same whatever approach the state chooses. It is clear that this new duty on the part of the state creates the potential for liability if back-up fails and injury to a consumer results. Moreover, the degree of liability risk is considerably greater than for the risks involved in the Cash and Counseling Demonstration, for the following reasons:

- First, the consumer plays no role in developing the system-wide back-up plan, and the state therefore cannot argue in its defense, in the event back-up fails, that the consumer's negligence caused or contributed to the failure of back-up services. The caveat here, of course, would be a case in which the consumer failed to inform or belatedly informed the state agency of the need for back-up services.

- Second, the state may be subject to a liability standard that is considerably more stringent than the negligence standard. Under the Independence Plus waiver templates for consumer-directed personal assistance programs, the state is required to "assure" emergency back-up care for consumers. Undertaking a responsibility to "assure" emergency back-up suggests that the state in essence is guaranteeing that emergency back-up care will be available when needed. This sets the bar at a higher standard than the usual duty to exercise reasonable care in developing and implementing an emergency back-up system. Depending on how strictly a court

[479] E-mail from Carol Schultz, Medical/Health Care Program Analyst, Florida Agency for Health Care Administration, to Sandra L. Hughes, Consultant, ABA Commission on Law and Aging, October 20, 2003 (on file with authors).

interprets the duty to "assure" emergency back-up, a consumer asserting a claim against the state may not need to prove negligence to establish liability. The state might even be subject to a duty akin to strict liability for injuries caused by the failure of the back-up system.

- The language creating a duty to "assure" emergency back-up could also be interpreted as creating a nondelegable duty, in which case the state could be liable for the failure of back-up care provided by government or private agencies with which the state has contracted to provide this service. As noted in Section V.E, the concept of nondelegable duty is applied in those cases where a court concludes that as a matter of policy, the government should be responsible for the torts of independent contractors who are carrying out the work of or executing a responsibility of the government. The doctrine is particularly likely to be applied to duties "related to the protection of the health and safety of citizens."[480] Here, the language of the Medicaid waiver template can be interpreted as creating a non-delegable duty on the part of the state to protect the safety of CDPAS participants by "assuring" that they receive emergency back-up care. Under such an analysis, a state that has arranged to provide back-up through a local or county agency, such as the 911 system, or through a private provider, such as a home care agency, would not be able to defend itself by arguing that the other entity's negligence, not the state's, was responsible for the failure of back-up. On the other hand, if the duty to "assure" emergency back-up *is* delegable, the state may be able to protect itself from liability by contracting out that function.

Section VI.A.3 below describes emergency back-up provided by public authorities under the California In-Home Supportive Services (IHSS) Program. The variations in back-up in that program illustrate a continuum of duty, and therefore liability risk, that results from different systemic back-up strategies. The approaches range from:

- Providing no formal back-up support. The consumer bears responsibility to arrange adequate back-up.

- Maintaining of a list of providers available to work on an emergency basis.

- Contracting with a community home care agency to provide emergency worker replacement 24/7.

- Hiring a pool of on-call workers, employed by the public authority, to provide emergency back-up.

---

[480] Williams v. Department of Corrections, 481 S.E.2d 272, 276 (Ga. Ct. App. 1997).

The liability risk increases from the first to the last example above. In the last example, back-up provided directly by workers employed by the public agency itself creates the full risk that any private health care agency incurs in providing services. However, the waiver template requirement that the agency "assure" emergency back-up appears to set an even higher standard than that to which a private health care agency is subject. A private home care agency's obligation is one of reasonable care in providing back-up, not guaranteeing back-up in every instance. The regulatory language plays a major role in setting the bar to which states will be held.

VI. LIABILITY ISSUE VARIATIONS IN OTHER MODELS OF CDPAS

The liability analysis up to this point has focused primarily on the Cash and Counseling Demonstration. Of course, other models of CDPAS, besides Cash and Counseling, exist and face a similar array of liability issues. However, differences in structure and operation may make significant differences in liability risk, so this section of the report examines two other well-established CDPAS programs in order to determine whether and how these liability issues affect them differently. As with the Cash and Counseling programs, the methodology for this analysis involved review of authorizing law and regulations, review of available literature and reports on the two programs, and telephone interviews with key contacts from both programs. The first program is California's In-Home Supportive Services Program (IHSS); and the second, the New York Consumer-Directed Personal Assistance Program (CDPAP).

A. California In-Home Supportive Services Program

California's In-Home Supportive Services Program (IHSS), created in 1973, is a state-wide, publicly-funded program that provides a broad range of personal assistance and related services to low-income consumers who are elderly, blind, or living with disabilities. The program is the largest state program of its kind in the country, and enrollment numbers have steadily increased, as demonstrated by a 38% increase in average caseload numbers from 1995 to 2001 -- from almost 190,000 to over 262,000.[481] As of May 2003, enrollment is over 300,000.[482] IHSS pays well over 200,000 home care workers throughout the state.[483]

IHSS is funded through a complex array of federal (Medicaid and Title XX), state, and county funding sources. One of the funding complexities, for example, arises because Medicaid (called Medi-Cal in California) will pay only enrolled Medi-Cal workers who are

---

[481] California Department of Social Services, Research and Development Division, In-Home Suppportive Services Recipient Report -- IHSS: Keeping the Quality of Life at Home 9 (2002), available at http://www.dss.cahwnet.gov/research/res/pdf/IHSSrecipient.pdf.

[482] California Department of Social Services, Research and Development Division, (TABLE) *In-Home Supportive Services (IHSS) Paid Cases, July 1998-June 2003* at http://www.dss.cahwnet.gov/research/res/pdf/daptrends/IHSSPaidCasesJun03.pdf (last visited August 19, 2003).

[483] Janet Heinritz-Caterbury, *Collaborating to Improve In-Home Supportive Services: Stakeholder Perspectives on Implementing California's Public Authorities* 4 (2002), a report of the Paraprofessional Healthcare Institute available at http://www.paraprofessional.org/publications/CA%20PA%20Report.pdf.

not the recipient's spouse or parent. Covered cases that do not meet Medi-Cal requirements are funded by non-Medicaid monies.[484]

Services that may be provided under the program include:

- personal care services (including assistance with ambulation; bathing, toileting, oral hygiene, and grooming; dressing; care and assistance with prosthetic devices; bowel, bladder, and menstrual care; repositioning; skin care, and transfers; feeding and assurance of adequate fluid intake; respiration; and assistance with self-administration of medications),
- domestic services such as house cleaning, doing laundry, changing bed linens, and shipping,
- heavy cleaning, usually a one-time service, such as scrubbing cupboards or removal of hazardous debris,
- accompaniment by a provider when needed during necessary travel to health-related appointments or to alternative resource sites,
- yard hazard abatement,
- protective supervision of those with a mental condition that makes it unsafe to be alone,
- teaching and demonstration directed at reducing the need for other supportive services, and
- paramedical services, such as injections, internal catheters, range of motion, and wound care, that make it possible for the recipient to establish and maintain an independent living arrangement.[485]

California's approach to providing CDPAS is unique in that it makes use of independent, county-based, quasi-governmental entities, called "Public Authorities," to perform selected functions within the IHSS program. Public authorities were first authorized under California law in 1992, through the enactment of Senate Bill 485.[486] The legislation provided counties the option of creating county-level public authorities primarily to serve as employer of record of IHSS workers for purposes of collective bargaining over wages, hours, and other terms and conditions of employment of the home care workers. It also authorized other tasks such as providing a referral registry for consumers and workers and training.

The legislation came about due to increasing demand for personal assistance workers combined with the lack of an adequate work force, exacerbated by poor pay and benefits. Vigorous union organizing efforts hit a roadblock in 1990 when the California

---

[484] California Welfare Directors Association, Adult Services Committee, *In-Home Supportive Services: Past, Present and Future* 10-12 (2003), available at http://www.cwda.org/downloads/IHSS.pdf.

[485] Cal. Wel. & Inst. Code §12300 (West 2003).

[486] 1992 Cal. Legis. Serv. Ch. 722 (S.B. 485) (West), amending Cal. Wel. & Inst. §12301.6.

Court of Appeals held that, for purposes of collective bargaining, a county could *not* be deemed the employer of home care workers, because the county did not exercise any supervisory control, and because workers are free to terminate their services without notice to the county.[487] Thus, IHSS workers as a group had no one with whom they could bargain for better wages or benefits, and consumers had no one to advocate for better service delivery.

Consumers and workers came together to back legislation that addressed these problems through the creation of public authorities, an entity unique to California. Public authorities became a visible advocate for greater access to quality consumer-directed personal assistance and stronger worker rights. The legislation required a governing or advisory structure that ensured a high level of consumer direction of the public authority itself. In those counties that established public authorities after the 1992 law, wages and benefits substantially improved compared to other counties.[488] Although only a minority of workers actually joins a union, even in counties with well-established public authorities, they all benefit from the terms of collective bargaining agreements within the particular county, because the union agreement is applied to virtually all workers.

Between 1994 and 1999, seven counties created public authorities: Alameda, Contra Costa, Los Angeles, Monterey, San Francisco, San Mateo, and Santa Clara counties. These counties represented over 50 percent of the state IHSS caseload.[489] Amendments to the law in 1999 required all counties to establish a public authority or to contract with a nonprofit consortium to provide IHSS services, setting a deadline of January 2003.[490] As of mid-2003, all but four of the 58 California counties have established public authorities for IHSS.

A key feature of the legislation was the inclusion of a statutory immunity provision expressly for public authorities. The statute provides:

---

[487] Service Employees Int'l Union v. County of L.A., 275 Cal. Rptr. 508 (Cal. Ct. App. 1990).

[488] The wage and benefit differential is illustrated by comparing the wage and benefit data contained in the public authority profiles posted on the web site of the California Association of Public Authorities, http://www.capaihss.org (last visited August 21, 2003). Twenty-five counties are profiled, and 23 of them posted wage and benefit information. Six of the counties listed had public authorities prior to the 1999 enactment that made them mandatory: Alameda, Contra Costa, Monterey, San Francisco, San Mateo, and Santa Clara. (A seventh county, Los Angeles, also had a pre-existing public authority but was not profiled on the web page.) The average worker wage for these six counties was $9.42, and all provided medical benefits. In the other 17 counties where public authorities were only recently established, the average wage was $7.48, and only six of the 16 reported including some medical benefits.

[489] Heinritz-Canterbury, *supra* note 483, at 13.

[490] 1999 Cal. Legis. Serv. Ch. 90 (A.B. 1682) (West) and 1999 Cal. Legis. Serv. Ch. 710 (A.B. 1067) (West), adding Cal. Wel. & Inst. §12301.6.

> [A]ny public authority created pursuant to this section shall be deemed not to be the employer of in-home supportive services personnel referred to recipients under this section for purposes of liability due to the negligence or intentional torts of the in-home supportive services personnel.[491]

The language makes clear that the public authority cannot be found vicariously liable for the actions of personal assistance workers. It does not grant immunity for functions *directly* handled by the public authority. In addition to acting as the employer of IHSS workers for purposes of collective bargaining, the other functions that public authorities may handle directly include the following that are mandated under the public authority statute:

- Establish a registry and referral system to connect consumers and workers;
- Investigate the qualifications and background of potential workers;
- Establish a referral system to connect workers to consumers;
- Provide training for workers and consumers;
- Perform any other function related to the delivery of IHSS; and
- Ensure that the requirements of the personal care option under federal Medicaid law are met.[492]

Interviews with key contacts indicate that the well-established public authorities do provide a registry and referral system to connect consumers and workers, and they all do some level of background check on workers, although this varies significantly. Some require two work or personal references; some do criminal background checks at the local or state level.

All provide basic worker orientation to the program, and skills training is made available to varying degrees. Some public authorities do very little; some provide general skills training directly; and some link workers to training curricula provided through community colleges or other community resources. In all cases, the training for workers is optional. Many public authorities provide a written program handbook for workers and consumers.[493] Some distribute videotapes that describe the role and responsibilities of workers and consumers. Little or no formal training for consumers takes place, although some counties have had some success with promoting peer counseling among consumers and holding conferences with workshops for consumers and workers.

The scope of the public authority's work is limited by the practical reality that many if not most consumers and workers connect to each other without any contact with the

---

[491] Cal. Wel. & Inst. §12301.6(f)(1) (West 2003).

[492] Cal. Wel. & Inst. §12301.6(e) (West 2003).

[493] For example, the San Francisco public authority provides a 78-page handbook for providers entitled *Home Care Workers Handbook* (2003), and a 67-page handbook prepared by Consumers In Action for Person Assistance (CIAPA) entitled *Managing Your Personal Assistance Services* (undated).

registry or public authority. This is because so many consumers hire people they already know. Indeed, just over 40% of IHSS workers are relatives of the consumer.[494]

The other key participants in the functioning of IHSS -- besides the public authority, consumer and worker -- are the state and counties. It is the counties that administer the IHSS program at the local level on a day-to-day basis. The California Department of Social Services oversees the IHSS program, although a large share of IHSS funds come from the Department of Health Services which is responsible for administering the MediCal program. The state Controller's Office actually cuts the workers' checks and pays the requisite employee benefits, including social security, state disability insurance, unemployment insurance, worker's compensation, and any benefits such as health coverage that may have been negotiated in each county.[495] Income tax withholding is the worker's choice.

The day-to-day administration of IHSS occurs at the county level through a county IHSS administrative agency. The county determines eligibility for the program, both financial under Medi-Cal criteria and functional under the criteria of the IHSS program. The IHSS administrative agency sends out a social worker to interview the applicant in the home setting to determine eligibility and need for IHSS. The social worker assesses the types of services needed and the number of hours the county can authorize for each of the services. Up to 283 hours per month can be approved.[496]

Counties may offer IHSS services through any of three modes: (1) a contract mode, in which the county contracts with an agency to provide services; (2) the individual worker mode, in which the consumer directly employs the individual worker; and (3) the homemaker mode, in which the IHSS worker is a county employee. In fact, 95% of all IHSS consumers receive services through the individual worker mode.[497] Non-self-directing consumers can utilize the independent worker mode if they have a representative authorized by the consumer. Under this option, the consumer or authorized representative has the responsibility to hire, train, supervise, and fire an individual worker. Thus, while the state sets the maximum hours and compensation, the consumer selects the worker, determines the worker's schedule and tasks, and trains and supervises the worker. State law expressly defines the consumer as the employer of the IHSS worker.[498]

---

[494] California Department of Social Services, Research and Development Division, *IHSS Providers; Characteristics of Caregivers in the In-Home Supportive Services Program* 4 (October 2001), available at http://www.dss.cahwnet.gov/research/res/pdf/IHSSproviders.pdf.

[495] California Department of Social Services, Research and Development Division, *In-Home Suppportive Services: Individual Provider Benefits and Services Information* (Pub. 104, 1999).

[496] Cal. Wel. & Inst. §12300(h)(3), §12303.4(b) (West 2003).

[497] California Welfare Directors Association, *supra* note 484, at 9.

[498] Cal. Wel. & Inst. §12301.6(c)(1) and (c)(2)(B), §12303.25(a) (West 2003).

The consumer and the individual worker complete, sign, and submit timesheets verifying the delivery of authorized services for semi-monthly pay periods. The county IHSS administrative agency enters the information into the state's computer system to enable the state to generate a check. The county agency also assigns a social worker whom the consumer may call with problems, questions, re-assessment of hours, or other issues. The social worker must re-assess the individual's eligibility at least yearly.

With respect to liability risk, the IHSS statute also provides explicit immunity protection to the county and state, similar to that of the public authority:

> Counties and the state shall be immune from any liability resulting from their implementation of this section in the administration of the In-Home Supportive Services Program.[499]

It is not completely clear how far this immunity reaches. It does not appear intended to protect the state from failure to maintain required worker benefit payments such as social security or workers' compensation, since they have borne that duty for several years and continue to do so. Case law in California established the proposition long ago that, at least for purposes of certain employer obligations such as minimum wage[500] and worker's compensation,[501] the state is the co-employer of IHSS independent workers. Accordingly, this immunity language would appear to apply primarily or solely to actions for damages based on tort causes of action.

The statutory immunity provision goes on to insulate the county and state from any liability incurred by a public authority:

> Any obligation of the public authority or consortium pursuant to this section, whether statutory, contractual, or otherwise, shall be the obligation solely of the public authority or nonprofit consortium, and shall not be the obligation of the county or state.[502]

The overall impact of this structure on liability risk would appear to be two-fold. On the one hand, the employment configuration under the IHSS program is somewhat more complex than in other models because there are more actors involved. Figure 2 illustrates the functional relationships among the parties. The complexity itself can cause a risk of role confusion, and thus liability risk, if the role differentiation is not crystal clear or is not followed. On the other hand, most of the risk is expressly eliminated by state statute

---

[499] Cal. Wel. & Inst. §12301.6(f)(3) (West 2003).

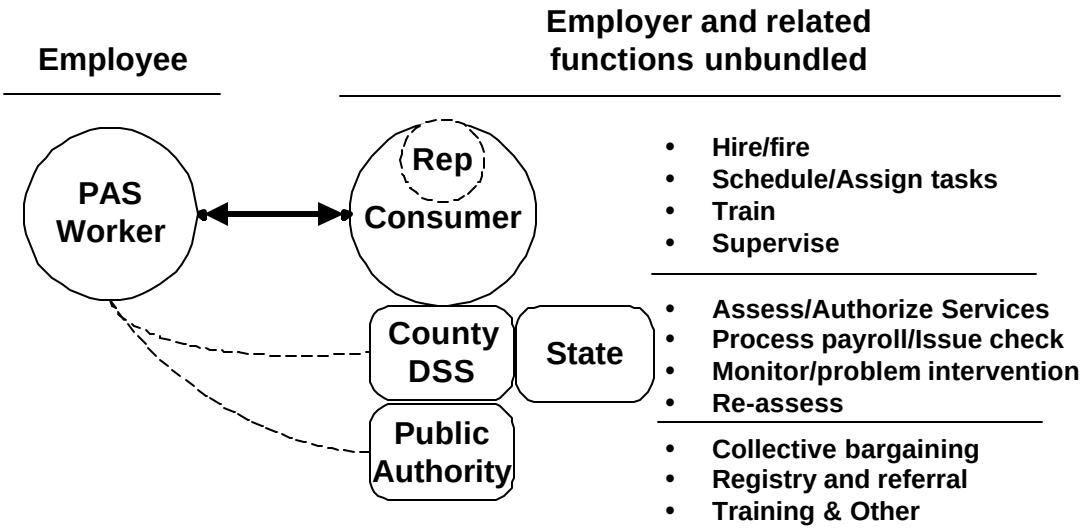
[500] Bonnette v. California Health and Welfare Agency, 704 F.2d 1465 (9th Cir. 1983).

[501] In-Home Supportive Services v. Workers' Compensation Appeals Board, 152 Cal. App. 3d 720 (1984).

[502] *Id*.

shielding the state and county quite broadly and shielding the public authority from vicarious liability for the actions of independent workers.

FIGURE 2
Parties Involved in California IHSS Program



1. Potential Liability Arising from the Relationship between Consumers and Workers

The analysis of liability risk in the consumer-worker dyad remains virtually unchanged under the IHSS model compared to Cash and Counseling, since the parties involved and the functions they perform are substantially similar. However, the IHSS model does provide additional protection in case of injury to workers, since workers' compensation coverage is universal, as well as state disability insurance. Moreover, because of the unionization of many IHSS workers and the ability to bargain collectively with public authorities, increasing numbers of workers are receiving employee health care benefits. On balance, the IHSS public authority model provides greater emphasis on the development and needs of the personal assistance workforce than does the Cash and Counseling model.

2. Liability Risk of County and State Administrative Agencies for IHSS

Because the county and state agencies involved in IHSS have the benefit of broad statutory immunity, their tort liability risk is negligible.[503] Containing no words of limitation, the liability bar would presumably preclude both direct or corporate liability for the actions of the state or county, as well as vicarious liability for the negligence of IHSS workers.

3. Liability Risk of Public Authorities

State law, as already noted, grants public authorities protection from vicarious liability. In other words, the public authority cannot be deemed responsible for the actions of an IHSS worker as an employer.[504] This immunity eliminates a predominant concern that any state, local, or private entity faces when it contemplates paying for or arranging consumer-directed services, over which, by design, it will have little control.[505]

The immunity provision for public authorities, unlike that for the state and counties, does not extend to functions that a public authority carries out directly. As a result, public authorities do bear some risk of liability for injuries it may cause in performing such functions. These functions may include: screening and referral of workers through the registry; training; providing emergency worker support if done directly by the public authority; and monitoring services, to the extent the public authority takes on that task.

Screening and Referral Through Registries

All the public authorities, except Alameda County's, run a registry in-house. Alameda contracts out the registry function to several community-based organizations. This in itself provides another level of distancing from liability risk.

Based on interviews with public authority directors, it is fairly clear that substantial variation exists in the extent of worker screening for purposes of registry listings. If screening is done poorly or if red flags are ignored, and the registry refers out an axe murderer, for example, the potential for liability clearly exists. At a minimum, all the registries ask for voluntary disclosure of convictions and all require two prior job references, or at least personal references if job experience is lacking. All the registries have some criteria for removing a worker's name from the registry and some form of appeal process for removal actions. The San Francisco public authority spells out six grounds for registry exclusion:

---

[503] Cal. Wel. & Inst. §12301.6(f)(3) (West 2003).

[504] Cal. Wel. & Inst. §12301.6(f)(1) (West 2003).

[505] See Kapp, Improving Choices Regarding Home Care Services, *supra* note 397, at 441.

1. Abusing or being under the influence of alcohol, or using or being under the influence of illegal drugs on the job.

2. Providing false information to the Registry or omitting information that could affect your eligibility to be on the Registry.

3. Criminal behavior, including theft, abuse, or neglect, or felony convictions determined to be inappropriate for a worker on the Registry.

4. Sharing confidential information about a consumer.

5. Sexual harassment of the consumer.

6. A pattern of poor performance, unprofessional conduct, or unreliability.[506]

All the registries ask for voluntary disclosure of criminal records from registry applicants, and roughly half of them, including the heavily populated county of Los Angeles, require criminal records checks. These checks vary from local, to state, to national FBI checks. The last option is rare because of the cost. The current cost of the statewide check alone is reportedly $52 each, and their practical value is very much a matter of ongoing debate within the public authorities. To the extent that convictions are reported, the consequences are also somewhat variable among the public authorities as to which crimes will disqualify a worker from the registry and whether any circumstances, such as the passage of time, will enable a disqualification to be waived. Some registries merely provide the information about the felony conviction to the consumer as part of the registry information.

In referring workers to consumers, all the registries do some level of matching consumer needs with worker abilities, at least on the level of matching preferences for gender, pet acceptance, smoker status, and scheduling needs. And all appear to follow the practice of sending out at least three names to consumers or, in some counties, as many as 15, so as to avoid an implicit recommendation of particular workers.

It is important to keep in mind that while a criminal record can disqualify a worker from being included in the registry, consumers are still free to hire workers with criminal backgrounds if they choose. Indeed, most workers are not hired through the registry, particularly those who are members of the consumer's family. For example, the San Francisco public authority estimated that about half the 12,000 consumers in the IHSS program were connected to workers through the registry, while the Los Angles public authority estimated the number as only 2000 of the more than 100,000 IHSS consumers in that county.

---

[506] San Francisco IHSS Public Authority, *Home Care Workers Handbook* 15 (2003).

A key facet of minimizing liability risk in operating the registry, as in any function, is clear communication of rights, responsibilities, and expectations. Some of the public authorities have developed detailed disclosures and releases that workers and consumers must read and sign in order to make use of the registry. For example, the Los Angeles public authority uses a three-page form, entitled "Participant's Rights, Responsibilities and Release Agreement," that describes in detail the limited role and operation of the registry and includes a disclaimer of any responsibility...

> for any injuries or damages which may arise out of the referral or which may arise out of the employment, or for investigating or resolving any disputes, misunderstandings or injuries which may arise between a Consumer and a Provider or any third party.[507]

The form goes on to include an express release of the registry "from any claim, damages, injuries, liability or remedy of any nature relating in any way to the Registry, its services or denial of services, or its actions or failures to act."[508] The enforceability of such broadly worded releases is always somewhat in doubt because courts generally frown upon them for public policy reasons. Although legalistic in tone and style, the form goes about as far as reasonably possible in articulating the limited functions of the registry and the rights and responsibilities of workers, consumers, and registry. At the same time, its dense legal language may be somewhat intimidating and difficult to understand for many consumers and workers.

Some public authorities, such as the San Francisco public authority, accomplish much of their communication of expectations by providing well-written handbooks to workers and consumers and by developing information-rich web sites.[509] The limitation and challenge of these communication approaches is their reliance on a presumption of English reading-based literacy -- a presumption that does not apply to a large proportion of IHSS consumers or workers. To illustrate, consumer demographics reported by the Los Angeles IHSS program indicate that only 44.7% of its consumers spoke English as their primary language. Other primary languages include: Spanish (16.5%), Armenian (15.3%), Russian (5.4%), Chinese (5.2%), Tagalog (1.9%) and other (11.9%).[510]

Training

The mandate to provide training in the California public authority law adds another functional area that distinguishes the California model from Cash and Counseling. The

---

[507] Personal Assistance Services Council of Los Angeles County, Participant's Rights, Responsibilities and Release Agreement 1 (June 18, 2002).

[508] *Id.* at 3.

[509] See the San Francisco public authority's website at http://www.sfihsspa.org, and handbook at *supra* note 506.

[510] Los Angeles County In-Home Supportive Services Program (IHSS), Fact Sheet, June 2002.

latter provides consultation and counseling, including information about where one may obtain training, but not training itself.

Interviews with public authority directors, as well as review of 25 public authority profiles posted by the California Association of Public Authorities,[511] reveals a tremendous variation in training resources and approaches. At a minimum, most provide an initial orientation to the IHSS program and its procedures. This may range from a half-hour one-on-one meeting to a two- or three-hour formal orientation course. To the extent that caregiver knowledge and skills training is provided, most public authorities arrange it through outside resources such as a local health department or Red Cross, rather than providing training by in-house staff. These training sessions typically cover elementary topics such as basic First Aid and CPR; communication and conflict resolution skills; and universal health and hygiene precautions. Some public authorities arrange more extensive skills training in areas such as bowel and bladder care; bathing and transferring techniques; diabetes education, nutrition and fluids; and recognizing and reporting abuse. Community colleges are often relied upon for such training. None of the public authorities reported providing on-the-job training for particular workers and consumers. All training, except for basic orientation, is voluntary.

Most public authorities seek to accommodate language diversity by providing orientation materials and forms in the major non-English languages. Likewise, many offer training or refer workers to classes taught in languages other than English.

Given these factors -- the focus on general knowledge and skills, their role as arranger rather than provider of training, and the optional nature of training for workers -- the risk of liability for poor training is minimal for most public authorities.

Emergency Back-Up Support

The availability of replacement workers in the event of worker no-shows varies among the public authorities. Practices cover the gamut:

- In Los Angeles, the county provides no formal support. It is the consumer's responsibility to arrange adequate back-up.
- The Kings County registry maintains a list of providers who will work on an emergency basis.
- Alameda County contracts with a community home care agency to provide emergency worker replacement 24/7.

[511] See http://www.capaihss.org/Info_home.html (last visited August 22, 2003).

- San Francisco maintains a pool of on-call workers, employed by the public authority, to provide emergency back-up.

In the Cash and Counseling states, the consultants make sure that the consumer has a back-up plan, but the specifics of the plan are the consumer's responsibility. As the examples above suggest, some public authorities are even less involved in back-up than are the Cash and Counseling States; some are more involved and proactive, as exemplified by the Alameda and San Francisco public authorities. The more directly public authorities take on responsibility to provide and control emergency back-up, the greater become the liability risks. Thus, in the above examples, the risk increases from the first to the last example. By employing the workers directly, the San Francisco public authority assumes the full risk that any health care agency incurs in providing services. Alameda removes itself one step by contracting out the function. Of course, the importance of emergency back-up is substantial, so even with increased risk, the policy objectives of ensuring the welfare and safety of the consumer may very well justify assumption of the responsibility and accompanying risk.

Monitoring Services

Monitoring is not a term that any of the public authorities or local social services departments would use to describe their function, but we apply the term here to mean any activities that enable any of the entities involved in the consumer-directed service delivery system to spot and respond to problems. In that sense, both the local social services departments and the public authorities provide some monitoring.

At a minimum, the social services social worker must visit the consumer annually to reassess need and eligibility. Consumers approved for the IHSS program are also instructed to call their social worker if problems arise. If, for example, on a home visit by the social worker, it is apparent that the consumer is not able to self-direct his or her care any longer, the consumer may be terminated from the consumer directed-component of IHSS. If the problem is one that rises to the level of abuse and neglect, the social worker is obligated to report the case to adult protective services. IHSS workers and public authority staff are also mandated reporters, legally required to report suspected abuse of consumers. Thus, the analysis made elsewhere in this report regarding potential liability for abuse or for failure to report abuse applies equally as well to the IHSS program.

A couple of counties -- Sonoma and Medocino -- have incorporated a more proactive case management type of approach to provide extra support to consumers who need it. However, the actual duties of these case managers were not investigated in this review. Overall, it can be said that the monitoring by the counties is fairly analogous to that described in the Cash and Counseling program, and thus, the liability issues are fairly similar, with the significant caveat that the counties are given statutory immunity.

The public authorities are less involved in monitoring than the local social services offices, but they do receive occasional complaints and hear of concerns from those workers and consumers who make use of the registries. Some public authorities also survey consumers and workers to assess their satisfaction with the registry services. To the extent that they become aware of problems through these activities, they may provide some consultation in problem solving or referral. They may also determine that a problematic worker or consumer is no longer appropriate for a registry listing. Overall, neither the public authorities nor consumers see the role of public authorities as responsible for quality of care issues. Thus, direct liability risks for monitoring are not significant.

B. New York's Consumer-Directed Personal Assistance Program (CDPAP)

New York State's Medicaid program operates one of the most extensive personal care programs in the country, accounting for nearly half of the national Medicaid spending for the personal care option under state plans.[512] An eligible beneficiary can receive 24/7 personal care if need is demonstrated. In addition, New York provides broad Medicaid home health care benefits, plus a variety of home- and community-based waiver programs, such as the Long-Term Home Health Care Program, which provides nursing home level home care for chronically ill individuals regardless of age. New York also sponsors some state-funded, community-based programs including the Supplemental Nutrition Assistant Program and the Expanded In-Home Services for Elderly Program.[513]

The Consumer-Directed Personal Assistance Program (CDPAP) represents a relatively small subset of personal care services in the state, with only 4783 persons in the program during calendar year 2003, although the number is rising.[514] However, its roots go back to 1980 when a group of self-directing consumers with disabilities formed a non-profit, consumer-run group called "Concepts of Independence." Concepts won a contract with New York City's Human Resources Administration (HRA) to provide consumer-directed personal assistance services under the city's Medicaid program. Concepts is paid as a Medicaid personal care provider agency, and it in turn pays personal assistants,

---

[512] Allen J. LeBlanc, et al., "State Medicaid Programs Offering Personal Care Services," 22 *Health Care Financing Rev*. 155, 161 (2001) (based on figures provided in "Table 1: Medicaid Personal Care Participants in the United States: 1998-1999").

[513] Teresa A. Coughlin & Amy Westpfahl Lutsky, "Recent Changes in Health Policy for Low-Income People in New York" 19, in *Assessing the New Federalism, State Update* 22 (Urban Institute, 2002), available at http://www.urban.org/UploadedPDF/310439.pdf.

[514] Telephone interview with Christopher Phillips, Health Program Administrator, Office of Medicaid Management, Bureau of Long-Term Care, New York State Department of Health (October 14, 2003).

employed by consumers in the CDPAP program. Concepts is the employer of record of the personal assistant only for purposes of wages and benefits.

Concepts grew slowly but steadily during its first decade of operation, but statewide growth of consumer-directed services did not occur until 1992 when legislation created a state-wide "Patient-Managed Home Care" demonstration program.[515] In addition to expanding the consumer-directed model, the legislation also amended the state's Nurse Practice Act to permit family members, household members, friends or domestic employees to perform skilled nursing tasks, as long as they do not hold themselves out as a person licensed to practice nursing and they were either unpaid or employed under the Patient-Managed Home Care program.

In 1995, amendments to the statute converted the demonstration program to a permanent statewide program and changed its name to its current name, the Consumer-Directed Personal Assistance Program or CDPAP.[516] As of late 2002, about 48 of 62 local districts (county Medicaid agencies) have established CDPAP services.[517] No formal regulations have been adopted for the program as of mid-2003, although the state Department of Social Services has issued several memoranda setting forth guidelines for districts developing CDPAP programs.[518]

Under the 1995 law, an individual is eligible for CDPAP if the person meets Medicaid eligibility requirements for home care services and:

> has been determined by the social services district, pursuant to an assessment of the person's appropriateness for the program,... as being in need of home care services or private duty nursing and is able and willing or has a legal guardian able and willing to make informed choices, or has designated a relative or other adult who is able and willing to assist in making informed choices, as to the type and quality of services, including but not limited to such services as nursing care, personal care, transportation and respite service.[519]

Because Concepts is the oldest and largest consumer-directed provider in CDPAP, this discussion will be limited to Concepts' operation and experience in New York City.

---

[515] 1992 Sess. Law News of N.Y. Ch. 795 (S. 9032) (McKinney's).

[516] 1995 Sess. Law News of N.Y. Ch. 81 (S. 5280-A, A. 7984-A) §365-f. (McKinney's), codified at NY Soc. Serv. Law §§365-f, 367-p(c) (2003).

[517] Valerie J. Bogart, "Consumer Directed Assistance Program Offers Greater Autonomy to Recipients of Home Care," 75-Jan *N.Y.S. Bar Journal* 8, 9 (2003).

[518] *Id.*

[519] NY Soc. Serv. Law §§365-f(2)(c) (West 2003).

Concepts serves about 1,300 consumers in the city and about 300 in six counties beyond New York.[520]

For consumers, the process begins with a Medicaid application to a local social services district. In New York City, the equivalent of the social services district is the Human Resources Administration that operates through neighborhood "Community Alternative Systems Agencies" or "CASA" offices. The consumer must provide a physician's order that describes the consumer's medical and functional impairments and the need for home care services. The CASA office, through the Home Care Services Program, then conducts an assessment by a case manager and another by a nurse to determine whether the applicant is eligible for personal care services under Medicaid and, if so, the number of hours per week. Once this is accomplished, the CASA office will consider enrollment in the consumer-directed program.

The CDPAP application requires the consumer, or the consumer's parent, legal guardian, or responsible adult to answer questions demonstrating ability and willingness to assume responsibility for:

- recruiting, selecting, training and orienting each personal assistant;
- directing the personal assistant's daily activities within the service plan authorized by the Home Care Services Program;
- obtaining and assigning replacement assistants;
- discharging the personal assistant when necessary;
- completing and returning all forms as required by Concepts;
- resolving all personal assistant complaints;
- maintaining contact with the HRA case manager; and
- maintaining contact with the appropriate Concepts staff members as needed.[521]

Once enrollment is approved, the CDPAP contractor -- Concepts -- is notified. Whomever the consumer selects to work as a personal assistant must go to Concepts to complete the necessary employment paperwork. One key difference between the New York program and Cash and Counseling is that certain family members cannot serve as personal assistance workers in the New York program. The program follows the state's regulation for Medicaid personal care services in this regard, which prohibits payment to "a patient's spouse, parent, son, son-in-law, daughter or daughter-in-law...."[522]

---

[520] Concepts has been the only consumer-directed provider in the city, but recently HRA issued a request for funding proposal to solicit additional providers. As of August 2003, HRA was still in the process of evaluating proposals.

[521] HRA Home Care Services Program, Consumer Directed Personal Assistance Program Application 1 (Form M13e, p. 1, Rev. 1/6/97).

[522] N.Y. Comp. Codes R. & Regs. Tit. 18, §505.14 (West 2003). Advocates, however, point out that this state regulation is more restrictive than the federal regulation which prohibits as providers only family members who are

Concepts is responsible for the following duties:

- hiring and dismissing personal assistants at the direction of the consumer, legal guardian or responsible adult;
- acting as the personal assistant's employer of record in relation to wages and benefits [i.e., Social Security, unemployment compensation, worker's compensation, health benefits, and leave benefits];
- establishing the required personnel files;
- collecting and verifying the consumer/personal assistant time sheets;
- maintaining time and leave records;
- paying each assistant's wages and administering each assistant's fringe benefits;[523]
- resolving appropriate complaints; and
- submitting records as needed to the HRA-Home Care Service Program.[524]

Concepts performs two additional functions. One is to administer a "consumer classified list" for consumers seeking personal assistants, and a "personal assist ad list" for personal assistants seeking work. Personal assistants who have worked at least 500 hours for Concepts may use the latter. Concepts merely coordinates and periodically updates these lists. They perform no recruiting, screening, or assessment of the listings. The second function developed only after the 9/11/01 disaster, when HRA asked Concepts to get more involved in monitoring the circumstances of the consumers. Concepts now employs three "quality assurance specialists" and a supervisor to serve as "point persons" for every consumer. They are available in a responsive capacity, to answer questions, initially investigate problems, and be available as a resource. However, they do not take over the monitoring function of the CASA case manager. If problems merit, the quality assurance specialist may refer the matter to the case manager.

On an ongoing basis once services begin, the CASA office, through its case managers, stays involved in a monitoring capacity. At a minimum, it performs semi-annual nursing reassessments and annual case worker visits to monitor and reassess services. The relationship among the parties, with their respective duties is illustrated in Figure 3 below.

"legally responsible" for the consumer, in other words, only one's spouse and the parent of a minor child receiving services. See Bogart, *supra* note 517, at 11, *citing* 42 C.F.R. §440.167.

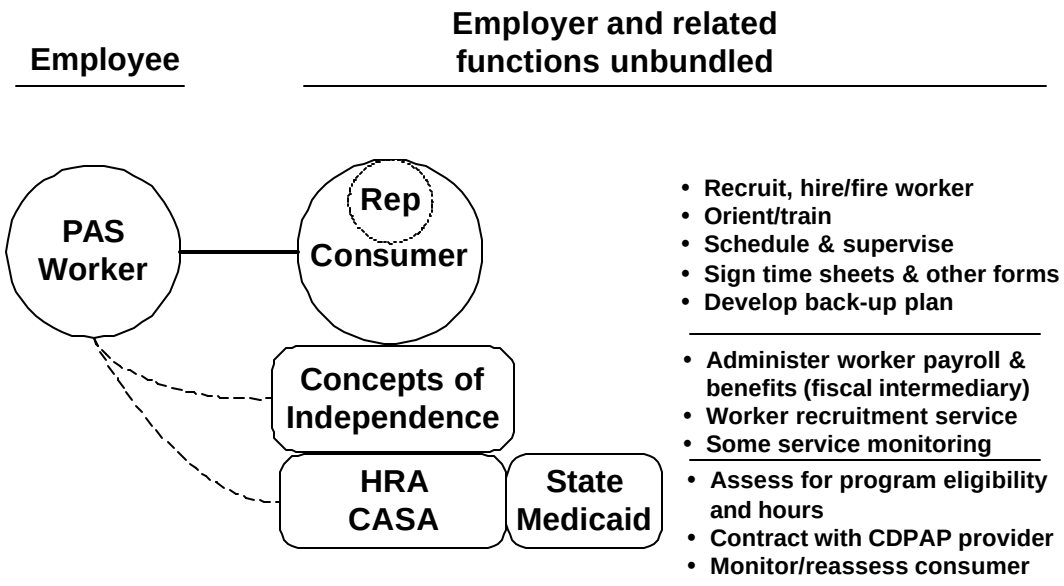
[523] A key feature of Concept's payroll management is the fact that they send the paycheck to the consumer who then pays the worker.

[524] *Id.* at 2.

1. Potential Liability Arising from the Relationship between Consumers and Workers

The analysis of liability risk in the consumer-worker dyad remains virtually unchanged under New York's CDPAP model compared to Cash and Counseling, since the parties involved and the functions they perform are substantially similar. However, like California, the New York model provides additional protection in case of injury to workers, since workers' compensation coverage is universal, along with other basic worker benefits.

FIGURE 3
Parties Involved in New York CDPAP



Although New York does not have the equivalent of the California public authority to serve as the employer for collective bargaining purposes, the workers in the CDPAP (and in all home care positions in the city) benefit from "Living Wage" legislation adopted by the New York City Council in November of 2002. The legislation raised minimum worker pay for home care workers and others to $8.10 per hour with health care coverage or $9.60/hour without healthcare coverage, effective July 1, 2003. The amount is adjusted annually.[525]

[525] NYC Code §6-109, eff. February 25, 2003.

2. Liability Risk of County and State Administrative Agencies (HRA through CASA offices)

The employer-type duties retained by the Human Resources Administration through its local CASA office -- primarily program eligibility and monitoring -- fall well below the level of involvement that could give rise to a risk of being deemed employer of the personal assistants in the CDPAP. Thus, concern about vicarious liability for injuries caused by workers in the program is not significant. However, as with all functions, the CASA office and its staff must adhere to a duty of ordinary care for the actual functions it takes on.

CASA's initial function is that of eligibility determination. But the eligibility process is tempered by Medicaid appeal rights that provide a means of redress for consumers who disagree with any determination. Personal injury law is not especially relevant with respect to this function, with the possible exception of decisions regarding who may be approved as a responsible adult to direct care on behalf of the consumer.

Appointment of a "Responsible Adult"/Representative

The worst case scenario for any agency in the position of approving consumer-directed care is the negligent approval of a surrogate who subsequently exploits and seriously injures the consumer. The liability concern in the New York program closely tracks that already discussed under Cash and Counseling. The challenge is the creation of a process and standard for recognition of the surrogate that sufficiently protects both the consumer and the agency approving the arrangement.

The CDPAP statute, quoted earlier, says only that a consumer who is unable to self-direct care may still participate in CDPAP if he or she:

> has a legal guardian able and willing to make informed choices, or has designated a relative or other adult who is able and willing to assist in making informed choices, as to the type and quality of services.[526]

The language on its face indicates that it is the consumer who is the designator and not someone else (unless a guardian exists). Thus, some kind of appointing process and confirmation of that process would be expected. The application materials for CDPAP do provide some criteria for who may be the responsible adult, and the application form requires that person's contact information and signature, but they are silent on how designation is made or confirmed, other than the fact that the person must be interviewed by the case worker and registered nurse.[527] In most cases, the interview process may be

---

[526] NY Soc. Serv. Law §§365-f(2)(c) (West 2003).

[527] See HRA Home Care Services Program, Consumer Directed Personal Assistance Program Application 1 (Form M13e, p. 1, Rev. January 6, 1997).

more than sufficient to make a sound determination, but as with the Cash and Counseling program, greater clarity in the appointment process would enhance safety and reduce liability risk.

Monitoring by the CASA Office

The liability analysis provided with respect to consultants in the Cash and Counseling programs applies quite similarly to the monitoring functions of the CASA office. Monitoring constitutes both a safeguard against personal injury as well as a responsibility for which the CASA office can be held accountable in a tort claim if the function is carried out negligently. The challenge again is to define the nature and frequency of monitoring clearly in program procedures and materials, carry out the function as envisioned consistently, and act upon information gathered in the process, especially if the information suggests management or care problems.

3. Liability Risk of Concepts of Independence

Concepts of Independence is the employer of record of personal assistants for purposes of payroll and benefits management and for purposes of Medicaid regulations requiring identification of a provider agency to receive Medicaid payments. To this extent, it serves as little more than a fiscal agent, similar to the fiscal agents under Cash and Counseling. Concepts provides no recruiting, screening, or active referral function; instead, it merely maintains a referral list on which consumers and workers list themselves. In some respects, Concept's involvement with workers is even less that of the fiscal agents under Cash and Counseling, because it does not pay workers directly. Instead, it sends the paycheck to the consumer who then turns it over to the worker. Consumers bear the responsibility for the key employer functions: recruiting; hiring/firing; training; and assigning, scheduling and supervising the work of independent workers. Under this configuration, the case law suggests very low exposure of Concepts under any theory of vicarious liability.

As for the functions for which Concepts is directly responsible -- primarily payroll management functions -- the liability analysis closely tracks that of the Cash and Counseling fiscal agents and, similarly, involves fairly low risk of tort liability.

Monitoring by Concepts of Independence

One recently acquired function of Concepts that does go beyond that of fiscal agent if that of quality assurance monitoring. As noted above, Concepts now employs three "quality assurance specialists" and a supervisor to serve as "point persons" for every consumer. They are available in a responsive capacity, to answer questions, initially investigate problems, and be available as a resource. The key limiting factor of this function is that it is responsive to concerns and problems reported by consumers or others

and is not supervisory in nature. The CASA case manager still bears the primary responsibility of supervisory monitoring on a periodic basis, and when Concepts becomes aware of problems meriting more active intervention, its most proactive option is to refer the matter to the case manager. Of course, even this level of monitoring can be done so poorly as to violate a duty of ordinary care, resulting in liability for injury. But, the overall risk is modest under this scenario, and the key to avoiding even that risk is, as always, is to define the nature and extent of monitoring clearly in program procedures and materials, to carry out the function as envisioned consistently, and to act upon information gathered in the process, especially if the information suggests management or care problems.

To recap, two other models of consumer-directed personal assistance services -- the California In-Home Supportive Services Program, and the New York Consumer-Directed Personal Assistance Program -- face similar liability issues as are found in the Cash and Counseling model. Variations in the issues are dictated by (1) authorizing legislation which defines the duties of the program participants and/or the limits of liability (as in the immunity provisions in the California law), and (2) by the scope and nature of the functions the participating entities actually take on. In all these models, there is a division of labor of employer and related tasks among the participants in the system. The division of tasks limits the liability risk of each participant in different ways. However, because liability risk follows function, success in appropriately limiting liability risk depends on clarity in the division of responsibility, clear communication of expectations, and consistent compliance with those expectations.

VII. CONCLUSIONS AND OPTIONS TO ADDRESS LIABILITY RISKS

This section summarizes our conclusions regarding the potential liability risks for each actor in consumer-directed care -- consumers, workers, authorized representatives, fiscal intermediaries, consultants, and states -- and identifies steps that can be taken to minimize the risk of liability. Overall, we conclude that:

- The risk of liability as between the consumer and the worker is no greater than that encountered under agency provided care. In addition, because in many cases family members serve as CDPAS workers under this model of care, there is, as a practical matter, less likelihood that the parties will seek compensation for personal injuries in the courts.

- Putting aside any impact of familial relationships, personal assistance workers face a heightened theoretical risk of liability if they are negligent in performing caregiving duties, compared to agency provided care, because in the latter structure the plaintiff is more likely to sue the agency, under the doctrine of vicarious liability, than to sue the worker. The agency is likely to have greater assets against which to recover.[528] Absent the agency, the individual worker employed by the consumer bears the sole legal responsibility for injuries caused by the worker's negligence. However, the practical likelihood of liability is influenced by the extent of assets or insurance owned by a prospective defendant. Individuals providing personal assistance are likely to have insignificant assets compared to agencies and in practical terms, are therefore likely to be "judgment proof."

- In the case of injury to workers while on the job, liability risk is affected dramatically by the availability of workers' compensation. Where workers are *not* covered by workers' compensation benefits, consumers who have assets are more likely to be subject to suit for compensation if a worker is injured on the job, because of the absence of other remedies. Workers' compensation provides a relatively simple administrative remedy to injured workers and, at the same time, bars most personal injury actions by the worker against the consumer.

---

[528] Vicarious liability should be distinguished from direct liability. Direct liability applies where an institution or individual is held directly liable for acts, or failures to act, in matters that are directly within its control. Vicarious liability holds a principal strictly responsible for the acts or omissions of his or her agent, based upon the common law doctrine of *respondeat superior*, this doctrine literally meaning "let the master answer." These concepts are explained in greater detail in Section I.D.

- With respect to other actors in the provision of services -- i.e., the state sponsoring agency, consultants, fiscal agents, public authorities (as in California), or consumer-directed provider agencies (as in New York) -- this analysis finds that their liability risk is limited to the specific tasks they perform, with minimal risk of vicarious liability for personal injury negligently caused by personal assistance workers. The risk of direct liability is also relatively very low because of each actor's limited functions.

Thus, in general, delivering home care services through the Cash and Counseling model or a similar consumer-directed structure results in a relatively low level of liability risk where employer and support functions are "unbundled" in a clearly defined and communicated fashion.

In this section, in addition to describing the liability risks in greater detail, we identify a number of steps that can be taken to minimize or at least reduce potential liability. However, two key framing points about liability risk should always be kept in mind. One, liability risk never disappears entirely, even under a grant of statutory immunity. Two, the best protection against liability in connection with any consumer-directed program is first, development and implementation of a well-designed program that clearly assigns and communicates responsibilities, and second, careful and consistent adherence to the procedures and protocols of the program.[529] The Cash and Counseling Demonstration's final report on Lessons from the Implementation of Cash and Counseling in Arkansas, Florida, and New Jersey provides excellent advice and comprehensive recommendations regarding the design of a CDPAS program which we will not repeat here.[530]

A. Workers

Individual workers face a significant risk that they may be found liable if they are negligent in performing their duties under general tort law principles. However, this reality is tempered by the fact that if a worker does not have sufficient income or assets to pay the judgment in a damage action (that is, the worker is "judgment proof"), this is a risk that is not likely to materialize.[531] Workers also face the risk that they will be injured on the job, and if they are not covered by workers' compensation, they may not, as a practical matter, be able to recover damages in connection with the injury. In addition, in some states, workers risk civil or criminal liability if they fail to report abuse or neglect of the consumer as required by state adult protective services (APS) laws. A worker who engages in gross

---

[529] See the discussion in the introduction to Section IV of the importance of following written instructions and procedures because a court may look to those procedures or instructions as providing the relevant standard of care in a negligence action.

[530] Lessons Report, *supra* note 21.

[531] The fact that a provider is judgment proof may not be a concern to the provider, but it may be a concern to the consumer, who risks being unable to recover damages caused by the provider.

negligence or abuses the consumer may also be civilly and/or criminally liable under state APS laws. These abuse and neglect related risks are extremely low-frequency risks.

Worker Liability Risks

- **Negligent caregiving**. Case law demonstrates that individual workers face a significant risk that they may be found liable if they are negligent in performing their caregiving duties, including leaving the consumer unattended. However, if a worker's income and assets are low or modest, as is the case for many in this field, the worker may, in practical terms, be "judgment proof." From this perspective, the risk of enforceable liability for negligent caregiving is a risk that is not likely to materialize (Section II.A.1).

- **Negligence in non-caregiving matters**. A worker may be found liable for negligence in non-caregiving activities, most notably creating a hazard in the consumer's home, However, here, again, if a worker does not have sufficient income or assets to pay the judgment in a damage action, this is a risk that is not likely to materialize (Section II.A.2).

- **Failure to report abuse or neglect**. A worker may be a mandatory reporter under the state's adult protective services (APS) law and may therefore be both civilly and criminally liable for failure to report abuse or neglect that comes to attention of the worker. However, liability can easily be avoided by complying with the APS law (Section II.A.3.a). As a practical matter, workers employed by the consumer or the consumer's representative, especially if the worker is a family member, may have greater emotional or economic barriers to reporting, compared to agency-employed workers.

- **Liability for abuse or neglect**. A worker may be criminally liable under the state's APS law if the worker abuses or neglects the consumer. This is a low level risk because of the infrequency of misconduct that rises to the level of abuse or neglect. Of course, on the rare occasions when it does occur, the injury to the consumer can be extremely serious (Section II.A.3.b).

- **Liability for injury to third party caused by worker**. The worker and the consumer are potentially liable for injuries to third parties caused by the worker while acting within the scope of employment. The worker's liability is direct, i.e., flowing directly from his or her own action or inaction, while the consumer's risk of liability is vicarious, arising from the employer-employee doctrine of *respondeat superior*. Unless the worker or the consumer has sufficient income or assets to pay the judgment in a damage action, this too is a risk that has a low probability of materializing against the worker (Section II.C).

- **Liability for injury to third party caused by consumer**. A third party may claim that an injury inflicted by a consumer was caused by the negligent care or supervision of the worker, thus making the worker liable for damages (Section II.C). However, such claims are rare and are likely to be dismissed for failure to prove that the worker owed a duty of care to the third party.

Other Risks

- **Inability to recover compensation for on the job injuries**. The worker may be injured on the job by the consumer (Section II.B.1 and Section II.B.2), by a third party (Section II.C), or as a result of the negligence of the owner or renter of the consumer's home (Section II.B.1). If the potential defendant has neither assets nor liability insurance, the worker will not be able to collect damages in connection with the injury, unless the worker is covered by workers' compensation insurance.

Options to Address Liability Risks

- **Fully inform the worker of the liability risks and document the process**. At the time a worker is hired, the worker can be made aware of the potential liability risks, including the terms of the state APS law, and the steps the worker can take to minimize these risks.

- **Require workers' compensation coverage for all workers**. Workers' compensation coverage would ensure that workers receive compensation for all on the job injuries, regardless of fault or the availability of compensation from responsible parties, and is therefore highly desirable.[532]

- **Make available optional training programs for workers**. Under the Cash and Counseling model, consumers are responsible for providing any necessary training to workers. While for many consumers it is important that they have the right to train their own workers, state programs might consider making available strictly optional training resources and programs for workers who want assistance (for example, provide videos containing instruction on basic skills such as proper bathing techniques; contract with community resources to provide free basic training sessions; seek to expand the availability of community college courses in relevant skills). While the state should not assume responsibility for the quality and effectiveness of such programs, the state should attempt to offer training that is

[532] In New Jersey, the only one of three Cash and Counseling states to require workers' compensation coverage, the consumer was allowed to pay the premium for the workers' compensation rider to homeowner's or renter's insurance out of the consumer's cash allowance, and "consumers who did not already have a policy were allowed to include the full cost of such insurance, not simply the cost of the rider." New Jersey Implementation Report, *supra* note 18, at 103.

consistent with the philosophy of consumer direction and should avoid "canned" training programs and materials that are inconsistent with that philosophy.

B. Consumers

Consumers face a distinct risk of liability for on the job injuries to workers unless the worker is covered by workers' compensation. However, unless the consumer or a family member (acting as authorized representative) has significant assets, the worker is unlikely to bring a personal injury suit. Cases in which consumers with mental impairments engage in negligent or aggressive behavior that causes injury to the worker are more complicated, because the mental impairment may or may not be recognized as a defense in a damage action. Consumers also are subject to employment-related legal claims (e.g., unlawful discharge) but can be protected from liability by a carefully worded employment agreement and by taking care not to violate any applicable state employment laws. Finally, consumers may be vicariously liable as employers for injuries caused to third parties by their workers during the course of employment.

Consumer Liability Risks

- **Negligence in maintaining the worker's workplace**. Consumers face a distinct risk of liability for on the job injuries to individual workers they employ unless those employees are covered by workers' compensation. This risk exists with respect to any invitee into the home, whether the invitee is a housekeeper, dog walker, social visitor, or anyone else. The risk to the personal assistance worker is only one of degree -- that is, the personal assistance worker is likely to spend a greater amount of time in the home and perform intimate, hands-on services, thereby giving rise to greater opportunity for injury.

  The existence of workers' compensation coverage is a key protection for both workers who risk injury and for consumers who, without it, face significant liability risk. The case law demonstrates that a consumer may be found liable for negligence in maintaining the workplace -- that is, for creating or failing to correct hazardous conditions in the consumer's home. If the consumer lives with a family member or friend who is the owner or renter of the consumer's home, that family member or friend may also be liable on a theory of premises liability (Section II.B.1). It should be noted that this risk is theoretically the same, regardless of whether the services are consumer-directed or agency-provided. In both circumstances, the consumer or home-owner has an obligation to maintain a reasonably safe workplace. The difference is that under agency-provided care, workers compensation coverage is universal, and where such coverage exits, personal injury suits against the consumer or homeowner are far less likely.

- **Injuries caused by the consumer's mental impairment**. Cases in which consumers with mental impairment engage in negligent or aggressive behavior that causes injury to the worker are more complicated, because state law varies on whether the consumer's mental impairment will be recognized as a defense in an action for damages. The trend is to recognize the defense when asserted by a defendant who is confined to a residential facility, and there is case law suggesting that in at least some circumstances, this defense will also be accepted in the home care setting (Section II.B.2).

- **Wrongful discharge and other employment-related claims**. As an employer, the consumer is potentially liable for a variety of employment related claims, such as discharge in violation of an employment agreement or employment actions that are discriminatorily motivated. However, this is a low frequency risk, and consumers can be protected from liability by a carefully worded employment agreement (expressly noting that the worker's employment is terminable at will by the consumer) and by being made aware of any applicable state employment laws (Section II.B.3).

- **Liability for injuries to third parties caused by the worker**. Consumers may be liable as employers on the basis of vicarious liability (also referred to as *respondeat superior*) for injuries caused to third parties by their workers while acting within the scope of employment. For example, an auto accident caused by the worker while running an errand for the consumer could result in such liability (Section II.C).

Other Risks

- **Inability to recover compensation for injuries caused by the worker**. Because many, if not most, workers are likely to have limited income and assets, the consumer may not as a practical matter be able to recover damages for injuries caused by the worker (Section II.A.1 and Section II.A.2).

Options to Address Liability Risk

- **Fully inform the consumer of the liability risks**. At the time of enrollment, the consumer can be informed of all potential risks and the steps the consumer can take to minimize those risks (for example, the consumer should be advised of the legal responsibility to maintain a safe workplace and the importance of correcting potentially hazardous conditions in the home). A homeowner's or lessee's insurance policy that includes protection for such liability is advisable.

- **Inform the consumer of the possible need for liability insurance coverage if the consumer has assets at risk**. States should consider advising the consumer that if the worker causes injury to a *third party*, the consumer will be jointly liable to the third party under the doctrine of vicarious liability. If the worker is judgment proof and

does not have liability insurance, the consumer may be solely liable and will not be able to obtain contribution for damages from the worker. To protect against this possibility, the consumer may want to consider obtaining liability insurance if the consumer has assets at risk.

- **Document that the consumer has received this information and agrees to these risks**. It is advisable to provide the information described in paragraphs one and two in writing, preferably as part of the enrollment agreement signed by the consumer. This will provide written documentation that the consumer has been made aware of the risks and has accepted those risks in agreeing to participate in the CDPAS program. It is likely that most applicants for CDPAS will conclude that the benefits far outweigh the risks.

- **Provide workers' compensation coverage for all individual providers**. In states where it is available, it is highly desirable that workers' compensation coverage be provided, or at least made available, for all individual workers through the state program. Placing the burden or option on consumers to obtain the coverage will substantially lessen the likelihood of implementation. Consultants can be directed to explain the importance of coverage to consumers and assist them in enrolling their workers. This will provide protection for both workers and consumers -- the worker will be guaranteed compensation for on the job injuries even if the consumer (or other responsible party) is judgment proof, and the consumer will be protected from suits for damages by workers (this is particularly important in the case of a mentally impaired consumer).

- **Offer provider background checks to consumers**. The state can offer worker background checks to consumers, including criminal background checks, as is required in the Medicaid waiver templates for CDPAS programs,[533] and consultants can play an important role by explaining to consumers the value of obtaining such checks. This will provide some protection against hiring a worker who is negligent or dishonest or who is likely to abuse or neglect the consumer.

- **Advise the consumer to enter into a written employment agreement with the worker that allows termination of employment at will**. States should advise the consumer and the worker to execute a written employment agreement that clearly states that the consumer may terminate the worker's employment at will. The

[533] Both the Section 1115 and the Section 1915(c) waiver templates provide: "Upon family or individual request, the State makes available, at no cost, provider background checks, including criminal background checks." Independence Plus, §1115 Demonstration Version, A Demonstration Program for Family or Individual Directed Community Services, and Independence Plus, 1915(c) Waiver Version, A Waiver Program for Family or Individual Directed Community Services, at http://cms.hhs.gov/independenceplus/1115temp.pdf (last visited October 1, 2003) and http://cms.hhs.gov/independenceplus/1915temp.pdf (last visited October 1, 2003).

agreement can also include a provision requiring the worker and/or the consumer to provide advance notice of termination without undercutting the consumer's right to terminate the worker's employment at will.

- **Provide information and training regarding employment laws that apply to the consumer**. As part of the consumer's orientation or training, the consultant can include information regarding any state employment laws, such as the state anti-discrimination law, that are applicable to the consumer, and can advise the consumer regarding steps that can be taken to avoid liability.

C. Authorized Representatives

Although the liability risks listed below are real, in most cases authorized representatives will be relatives or friends whose caregiving commitment will be high, as will their level of integrity in performing their duties. Such individuals may be informed of these risks, but they are unlikely to be deterred from acting as a representative by the threat of liability.

Representative Liability Risks

- **Liability for negligence and for breach of fiduciary duty**. In addition to potential liability for negligence (that is, failure to exercise ordinary care) in performing the duties of an authorized representative, an authorized representative may well have a heightened "fiduciary duty" to the consumer. However, in most cases authorized representatives are relatives or friends whose caregiving commitment is high, as is their level of care in performing their duties, thus significantly reducing the likelihood of negligence or breach of fiduciary duty (Section II.D).

- **Liability for negligent hiring of a worker**. The parent or other legally responsible person who is acting as the consumer's authorized representative could be liable for injuries or damage to a third party that results from a worker's failure to properly supervise or care for the consumer. However, case law on negligent hiring and parental liability strongly suggests that the authorized representative would be liable only if the representative: (1) knew or should have known that the consumer was likely to cause such damage or injuries; and (2) the authorized representative was negligent in hiring the personal assistant responsible for the supervision or care of the consumer The risk of liability is relatively low (Section II.D).

- **Liability as the employer of the worker**. The authorized representative normally will be considered the joint employer, or the sole employer of the worker if the consumer has no ability to self-direct his or her care, and therefore will have potential

employment related liability (see Section II.B.3), including vicarious liability for torts committed by the worker that cause injury to third parties.

- **Liability for abuse, neglect or exploitation of the consumer**. In states that provide for a civil cause of action for abuse of a vulnerable adult, the representative may be liable to the consumer if the representative abuses, neglects or exploits consumer. The representative could also be criminally liable. Again, this is a very low-incidence risk. Finally, the representative may be a mandatory reporter under the state APS law (Section II.D).

Options to Address Liability Risks

- **Fully inform the authorized representative of the liability risks**. The authorized representative can be fully informed of each of these liability risks as part of the screening process for authorized representatives.

- **Document that the authorized representative has been informed of and agrees to these risks**. It is desirable that the authorized representative sign a written document in which the representative agrees to assume the duties and responsibilities of an authorized representative. This document should include a description of the responsibilities and risks associated with the role of an authorized representative.[534]

- **Follow the same options for consumers, as appropriate**. The options for addressing liability risks for consumers apply to authorized representatives to the extent that they act in place of the consumer.

D. Fiscal Agents

For fiscal agents, the risk of personal injury liability is very limited. The possible theories of liability are speculative and difficult to prove, and even if the plaintiff is nonetheless successful, the amount of damages a consumer or worker will be able to recover is probably small. Thus, it is unlikely that a consumer or worker will find it worthwhile to pursue a legal action against a fiscal agent.

[534] The Representative Screening Questionnaire and the Designation of Authorized Representative forms developed by the states of Arkansas and New Jersey can be used as a model, but should be modified to include a more explicit and complete discussion of the potential liability risks for authorized representatives. Copies of these documents are attached as Appendix D and Appendix E.

FA Liability Risks

- **Liability to consumers for breach of contract**. In some states, the fiscal agent enters into an agreement directly with the consumer, creating the possibility of a breach of contract action by the consumer if the FA fails to issue a paycheck to the worker and the consumer loses the worker's services and suffers injury as a result. However, the possible theories of liability are speculative and difficult to prove, and even if the plaintiff is nonetheless successful, the amount of damages a consumer or worker will be able to recover for breach of contract is likely to be insignificant (Section III.A).

- **Tort liability to consumers and workers for failure to pay worker**. Negligence resulting in failure to pay the worker could also give rise to a tort action by the worker or the consumer. Here, too, there are also serious legal obstacles to these claims, such as the difficulty of proving causation, and in any case, the amount of damages at stake are speculative at best (Section III.B).

- **Liability to consumers for negligent monitoring**. A fiscal agent's negligence in monitoring a consumer's expenses and detecting problems could result in negative consequences for the consumer such as dis-enrollment from the CDPAS program, but here again there are serious legal obstacles to recovery, most notably the consumer's contributory negligence in deviating from the spending plan (Section III.C).

- **Liability for failure to report abuse or neglect**. A fiscal agent may be a mandatory reporter under the state's adult protective services (APS) law and may therefore be both civilly and criminally liable for failure to report abuse, neglect, or exploitation that comes to attention of the FA. Liability can easily be avoided by complying with any applicable APS reporting requirements (Section III.D).

Options for Addressing Liability Risks

- **Implement a quality management plan**. The fiscal agent should consider implementing and adhering to an effective quality management plan.

- **Utilize liability insurance**. The fiscal agent may want to obtain sufficient liability insurance to provide protection against the possibility of a large claim.

- **Seek assurances from the state regarding the adequacy of back-up plans**. To protect against claims resulting from loss of a worker's services as a result of nonpayment, the fiscal agent may want to ask for assurances from the county or state agency that administers the CDPAS program that effective procedures are in place to ensure that consumers prepare and maintain an adequate back-up.

- **Check applicability of the state APS law**. The fiscal agent can be advised to determine the scope and applicability of the reporting provisions of the state APS law and notify its employees of the law's requirements if they apply to the FA.

E. Consultants

In the Cash and Counseling model of CDPAS, consultants, rather than the state, are assigned the most critical program functions -- assisting the consumer in designating an authorized representative and developing the spending plan and the back up plan; providing consultation with regard to hiring, training and supervising workers; and monitoring program quality and initiating action to correct problems. The way the program defines and implements these functions of the consultant is critical to the liability risk analysis, for liability risk follows function. For example, there is a point at which a consultant could become too involved in and exercise too much control over the delivery of services, such that a court might deem them to be real employer or at least co-employer of the worker. At that point, they would become vicariously liable for injury to consumers caused by worker negligence.

Fortunately, the risk of vicarious liability of consultants is not significant in the Cash and Counseling Demonstration, because the three programs appear to effectively communicate and follow the principle that the consumer bears primary responsibility for decisions regarding development of the spending plan and back-up plan and selection and supervision of workers, including hiring/firing, training, and scheduling of workers. This separation of responsibility should protect the consultant from being deemed vicariously liable for injury to consumers caused by workers or by deficiencies in the spending plan or back-up plan. Vicarious liability aside, consultants still carry some risk of direct liability for negligence in carrying out their own assigned responsibilities.

Consultants can effectively protect themselves against liability by: (1) being very clear in practice about staying within the bounds of consultation versus case management; (2) complying with program procedures and instructions carefully and executing all responsibilities conscientiously and with reasonable care; and (3) making it clear all times that it is the role of the consumer, not the consultant, to make decisions regarding the consumer's care.

Consultant Liability Risks

- **Liability for negligent designation of an authorized representative**. To the extent that the consultant takes on responsibility for screening and/or approving an authorized representative, the consultant may be liable to the consumer for negligence in investigating, evaluating, or approving that selection if the

representative is negligent in performing his or her responsibilities or otherwise fails to act in the consumer's best interest (Section IV.A).

- **Liability for negligent assistance in the development of the spending plan and back-up plan**. If the consultant provides inadequate or incorrect advice, the consultant may be liable for negligent assistance in the development of the spending plan or back-up plan. In states that give consultants authority to approve the spending plan and/or the back-up plan, the consultant may be liable for negligent approval of a deficient plan (Section IV.B).

- **Liability for negligent assistance in hiring, training and supervising workers**. Similarly, if the consultant negligently provides inadequate or incorrect advice regarding hiring, training or supervising workers, the consultant may be liable for negligence if the consumer who relies on that advice is subsequently injured (Section IV.C).

- **Liability for negligent monitoring**. A consultant may be liable if the consultant is negligent in monitoring program quality or fails to initiate action to correct problems identified in the course of monitoring, resulting in injury to the consumer (Section IV.D).

- **Liability for failure to report abuse or neglect**. A consultant may be a mandatory reporter under the state's adult protective services (APS) law and may therefore face both civil and criminal liability for failure to report abuse or neglect that comes to the attention of the consultant (Section IV.E).

Options for Addressing Liability Risks

- **Implement a quality management plan**. The consultant agency can consider implementing and adhering to an effective quality management plan. The quality management plan should include provisions to ensure that the consultant follows all written procedures or instructions regarding the consultant's activities.

- **Utilize liability insurance**. The consultant agency may want to obtain sufficient liability insurance to provide protection against the possibility of a large claim.

- **Clearly communicate and document the consultant's role**. The extent and limitations of the consultant's role can be clearly communicated to the consumer. This should be done both orally and by having the consumer read and execute a

Consumer/Consultant Agreement that spells out the respective responsibilities of consumers and consultants.[535] [See copy at Appendix C.]

- **Ensure that important decisions are made by the consumer**. In the Cash and Counseling model, although the consultant can and should answer questions and facilitate decision-making by presenting options, all important decisions should be made by the consumer. If the consultant believes a consumer's decision is not just unwise but potentially dangerous, the consultant can communicate the concern to the consumer, while making it clear that the consultant is only giving the consumer advice and that the decision is ultimately the consumer's. If the consumer disagrees with the consultant's advice, the consultant should document the fact that the advice was given and that the consumer elected to disregard the advice.

- **Adopt clear and explicit criteria for the approval of spending plans and back-up plans**. In states that give consultants authority to approve the spending plan and/or the backup plan, it is desirable that the state adopt clear and explicit minimum criteria for the approval of such plans, including guidance regarding the circumstances in which consultants are authorized to override a consumer's preference and withhold approval from the plan or to terminate the consumer from the consumer-directed program.

- **Check applicability of the state APS law**. The consultant agency can determine the scope and applicability of the reporting provisions of the state APS law and advise its employees of the law's requirements if they apply to consultants.

F. States

In the Cash and Counseling model of CDPAS, the state's risk of liability for personal injury is greatly reduced. Most of the functions that were performed by the state or a provider agency in traditional Medicaid-funded home care services are now unbundled and performed by consumers (e.g., hiring and supervising workers), consultants (e.g., advising consumers and monitoring care), and fiscal agents (e.g., payroll services for

---

[535] Florida's "Consumer/Consultant Agreement," which lists the responsibilities of consumers and consultants, is a good model. The consumer's responsibilities include: "write a purchasing plan;" "train workers about their job duties and what you expect from them;" and "contact your consultant if you have concerns about something, so small problems don't become big problems." The consultant's responsibilities to the consumer include: "provide training;" "review... [the] purchasing plan and backup plan;" and "review... monthly budget reports from the project bookkeeper." The agreement also lists "What the Consultant will *not do*," including "interview, hire, train or supervise your workers;" "find back-up or emergency workers;" and "write your purchasing plan." Consumer Directed Care Research Project, Florida Agency For Health Care Administration (December 1999) (emphasis added). A copy of the agreement is attached as Appendix C.

workers). The core functions that continue to be formed by the state, such as enrolling consumers and responding to serious problems in connection with consumer care, carry some risk of liability, but if the state program is well structured and operated in accordance with that structure, this risk is minimal.

State Liability Risks

- **Liability for failure to obtain adequate consent**. State programs that elect not to screen applicants to determine whether the applicant is an appropriate candidate for CDPAS risk liability if the state enrolls a consumer without first obtaining the consumer's clear agreement to participate in the program (Section V.A).

- **Liability for failure to adopt adequate criteria and procedures for selection of an authorized representative for consumers who lack the capacity to designate a representative**. The relatively informal criteria and procedures for selection of an authorized representative that are now in effect in the Cash and Counseling states create the risk that the state may be liable if a representative mismanages a consumer's care, particularly the care of a consumer who lacks the capacity to designate a representative (Section V.B).

- **Liability for negligent response to a problem or complaint regarding consumer's care**. The state will be liable if it fails to exercise ordinary care in responding to a problem or complaint regarding a consumer's care. However, this liability risk is no different from that faced in agency-provided care (Section V.C).

- **Liability as alleged employer of individual provider**. If the state is found to be the employer of the individual provider, the state will be vicariously liable for torts committed by that person while acting within the scope of employment and for worker's compensation if the worker is injured on the job. However, in the Cash and Counseling model, where the consumer, and not the state (or fiscal agent), controls the key employer functions (hiring/firing, assigning and scheduling tasks, training, and supervision), the risk of such liability is negligible (Section V.D).

- **Vicarious liability for consultant's or fiscal agent's negligence and other tortious conduct**. Even though the state identifies an individual who provides consultant or fiscal agent services as an independent contractor, if the state exercises sufficient control over the independent contractor, the state can nevertheless be found to be the employer of that contractor and will be vicariously liable for the contractor's negligence and other tortious conduct. In the Cash and Counseling model, the state typically does not exercise such control (Section V.E).

- **Liability based on non-delegable duty**. The state will be liable if a tortious act is committed by the consultant or the fiscal agent while carrying out a nondelegable duty

of the state. The concept of "nondelegable duty" has been used in those cases where a court concludes that as a matter of policy, the government should be responsible for the torts of independent contractors who are carrying out the work of or executing a responsibility of the government. However, courts vary in how they approach this issue, and the content of statutes or regulations setting forth the state's responsibilities in connection with CDPAS is likely to determine whether a nondelegable duty exists (Section V.E).

- **Liability for failure to provide effective emergency back-up care**. The Cash and Counseling Demonstration states required consumers to develop back-up strategies as part of the planning process, but if the state takes on a system-wide role in securing or providing emergency back-up, the state will take on significantly greater risk of liability for failure of back-up care, depending upon the level of responsibility and function assumed. As in the Cash and Counseling Demonstration, the state could take on little or no responsibility by placing the responsibility for back-up on the consumer's shoulders. It could assume responsibility to make reasonable efforts to provide back-up, and this could take myriad forms. Or, as required by the current federal Independence Plus Medicaid waiver templates for CDPAS programs, the state could be required to "assure" emergency backup care for consumers. Undertaking a responsibility to "assure" emergency back-up brings with it a high level of liability risk if the state's emergency backup system fails, and the consumer suffers injury as a result (Section V.F).

Options for Addressing Liability Risks

- **Institute procedures to verify the consumer's voluntary choice to participate in the program**. The agreement of the consumer, or the consumer's authorized representative, must be voluntary (that is, a matter of free choice, which means the availability of traditional agency care should be preserved as an option); the consumer should be fully informed about relevant information regarding the decision to participate in CDPAS (that is, all information needed to make a voluntary and intelligent decision); and the consumer must have the capacity to understand relevant information and make a choice.

- **Consider adopting more formal criteria and procedures for the designation of an authorized representative**. To avoid a possible claim that the state's criteria and procedures for designating an authorized representative are inadequate, the state may consider adopting: (1) a procedure whereby consumers who have capacity can make an advance designation of a representative to serve if and when needed; and (2) for consumers who lack capacity, adopt the more formal procedures

described in Section V.B.[536] In addition, the state should consider adopting heightened monitoring requirements for consumers whose care is directed by a representative.

- **Adopt a quality management plan in connection with consultant monitoring and the state's response to problems that are reported by consultants**. Because failure to detect or respond properly to situations that present a serious threat to the consumer's health or safety can result in a substantial damage award, it is desirable that the state define the nature and frequency of monitoring clearly in program procedures and materials, carry out the function as envisioned consistently, and act upon information gathered in the process, especially if the information suggests management or care problems.

- **Avoid vicarious liability as the employer of workers by following the Cash and Counseling model**. If a state divides responsibilities according to the Cash and Counseling model, there is very little risk that the state will be found to be the employer of the worker. Communication of the division of responsibilities is equally important and should include: (1) execution of an employment agreement by the worker and the consumer; and (2) consistent identification of the consumer as the worker's employer on payroll records, government forms, and other documents.

- **Minimize the risk of vicarious liability for the torts of consultants and fiscal agents by avoiding indicia of an employment relationship**. The state can effectively protect itself against potential vicarious liability for the torts of individuals with whom it contracts for consultant or fiscal agent services by avoiding the indicia of an employment relationship, such as the right of control over the manner, means and details of the work.[537]

- **Take care to avoid assumption of additional potential liability risks when drafting regulations, rules and protocols relating to the CDPAS**. As is discussed in the introduction to Section IV and in Section V.E, the courts typically look at government regulations, rules and protocols in determining the scope of the state's duty to its citizens, particularly its vulnerable citizens. Therefore, when drafting such documents, states should be careful to avoid inadvertently creating potential

---

[536] These procedures, which are described in greater detail in Section V.B, include: (1) an assessment of whether the consumer lacks capacity both to self-direct the consumer's care and to designate an authorized representative; (2) if the state has a statute that designates a default surrogate for medical decision-making, give a preference to designation of that surrogate as the representative; and (3) in the absence of such a statute, the consultant should assess all reasonably available representatives.

[537] More specific indicia that an employment relationship exists include the "right to discharge the employee, payment of regular wages, taxes, workers' compensation insurance and the like, long-term or permanent employment, and detailed supervision of the work." Dobbs, Torts, *supra* note 30, at 917.

liability issues, such as nondelegable duties or duties to undertake specific responsibilities in connection with CDPAS, by including clear and consistent descriptions of the responsibilities of both the state and of consumers, workers, authorized representatives, fiscal agents, and consultants.

- **Negotiate an indemnity clause in contracts with consultants and fiscal agents**. To protect again vicarious liability for the torts of consultants and fiscal agents, the state can include a clause in its contracts that provides for indemnification of the state for claims arising from the consultant or fiscal agent's conduct.

- **Enact legislation limiting liability in connection with CDPAS**. If liability is still a serious concern, the state can consider enacting legislation limiting liability or providing for immunity in connection with some or all claims in connection with CDPAS. This is the approach used by California in connection with its IHSS program (Section VI.A).

APPENDIX A

Table of Cases cited in Section II: Potential Liability Arising from the Relationship between Consumers and Workers

Title	State Date	Plaintiff	Defendant	Decision Level	Facts & Procedural History	Disposition	Prevailing Party	Comments
A. Independent Worker Liability Risk								
1. Negligent Caregiving								
Calick v. Double A Property Associates 251 A.D.2d 278	NY 1998	Survivor of deceased consumer	Home care agency	Supreme Court, Appellate Division	The consumer was injured when she slipped on a puddle in an elevator while being assisted by a home care attendant employed by the defendant home care agency. The attendant testified that she looked (as was her practice) and saw no puddle before the decedent entered the elevator. After a verdict for plaintiff, the TC (trial court) granted defendant's motion to set aside verdict--the TC found no negligence as a matter of law.	The Appellate Division reversed, holding that "the question of reasonableness of the attendant's actions... was a factual issue for the jury [to determine]." The court remanded the case for a trial on the issue of damages.	P Jury verdict reinstated.	
Eaton v. Comprehensive Care America 233 A.D.2d 875	NY 1996	Guardian of patient who had suffered disabling stroke	Home health care agency	Supreme Court, Appellate Division	A home health care aide, who had been hired to care for a patient who had suffered a severe stroke, left the patient alone with cigarettes and lighter in reach, and the patient suffered severe burns upon attempting to smoke. The guardian of the patient filed a suit for damages against the aide's employer. The jury found in the plaintiff's favor and awarded extensive damages, including damages for past pain and suffering and for shock and fright. On appeal, the defendant argued that the court erred in excluding evidence that the consumer was allowed to smoke unattended while in the care of family members and in permitting the jury to award damages for shock and fright separate from pain and suffering.	The Appellate Division held that evidence regarding family decisions was not relevant but that the consumer could not recover for shock and fright in addition to past pain and suffering.	P Jury verdict for plaintiff upheld.	
Esposito v. Personal Touch Home Care 288 A.D.2d 337	NY 2001	Survivor of consumer who had multiple sclerosis	Home care agency	Supreme Court, Appellate Division	The plaintiff allegedly sustained injuries when he fell in the entrance to his bathroom while under the care of his home health aide. The plaintiff argued that the aide was negligent in leaving the consumer unattended in the bathroom. The TC granted summary judgment (SJ) in favor of the home health care agency.	The Appellate Division reversed, finding that a genuine issue of material fact existed regarding whether the aide breached her duty by leaving the consumer unattended while going to the bathroom. The court noted that: "Where a defendant is responsible for caring for an individual, the defendant's abandonment of that individual can result in liability."	P SJ for D reversed and P's claim reinstated.	
Gaylard v. Homemakers of Montgomery 675 So.2d 363	AL 1996	Consumer	Home health care agency	Supreme Court	The plaintiff sued the home health care agency for the alleged negligence of its employee in giving the plaintiff a bath. The plaintiff claimed that the water was too hot and that she sustained serious burns. The jury issued a verdict for the defendant, and the plaintiff appealed arguing that the TC improperly limited cross-examination of the employee.	The Supreme Court ruled that the plaintiff's cross-examination should not have been limited. Case remanded for a new trial.	P Plaintiff entitled to a new trial.	
Headley v. Maxim Health Care Services 716 N.E.2d 1241	OH 1999	Consumer (quadriplegic patient)	Home health care agency	Court of Common Pleas (TC)	The plaintiff, a quadriplegic who received home care services from defendant agency, was injured when her caregiver was attempting to use a lift to transport her to the shower. The defendant agency moved for SJ on the ground that her claim was a "medical claim" barred by the applicable one year statute of limitations. The TC denied the motion, finding that the claim was not against a worker who fell within the categories listed in the statutory definition of a "medical claim" and that the activity giving rise to the injury was not "directly related to diagnosing and addressing the patient's medical claim."	NA	P D's SJ motion denied.	

Title	State Date	Plaintiff	Defendant	Decision Level	Facts & Procedural History	Disposition	Prevailing Party	Comments
Keel v. West Louisiana Health Services 803 So.2d 382	LA 2002	Consumer, a quadriplegic home care patient	Home health care agency	Court of Appeal	The consumer sustained severe burns from hot water while being given a shower by a CNA employed by the defendant home health care agency. The TC found that the CNA inadvertently bumped the water faucet handle, causing hot water to burn the consumer, and granted judgment for the plaintiff.	The Court of Appeal affirmed the judgment for the plaintiff, noting that a medical review panel had found that the CNA had "breached the standard of care by failing to safely assist [the consumer] in his shower."	P TC's award of damages to P sustained.	Although the judgment was based on medical testimony regarding the standard of care for a CNA, the same facts involving personal assistance services could provide the basis for a claim of negligence.
Lee v. Health Force 702 N.Y.S.2d 108	NY 2000	Parents of mentally and physically handicapped child	Home health care agency and its employee	Supreme Court, Appellate Division	The parents of a mentally and physically handicapped child brought a negligence action against a home care agency and its employee for burns sustained by the child when the employee showered her in scalding water. The plaintiffs moved to amend their complaint to add a claim for punitive damages, alleging that the agency had acted with gross negligence in training the employee and that the employee was reckless in her care of the child. The TC granted the motion.	The Appellate Division reversed. The employee testified that she gave prompt and appropriate first aid when the shower water unexpectedly became very hot. She also testified that she had received extensive training, including training in emergency treatment for burns. The agency testified as to the competency of its personal care aides and that it regularly evaluated the needs of its	Ds Plaintiffs' motion to amend complaint to add claim for punitive damages denied.	
Rosenthal v. Bologna 620 N.Y.S.2d 376	NY 1995	Consumer who refractured his hip	Home health care agency and worker	Supreme Court, Appellate Division	Consumer contracted with defendant home health care agency to provide home health services seven days per week while he recuperated from a fractured hip. The home care attendant did not show up for work the first weekend because he mistakenly believed his services were required only five days a week. Over the weekend the consumer refractured his hip while attempting to move on his own from his wheelchair to his walker. The consumer sued the agency and the worker. The defendants asserted as an affirmative defense an alleged waiver of liability in the home care contract with the consumer. The TC denied plaintiff's motion to strike this defense.	The Appellate Division reversed, holding that the purported waiver violated public policy: "This aspect of the contract warrants judicial rejection here because of the State's interest in the health and welfare of its citizens, and also because of the highly dependent (and thus unequal) relationship between patient and health care provider."	P Ds cannot assert affirmative defense of waiver	The court's refusal to recognize a purported waiver of liability in the health care context has implications for attempts to limit liability based on waiver provisions.
Villarin v. Onobanjo 276 A.D.2d 479	NY 2000	Surviving family members of a patient who was severely disabled and bedridden	Home health care agency and worker	Supreme Court, Appellate Division	The consumer, who was severely disabled and bedridden, died in a house fire. His teenage stepdaughter also died while attempting to rescue him. Plaintiff surviving family members filed suit to recover for personal injuries (apparently sustained by the surviving family members) and wrongful death, claiming that the agency's employee breached his duty when he left the house an hour before the end of his shift. The TC granted the defendants' motion to dismiss.	The Appellate Division reversed: "the plaintiffs stated viable causes of action for the fire-related injuries they sustained as a result of the respondents' alleged unauthorized abandonment of their physically disabled client."	P	This case appears to involve both claims for damages for the wrongful death of the consumer and a claim by the third party family members for injuries they sustained and which they claim were proximately caused by the defendants' alleged abandonment.
Walker v. EHCCI Home Care Services 211 A.D.2d 402	NY 1995	Consumer, a patient with multiple sclerosis	Home care agency and worker	Supreme Court, Appellate Division	The consumer, who had MS, sued the home care agency and its worker for injury caused when the worker, whose duties were "cooking, cleaning and other household tasks," left him unattended. An emergency requiring hospitalization occurred during the unattended period. The defendant moved for SJ, arguing that the agency owed no duty to the plaintiff beyond the contracted tasks. The TC denied the motion, and the defendants appealed.	The Appellate Division sustained the TC, holding that "defendants owed a duty of care to plaintiff beyond contractual obligations to cook and clean." The court cited evidence that the worker had been instructed about the symptoms of MS and circumstances under which ambulance should be called, and had actually called "911" on several occasions.	P Ds' motion for SJ denied.	This case suggests that the duty of care of a personal assistant may extend beyond the services that the personal assistant has contracted to provide.

Title	State Date	Plaintiff	Defendant	Decision Level	Facts & Procedural History	Disposition	Prevailing Party	Comments
Williams v. Metro Home Health Care Agency 817 So.2d 1224	LA 2002	Consumer, a paraplegic confined to a wheelchair	Home health care agency and nurse assigned to plaintiff	Court of Appeal	The defendant home care agency assigned the defendant nurse to educate and assist the plaintiff in caring for decubitis ulcers. The nurse was scheduled to see the plaintiff three times a week. The plaintiff brought a negligence action against the defendants, claiming that the nurse visited him only once a week and that as a result he developed an ulcer that required surgical intervention. The defendants moved for SJ based on the plaintiff's failure to name an expert witness. The TC denied the motion and the defendants appealed.	The Court of Appeal upheld the TC, holding that expert testimony was not necessary: "Expert testimony is not necessary where the physician or caretaker does an obviously careless act from which a lay person can infer negligence."	P Ds' motion for SJ denied.	
Willis v. City of New York 266 A.D.2d 207	NY 1999	Consumer, a patient with multiple sclerosis and dependent on wheelchair and walker	Home health care agency	Supreme Court, Appellate Division	The consumer was injured when fire broke out in her home during the home health aide's working hours. The aide had left early, although there was a factual dispute as to whether the aide was given permission to leave early. The consumer sued for personal injuries, and the agency moved for SJ arguing that it did not owe a duty to rescue, that plaintiff's injuries were not foreseeable, and the aide's early departure was not a proximate cause of the injuries. The TC denied the agency's motion.	The Appellate Division upheld the TC: "Where a defendant is responsible for caring for an individual, the defendant's abandonment of the individual can result in liability."	P Ds' motion for SJ denied.	
2. Negligence in Non-Caregiving Matters								
Daniels v. Senior Care 21 S.W.3d 133	MO 2000	Children of consumer (elderly woman killed in house fire)	Home care agency	Court of Appeals	The children of an elderly woman who suffered from dementia sued a home care agency for the wrongful death of their mother. Both their mother and an employee of the home care agency who provided live-in assistance were killed in a house fire. The plaintiffs argued that the defendant's employee was responsible for the fire either because she "allowed decedent to accumulate papers and magazines on the heater, when she was under a duty to prevent decedent from doing so, or, alternatively, Defendant's employee placed these combustibles on the heater herself." The TC rejected these arguments and granted the defendant's motion for SJ.	The Court of Appeals reversed. Based on testimony from the fire marshall regarding the likely cause of the fire, the "Plaintiffs' submitted a probative factual scenario showing that defendant's breach of its duties was the proximate cause of her death."	Ps SJ for defendant reversed--case remanded.	
Rogers v. Crossroads Nursing Service 13 S.W.3d 417	TX 1999	Consumer receiving home health care after back surgery	Home health care agency	Court of Appeals	The consumer alleged that the employee was negligent in the placement of a heavy supply bag that fell and re-injured the consumer's back. The TC dismissed the suit on ground that the consumer failed to provide an expert report in accordance with the state's Medical Liability and Insurance Improvement Act.	The Court of Appeals reversed and remanded, finding that the claim was not governed by the MLII Act. The applicable standard of care was the ordinary negligence standard of care, rather than an accepted standard within the health care industry, and the case should be tried as a common law negligence case.	P TC's dismissal reversed and case remanded to TC.	
3. Abuse and Neglect								
b. Abuse or Neglect by the Worker								
Caretenders Inc. v. Commonwealth of Kentucky 821 S.W.2d 83	KY 1991	Commonwealth of Kentucky	Home health care agency and three nurses employed by agency	Supreme Court	A home health care agency and three of its nurses were prosecuted under a provision of the Kentucky APS statute that makes it a felony to knowingly engage in abuse or neglect. A client of the agency had developed several severe decubitis ulcers while under the defendants' care. The jury convicted the agency, but not the three nurses.	The agency made several arguments on appeal, including the argument that the evidence was insufficient to support the verdict, all of which were rejected. The Supreme Court upheld the verdict against the agency.	P Conviction of agency upheld on appeal.	

Title	State Date	Plaintiff	Defendant	Decision Level	Facts & Procedural History	Disposition	Prevailing Party	Comments
Commonwealth v. Waskovish 805 A.2d 607	PA 2002	Commonwealth of Pennsylvania	Home care worker	Superior Court	The defendant, Charles Waskovich, entered into a care arrangement with Kenneth Andrews, an elderly gentleman who had been living alone, to live in the defendant's home and provide him with personal assistance services, the value of those services (set at $7.00 an hour) to be applied toward the purchase of Mr. Andrews' house. After Mr. Andrews died from "pneumonia and severe infection associated with bedsores," Maskovich was convicted on charges of neglect of a care dependent person resulting in serious bodily injury. Under Pennsylvania law, a "caretaker is guilty of neglect of a care-dependent person if he... [i]ntentionally, knowingly or recklessly causes bodily injury or serious bodily injury by failing to provide treatment, care, goods or services necessary to preserve the health, safety or welfare of a care-dependent person for whom he is responsible to provide care." "Caretaker" is defined under Pennsylvania law as including a person "who has an obligation to care for a care-dependent person for monetary consideration... in the care-dependent person's home."	On appeal, Waskovich argued that the evidence did not support a finding that he was a "caretaker," but the appellate court disagreed and upheld his conviction.	Conviction of home care worker upheld on appeal.	
Trujillo v. Superior Court of Los Angeles 2002 WL 1558830	CA 2002	Son of deceased consumer	Home hospice care workers	Court of Appeal	Plaintiff, the son of an elderly woman who died when her decubitus ulcers became infected, brought an action under California's APS statute which permits the decedent's estate to recover for pain and suffering. The plaintiff alleged that the defendant home health and hospice care agency had been negligent in its care of his mother. TC granted the defendant's motion to dismiss.	The Court of Appeal reversed TC and held that the plaintiff's allegations--that the agency knowingly failed to attend to the mother according to its own schedule, and failed to provide professional care even after it was alerted that her condition was deteriorating--were sufficient to support a claim for elder abuse.	P TC ordered to vacate its order dismissing the case.	
B. Consumer Liability Risk								
1. Negligence in Maintaining the Worker's Workplace (i.e., the Home)								
Associated Home Health Agency, Inc. v. Lore 484 So.2d 1389	FL 1986	Home health care agency and its workers' compensation carrier	Employee of home health care agency	District Court of Appeal	A home health care agency and its workers' compensation carrier sued an employee of the agency claiming entitlement to a share of the $35,000 settlement in the employee's lawsuit against a consumer. The employee, a licensed practical nurse, was injured while at the residence of the consumer when the consumer's dog attacked her, causing serious injury. The TC held that the employee had recovered only partial damages because of her contributory negligence and that the workers' compensation carrier's recovery would therefore be pro rata; and that the carrier could not recover expenses it provided for the employee's rehabilitation.	The District Court of Appeal affirmed the TC's ruling.	P The underlying suit for damages was settled for $35,000 and the workers' compensation carrier is entitled to recover only a pro rata share.	
Baxter v. Cramco 425 S.E.2d 191	WV 1992	Caretaker for patient who had had a stroke	Consumer, her husband and manufacturer of chair	Supreme Court of Appeals	The caretaker for woman who had suffered a stroke brought a personal injury action based on injuries she sustained when the chair she was sitting on apparently collapsed. The jury found that both the patient and the manufacturer of the chair were not negligent, but that the patient's husband was. He appealed, arguing that the case should not have gone to the jury with a *res ipsa loquitor* instruction.	The Supreme Court of Appeals reversed, noting that to be held liable under a *res ipsa loquitor* theory, there must be evidence that the defendant had control over the instrumentality of the accident, and there was no such evidence here.	D Jury verdict for P reversed.	

Title	State Date	Plaintiff	Defendant	Decision Level	Facts & Procedural History	Disposition	Prevailing Party	Comments
Burton v. Landry 602 So.2d 1013	LA 1992	"Sitter" for defendant's elderly mother	Son of consumer	Court of Appeal	The defendant employed the plaintiff as a sitter for his elderly mother, who lived in his home. The plaintiff was injured when the defendant's cat ran by her while she was climbing the stairs, causing her to fall and sustain injuries. The plaintiff sued the defendant for negligence, and the TC granted the defendant's motion for SJ.	The plaintiff appealed, arguing that the behavior of the cat created an unreasonable risk and that the defendant was negligent in the keeping of the cat. The Court of Appeal rejected her arguments: "A cat owner is not guilty of negligence when a cat accidentally gets in the way or underfoot."	D SJ for defendant upheld.	
Castille v. Walmart Stores 815 So.2d 973	LA 2002	In-home caretaker	Consumer-homeowner and other defendants	Court of Appeal	An in-home caretaker sustained burns from a kitchen grease fire while employed at the consumer's home. She sued the consumer for negligence and on a claim of strict liability based on the argument that the consumer had installed an air conditioner filter in the stove hood, rather than a filter designed for the stove hood. The jury returned a verdict for the defendants. On appeal, the plaintiff asserted that the jury had had serious problems understanding the doctrine of strict liability and that there were no issues of fact, only errors of law.	The Court of Appeal affirmed. The court found that the TC had clearly explained the doctrine of strict liability and that the jury's determination was reasonable based on the evidence presented.	D Jury verdict for the defendants affirmed.	
Dapp v. Larson 240 A.D.2d 918	NY 1997	In-home aide	Consumer	Supreme Court, Appellate Division	A home health aide sustained injuries when she fell down the porch steps at the consumer's residence. It was raining at the time of the accident and the steps were covered with green all-weather carpeting. The plaintiff claimed that a brown plastic doormat constituted a dangerous condition causing the fall. TC granted defendant consumer's motion for SJ on the ground that the plaintiff failed to demonstrate the existence of a dangerous condition on the defendant's premises or that the defendant had notice of any such condition.	The Appellate Division affirmed, but on the different ground that the aide failed to submit evidence establishing that her accident was caused by the allegedly dangerous condition (the doormat).	D SJ for defendant affirmed.	
Hayes v. Moss 527 So.2d 373	LA 1988	In-home attendant	Invalid, her elderly mother, and insurer	Court of Appeal	The plaintiff worked as one of several attendants who provided round the clock care to the defendant in her home. On Carnival day, the invalid's mother was staying at her house and the second sitter had not come to work. The plaintiff's back was injured when her employer's mother insisted that she help her up off the floor without waiting to get a mechanical lift which was available. The plaintiff sued her employer on the theory that she was negligent for not having a second person available to take care of her mother, thereby making the house unsafe because of her mother's frail condition. The jury found the employer liable, and her insurer appealed.	The Court of Appeal reversed. The defendant employer of a domestic servant has a duty to provide the plaintiff with a reasonably safe place to work. However, "[t]his defendant had no duty to protect the plaintiff against the risk of offering voluntary assistance to a fallen house guest."	D Jury verdict for the plaintiff reversed and judgment entered in favor of insurer.	
Holmes v. Harper 786 So.2d 245	LA 2001	In-home care worker acting as a "sitter"	Employer (consumer's daughter) and consumer	Court of Appeal	The plaintiff sued for injuries sustained when she struck her foot against the leg of the consumer's bed while coming to the consumer's assistance in the middle of the night. The plaintiff alleged that the bed leg and lack of light constituted a dangerous and unsafe condition that caused the injuries. The TC granted the employer's motion for SJ finding no negligence and that the bed leg was not inherently dangerous.	The Court of Appeal held that the employer and consumer had no duty to protect the sitter from an object that posed "absolutely no unreasonable risk of harm." The court concluded that the risk encountered by the worker was no greater than "the risk, which might be encountered by any individual walking through any furnished house."	D SJ for the defendent affirmed.	The Court examined the case under the doctrine of premises liability (where the property owner has a duty of exercising reasonable care for the safety of persons on the premises and of not exposing guests to unreasonable risks of harm).

Title	State Date	Plaintiff	Defendant	Decision Level	Facts & Procedural History	Disposition	Prevailing Party	Comments
Lewis v. Oubre 461 So.2d 523	LA 1984	Sitter for elderly man	Consumer	Court of Appeal	The plaintiff was employed by the defendant in his home to assist him with medication, personal hygiene and related errands. While carrying out the garbage, the plaintiff slipped on the carport floor, which had a smooth finish and had become moist or damp due to humid weather conditions. She sued the consumer for personal injuries, alleging that the carport surface was an unreasonably dangerous condition and that the defendant was therefore strictly liable as a homeowner. She also alleged that the defendant was negligent. The TC dismissed the suit.	The Court of Appeal affirmed the decision of the TC, finding that: the carport surface did not create an unreasonable hazard or risk of harm to plaintiff; and the defendant was not negligent, both because it would not be reasonable to impose a duty to protect others from the natural accumulation of moisture and because the plaintiff was aware of the condition.	D The TC's order dismissing the case is affirmed.	
Meeks v. Rosa 988 S.W.2d 216	TX 1999	Home health care worker	Consumer	Supreme Court	The plaintiff allegedly slipped and fell on some spilled beans while working in the consumer's home. She sued the consumer on a premises liability theory, arguing that "the beans on the kitchen floor were a condition that posed an unreasonable risk of harm [because]: first...the refrigerator was overflowing; second,... Meeks had previously spilled beans on the floor." The jury found for worker, but the TC directed judgment for consumer. The Court of Appeals reversed and reinstated the verdict for the worker.	The Supreme Court reversed the Court of Appeals. The court noted that as "an invitee on the premises, Rosa could recover on her premises liability claim if she proved that: (1) Meeks knew of should have known of some condition on the premises; (2) the condition posed an unreasonable risk of harm to Rosa; (3) Meeks did not exercise reasonable care to reduce or to eliminate the risk; and (4) Meeks's failure to use such care proximately caused Rosa's injuries." There was insufficient evidence to support a jury verdict on either of the alternative theories of liability which Rosa presented to the jury.	D TC decision granting a directed verdict for plaintiff sustained and judgment entered for defendant.	This is another case brought under a premises liability theory.
Rolfe v. Betts 1998 WL 310826	CT 1998	Home health care worker	Consumer	Superior Court	The plaintiff home health care worker sued the consumer for injuries resulting from a fall on a sidewalk outside the defendant's home. The Plaintiff alleged that the defendant was negligent in attending to ice on the sidewalk and that the existence of a written home health care services contract with the defendant created a higher standard of care. The defendant moved for SJ. The TC denied the defendant's motion for SJ on the standard negligence claim because there were genuine issues of material fact. However, on the issue of a higher standard of care, the TC noted that "the existence of a written contract between the parties is insufficient to vary the standard of care applicable to the landowner."	NA	P D's motion for SJ denied.	
Singer v. Superior Court of Los Angeles County 83 Cal.Rptr.2d 355	CA 1999	Home health care nurse	Consumer	Court of Appeal	Home health care nurse filed suit in Superior Court asserting personal injury and wrongful discharge claims. She alleged that the consumer's dog had bitten her twice, causing both physical injury and emotional distress that was exacerbated by the defendant's failure to tell her whether the dog had been inoculated for rabies. The Superior Court issued an order transferring the case to Municipal Court based on its finding that the plaintiff's potential damages were less than the Superior Court's jurisdictional requirement of $25,000.	The Court of Appeal reversed, finding that the plaintiff's damages for emotional distress and lost earnings might well exceed $25,000.	P Superior Court directed to vacate its transfer order--case to remain in the forum chosen by the plaintiff.	

Title	State Date	Plaintiff	Defendant	Decision Level	Facts & Procedural History	Disposition	Prevailing Party	Comments
Sudduth v. Young 579 S.E.2d 7	GA 2003	Personal assistant	Consumer	Court of Appeal	The plaintiff, an overnight sitter for an elderly woman, sued the defendant claiming that she fell and injured herself because the defendant's floor was heavily waxed and extremely slippery and constituted a dangerous condition. TC granted the defendant's motion for SJ.	The Court of Appeals upheld TC: (1) the plaintiff failed to present sufficient evidence of a dangerous condition of whose existence the defendant knew or should have known; and (2) even if the plaintiff could establish this element of her claim, she failed to show that the defendant had superior knowledge of the alleged dangerous condition.	D TC's decision granting SJ to D upheld.	
2. Injuries Caused by the Consumer's Mental Impairment								
Anicet v. Gant 580 So.2d 273	FL 1991	Mental institution attendant	Patient at mental hospital	District Court of Appeal	The defendant, a violent patient who had been involuntarily committed to a mental hospital, threw a heavy ashtray at an attendant at the hospital and severely injured him. The attendant filed an action for personal injuries, and the jury found for the plaintiff.	The District Court of Appeal reversed, holding that the defendant was not liable because he had no control over his acts. The appellate court rejected the general rule that a mentally disabled person is subject to the normal rules of liability because: (1) the patient's relatives had done as much as they could to prevent injury by confining the patient to a mental hospital; and (2) the defendant was "employed to encounter, and knowingly did encounter, just the dangers which injured him."	D Jury verdict for P reversed.	This is one of several recent cases in which the court considered whether the defendant's mental disability justified or required a different approach to liability.
Gould v. American Family Mutual Life Insurance Co. 543 N.W.2d 282	WI 1996	Head nurse on secured dementia unit	Insurer for patient in secured dementia unit	Supreme Court	The defendant, a patient in a secured dementia unit who "was often disoriented, resistant to care, and occasionally combative," injured the head nurse on the unit when he knocked her to the floor. The nurse filed a personal injury action against the patient's insurer, and the jury found for the plaintiff.	The Supreme Court reversed, holding that "an individual institutionalized as here, with a mental disability, and who does not have the capacity to control or appreciate his or her conduct cannot be liable for injuries caused to caretakers who are employed for financial compensation." In support of this result, the court cited both the reasons relied on by the *Anicet* court, and also noted that a third rationale for applying the normal rules of liability to a mental patient, that it prevents tortfeasors from simulating mental incompetence, does not apply where the defendant has been committed to an institution.	D Jury verdict for P reversed.	This is one of several recent cases in which the court considered whether the defendant's mental disability justified or required a different approach to liability.
Herrle v. Estate of Marshall 53 Cal.Rptr.2d 713	CA 1996	CNA employed by convalescent hospital	Patient with Alzheimer's disease	Court of Appeal	The defendant, an Alzheimer's patient with a propensity to violence, was admitted to the convalescent hospital where the plaintiff worked. When the plaintiff tried to assist another nurse's aide who was moving the defendant, the defendant struck the plaintiff about the head several times, causing serious jaw injuries. After a bench trial, the TC ruled for the defendant.	The Court of Appeal sustained the judgment for the defendant, holding that the doctrine of primary assumption of risk applied because the plaintiff knew that her job exposed her to patients prone to aggression and violence and that there had been prior instances where nurse's aides had been struck by patients. The court explained that the doctrine of primary assumption of risk applies "'where, by virtue of the nature of the activity and the parties' relationship to the activity, the defendant owes no legal duty to protect the plaintiff from the particular risk of harm that caused the injury.'"	D TC's judgment for the D affirmed.	This is one of several recent cases in which the court considered whether the defendant's mental disability justified or required a different approach to liability.

Title	State Date	Plaintiff	Defendant	Decision Level	Facts & Procedural History	Disposition	Prevailing Party	Comments
Maher v. Scollard 1993 WL 19615	OH 1993	Nurse employed to provide home care	Consumer	Court of Appeal	The plaintiff was employed as a home care nurse for the defendant. On two occasions, the defendant, who was "in a confused mental state," grabbed the plaintiff by the wrists and slammed her hands first against a window frame and a radiator and, on the second occasion, against the bed frame. The plaintiff sued the defendant for negligence but apparently not for battery. The jury found for the plaintiff but reduced the verdict by 5% because it found that she did "assume the risk/commit an act of negligence." On appeal, the defendant raised two procedural issues and the plaintiff challenged the reduction of the verdict.	The Court of Appeals upheld the TC's reduction of the verdict. The court found that the plaintiff' was an independent contractor and she "could have refused nursing assignments offered by the agency, and was solely responsible for choosing the means of performing her assigned tasks." She therefore did '"assume the risk/commit an act of negligence which directly and proximately caused' five percent of her injury."	P/D Plaintiff recovered 95% at trial, but defendant prevailed on issue of reduction of verdict.	
Vincinelli v. Musso 818 So.2d 163	LA 2002	Paid companion to elderly Alzheimer's patient	Consumer	Court of Appeal	The plaintiff worked as a paid sitter/companion for the consumer, who had Alzheimer's disease. The plaintiff was injured when she slipped and fell on a small amount of ice cream that the defendant had spilled on her kitchen floor. After a bench trial, the TC granted the plaintiff damages of $67,500, which represented a reduction of 50% as a consequence of the plaintiff's comparative negligence. The defendant appealed, arguing that under the particular facts and circumstances, she did not owe a duty to her caregiver to protect against such an accident.	The Court of Appeal agreed with the defendant and reversed the TC, noting that the defendant "knew that Mrs. Musso might get ice cream on her own, and she knew that if she spilled some, she would not pay attention to the spill because of her disease...[T]he risk the plaintiff encountered was one of the risks she was contractually obligated to guard against."	D TC decision reversed and judgment rendered for D.	This case applies several of the leading cases in which the court considered whether the defendant's mental disability disease justified or required a different approach to liability.
White v. Muniz 999 P.2d 814	CO 2000	Caregiver at an assisted living facility	Cosumer (resident of assisted living facility who had Alzheimer's disease)	Supreme Court	Soon after she moved into an assisted living facility, the defendant struck the plaintiff on the jaw while the plaintiff was trying to change her adult diaper. The plaintiff sued the defendant for assault and battery (the plaintiff's negligence claim had been dismissed for procedural reasons). The jury rendered a verdict for the plaintiff. The Court of Appeals reversed the decision of the TC, and the plaintiff filed an appeal in the Supreme Court.	The Supreme Court reversed, holding that to prevail on a battery claim, "Colorado law requires the jury to conclude that the defendant both intended the contact and intended it to be harmful or offensive." The court reinstated the jury's verdict because the jury had been instructed that a verdict for the plaintiff required a finding that the plaintiff "must have appreciated the offensiveness of her conduct."	P Jury verdict for P reinstated.	The Court noted that its decision did "not create a special rule for the elderly" and that a jury could, as it did in this case, find that a mentally disabled person had the requisite intent.
3. Wrongful Discharge and Other Employment Law Claims								
a. Discharge in Violation of an Employment Contract								
Ashman v. Association Health Services No. 22059-8-11 1998 WL 310687	WA 1998	Home health aide manager	Home health care agency	Court of Appeals	The plaintiff, a home health aide manager who was terminated from employment because she disclosed the amounts of her salary and bonuses to subordinates, sued the defendant agency for wrongful discharge, alleging that her job description and statements in the agency's employee manual had impliedly modified the at will employment relationship. TC granted SJ to the defendant, finding that the plaintiff was an at will employee and that none of the agency's policies created an implied contract.	The Court of Appeals agreed with TC because "there were no genuine issues of material fact regarding whether AHS's policies or Ashman's job description created an implied contract of employment by promising specific treatment in specific situations."	D SJ for defendant upheld on appeal.	

Title	State Date	Plaintiff	Defendant	Decision Level	Facts & Procedural History	Disposition	Prevailing Party	Comments
McCullough v. Visiting Nurse Service of Southern Maine, Inc. 691 A.2d 1201	ME 1997	Visiting nurse	Home health care agency	Supreme Judicial Court	The plaintiff, a part-time visiting nurse employed by the defendant home health care agency, was discharged after she made two errors in patient care. She sued for wrongful discharge, claiming first, that written statements in an employee handbook created a contract of employment of definite duration, and second, that even if there was no contract of employment of definite duration, other written statements by the employer created a contract of employment terminable only for cause. TC granted SJ for the defendant because none of these statements was clear enough to override two acknowledgements she had signed that stated that she was an employee at will.	The Supreme Judicial Court agreed with the reasoning of TC and sustained the judgment for the defendant.	D SJ for defendant upheld on appeal.	
b. Other Employment Law Claims								
Clark v. Texas Home Health, Inc. 971 S.W.2d 435	TX 1998	Three nurses employed by the defendant	Home health care agency	Supreme Court	Three nurses who worked for a home health care agency, and who participated in a peer review committee investigating an alleged medication error by one of the agency's licensed vocational nurses, were discharged immediately after they told their employer that they intended to report the incident to the Texas Board of Vocational Nurse Examiners. The trial granted the defendant's motion for SJ, holding that the nurses were not protected from retaliation under the Texas Nurse Practice Act because the nurses had been dismissed before they filed a report, and an intermediate appellate court agreed.	The Supreme Court reversed, holding that the nurses were protected from retaliation, even though they had not yet filed a report at the time they were discharged.	P SJ for defendant vacated and case remanded for trial.	
James v. In Home Services, Inc. No. C3-95-482 1995 WL 479647	MN 1995	Nurse employed by defendant	Home health care agency	Court of Appeals	The plaintiff, a nurse who worked for a home care agency, was terminated from employment after her employer was told by a sheriff's deputy that she had been arrested and incarcerated for a period of time. The agency discharged her because it believed that she was a convicted felon and that she had falsified her employment application. TC granted SJ on all the plaintiff's claims: breach of contract; discrimination based on disability; retaliation for seeking workers' compensation benefits; defamation; intentional infliction of emotional distress; and punitive damages.	Although the Court of Appeals sustained the lower court's decision granting the defendant SJ on the plaintiff's first three claims, it reversed the lower court and remanded for trial her claims for defamation, intentional infliction of emotional distress and punitive damages because the agency had not taken steps to verify the information that provided the basis for her discharge.	P SJ for D on three claims reversed and claims remanded for trial.	
Kuechle v. Life's Companion P.C.A. 653 N.W.2d 214	MN 2002	Nurse employed by home health agency	Home health care agency	Court of Appeals	The plaintiff, a nurse employed by home health care agency, was diagnosed with panic disorder with agoraphobia. When she asked her employer for a flexible schedule to accommodate her condition, her employer refused. The plaintiff then filed a disability discrimination claim. Several weeks later the agency terminated her employment. The plaintiff sued her employer alleging disability discrimination under the ADA, reprisal under the Minnesota Human Rights Act (MHRA), and defamation. TC found for the plaintiff on each of her claims.	The Court of Appeals sustained TC with regard to each claim. In connection with the claims under the ADA and MHRA, the appellate court rejected the defendant's argument that respondent was not disabled within the meaning of the two laws (the defendant argued that if medicated, the plaintiff would not suffer from the symptoms of agoraphobia).	P TC's judgment for plaintiff upheld.	

Title	State Date	Plaintiff	Defendant	Decision Level	Facts & Procedural History	Disposition	Prevailing Party	Comments
Spierling v. Home Health Services, Inc. 737 A.2d 1250	PA 1999	Supervisor of staff nurses	Home health care agency	Superior Court	The plaintiff, a supervisor of staff nurses for a home health care agency, was discharged after she reported suspected fraud to Medicare. TC granted the defendant's motion to dismiss, finding that the plaintiff was not protected by either a "Whistleblowers law" or by a public policy exception to the at-will employment doctrine.	The Superior Court agreed with the district court, holding that her discharge did not violate Pennsylvania's narrow public policy exception to the doctrine of employment at will because the nurse was under no statutory duty to uncover and report evidence of past Medicare fraud.	D Dismissal of complaint upheld by Superior Court.	
C. Claims Involving Third Parties								
Leifer-Woods v. Edwards 281 A.D.2d 462	NY 2001	Third party's survivor	Home health care agency and home health aide	Supreme Court, Appellate Division	While operating a motorized wheelchair, the consumer struck and injured another tenant at the apartment building where he lived. The tenant's survivor sued the consumer's home health aide and the agency that employed her, arguing that they had a duty to control the consumer's conduct. The defendants filed motions for SJ in which they argued that no such duty to control existed, and the TC granted the defendants' motion.	The Appellate Division affirmed. "Absent a special relationship between a defendant and a third person, there is no duty on the part of the defendant to control the conduct of that third person so as to prevent him or her from causing physical harm to another.... [The agency and the aide] did not have custody of [the consumer] and they had no duty to control his use of the motorized wheelchair."	D TC's decision granting SJ to defendants affirmed.	In a consumer-directed care situation, it is even more likely that the court would find that the personal assistant had no duty to "control" the consumer.
Patrick v. Macon Housing Authority 552 S.E.2d 455	GA 2001	Third party personal care assistant who worked in an apartment building which had other tenants who employed personal care assistants	Home care agency which employed another personal care attendant who worked in building and owner of building	Court of Appeals	A personal care attendant was injured when she slipped on a pool of water in the laundry room of the apartment building where she worked. She sued the home care agency that employed the personal care attendant for another tenant in the building, claiming that the other attendant was responsible for the puddle and that the agency was liable under the doctrine of respondeat superior. The TC granted the defendant agency's motion for SJ.	The Court of Appeals affirmed the TC's ruling. The plaintiff's claim was based on "sheer speculation that Justice Home Care's employee left the water which caused the slip and fall."	D SJ for defendant upheld.	
Schmidt v. County of Kern No. F035536 2001 WL 1338407	CA 2001	Third party emergency room physician	County that administered state In Home Supportive Services (IHSS) program	Court of Appeal	The plaintiff was injured by a patient who was being driven to the hospital by her IHSS worker. When the patient began experiencing difficulties with her oxygen, the worker drove to the hospital emergency room and parked the car and left it running while he sought medical assistance. The plaintiff, an emergency room physician, was injured when the car started rolling and the consumer, who was still in the car, "accidentally pushed the accelerator instead of the brake in attempting to stop the car." The physician sued the county, claiming that the county was the employer of the worker and, therefore, was vicariously liable for his negligence. The jury found that the county was not liable because it was not the worker's employer.	The Court of Appeal rejected the plaintiff's argument that TC had committed reversible error in allowing testimony regarding the interpretation of statutory and regulatory laws pertaining to the IHSS program and upheld the verdict for the County.	D Jury verdict for D upheld.	
Smith v. Ford 472 So.2d 1223	FL 1985	"Personal attendant"	Consumer	District Court of Appeal	The plaintiff worked as a "personal attendant" for the defendant, performing a combination of domestic duties and personal care for her employer. She sued her employer for workers' compensation for injuries sustained in a car accident that took place while she was picking up her employer's dog at the veterinarian's office. She was awarded workers' compensation for the injury.	The District Court of Appeal found that the employee was a domestic employee who was not eligible for workers' compensation: "even if we were to hold that the 'personal attendant' duties were nondomestic, the *admixture* of duties would still result in claimant being a domestic servant in a private home."	D P found ineligible for workers' compensation.	There was no dispute that the personal attendant was acting within the scope of her duties at the time of the accident. The opinion does not indicate who was at fault in the accident or whether the plaintiff could have sought recovery from a third party.

APPENDIX B

Table of Other Cases that Directly Address CDPAS Liability Issues

Title	State Date	Plaintiff	Defendant	Decision Level	Facts & Procedural History	Disposition	Prevailing Party	Comments
Caulfield v. Kitsap County 29 P.3d 738	WA 2001	Consumer who had multiple sclerosis and was severely disabled	Department of Social and Health Services (DSHS), county, and caregiver	Court of Appeals	Through the Community Options Program Entry System, a Medicaid waiver program, the state's DSHS paid for the consumer to receive personal care from an in-home caregiver. Prior to this, the consumer had lived in a nursing facility and was monitored by a DSHS caseworker, who arranged for the transfer to in-home care and hired a caregiver for the consumer. The caseworker failed to visit the consumer until more than a month after his transfer, despite assurances that she would continue to be his caseworker, and at this visit, she observed major adverse changes in the consumer's condition and heard the consumer's complaints about his caregiver. The caseworker transferred the case the next day to a county social worker who noted problems that needed "immediate attention." Nonetheless, the county social worker never contacted or visited the consumer. Eight days later, the caregiver called because of concern about the consumer's condition and was told to call 911. The consumer was admitted to the ER with multiple critical problems. The consumer settled with DSHS prior to trial. At trial, the jury returned a verdict finding that the county, DSHS, and the caregiver were negligent and proximately caused consumer's injuries.	On appeal, the county contended "that it owed Caulfield no duty because it was immune under the public duty doctrine and Caulfield never showed that one of the exceptions to the public duty doctrine applied." The Court of Appeals disagreed, holding that the special relationship exception to the public duty doctrine applied: "Caulfield's relationship with his County case manager involved an element of 'entrustment' by virtue of the dependent and protective nature of the relationship.... Given Caulfield's inability to take care of himself, the case manager's responsibility for establishing and monitoring his in-home care plan took on great significance....This responsibility gave rise to a duty to protect Caulfield and other similarly vulnerable clients from the tortious acts of others, especially when a case manager knows or should know that serious neglect is occurring. This duty is limited by the ordinary care a case manager would take in similar situations and by the concept of foreseeability."	P Jury verdict for the consumer upheld.	The court found that the "special relationship" exception existed under both state law and the Restatement (2d) of Torts §315 (1965) ("There is no duty...unless (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives to the other a right to protection.") This is the only reported case applying this doctrine to a government agency responsible for supervising home care services.
Couch v. Visiting Home Care Service of Ocean County 746 A.2d 1029	NJ 2000	Consumer	County department of health and home care agency	Superior Court, Appellate Division	The plaintiff, who had become a quadriplegic as result of MS, developed a serious decubitis ulcer. The county department of health had been providing him with home nursing services, and a private home care agency had been providing him with home health aide services (initially, the home health aide services were paid for by Medicaid and Home Care Expansion Program monies; the patient assumed the cost when the HCEP program ended). Both the county and the home care agency terminated their services because they believed the patient needed more intensive care than they were able to provide. The trial court (TC) ordered the defendants to continue services. However, it is unclear from the opinion what was the legal basis for the plaintiff's claims and the TC "cited no authority for his action."	On appeal, the county pointed "to the well recognized principle that actions of a public body, particularly within its field of expertise, are entitled to a presumption of validity." However, the appellate court was "persuaded that the real issue is the right of these medical providers to withdraw from a case when in their professional opinion it would be improper and unsafe to continue." The appellate court ruled that if on remand the county and the agency still wished to withdraw home care services, they should be permitted to do so, but the court's ruling relies on the agreement by the county department of health at oral argument that it "accepted the responsibility for arranging continuing care" and the county's representation to the court that space for the plaintiff was available in a nursing home.	Ds County not required to continue providing home care services.	The appellate court deferred to the county's medical judgment because it did not "abandon" the patient: "If defendants, or either of them, feel that in the professional judgment of the nurses who must manage the case, they cannot properly and ethically continue their care, provisions must be made to furnish plaintiff with appropriate alternative in-patient 24 hour care or to furnish plaintiff with a reasonable time in which to make his own alternative arrangement. The ultimate decision is for him."

Title	State Date	Plaintiff	Defendant	Decision Level	Facts & Procedural History	Disposition	Prevailing Party	Comments
Pettit v. State of Nebraska 544 N.E.2d 855	NE 1996	Chore provider for elderly and disabled person	State Department of Social Services	Supreme Court	Plaintiff, a chore provider for an elderly and disabled individual employed under a Medicaid waiver program, injured her lower back while providing chore services. She sued the state DSS for workers compensation benefits based on her claim that she was an employee of the DSS. The Workers' Compensation Court found that she did not prove she was a DSS employee, and the Court of Appeals reversed.	The Supreme Court reversed the Court of Appeals and held that there was sufficient evidence to support the determination of the Workers' Compensation Court. A DSS employee had informed the plaintiff that she was an independent contractor and that the consumer was her employer. The consumer approved hiring the plaintiff as her chore provider and she had the authority to fire her.	D State not liable for workers' compensation benefits.	This case supports the argument that a Medicaid recipient who exercises the right to hire, fire and supervise a personal assistant is the employer of the assistant, and that the assistant is not an employee of the state.
Reeder v. State of Nebraska 578 N.W.2d 435	NE 1998	Consumer	State through its department of social services	Supreme Court	The consumer sued the state department of social services for injuries (decubitis ulcers on his feet which may require amputation) allegedly caused by the negligence of a licensed practical nurse (LPN) under a Medicaid waiver program in Nebraska. The consumer had hired the LPN, but the state had allegedly checked her credentials, approved her hiring, and developed a care plan for the consumer. The consumer sued the DSS claiming: (1) respondeat superior liability for negligent care by the LPN; and (2) that the DSS "had a separate, independent, non-delegable duty to supply [him] with a care provider fully capable of meeting all his daily needs." TC granted DSS's motion for summary judgment (SJ).	The Supreme Court agreed with the TC that DSS did not have any such non-delegable duty, but it reversed on the issue of respondeat superior, holding that whether the LPN was an employee of DSS or an independent contractor was a question of fact for TC.	Reversed and remanded to the TC.	
Reeder v. State of Nebraska 649 N.W.2d 504	NE 2002	Consumer	State through its department of social services	Court of Appeals	On remand, TC considered the question of whether the LPN was an employee of DSS or an independent contractor, but did not consider the possibility that Reeder (the consumer) was the LPN's employer. TC concluded that the LPN was an independent contractor and that the state therefore was not vicariously liable for the LPN's alleged negligence.	On appeal, the Court of Appeals upheld TC, noting that factors that supported independent contractor status included: (1) DHHS did not exercise a right of control over Perales (e.g., "DHHS does not oversee or direct the services a provider performs for a client because the physician's order determines the nature and extent or services"); (2) "Perales' completion of her duties was not directly supervised by DHHS but was actually supervised by her client;" (3) Peralis was working as a skilled provider; and (4) DHHS was not in the business of providing health care.	D State not liable on any of P's theories.	Like the Supreme Court in Reeder I, the Court of Appeals rejected the plaintiff's argument that the state had a non-delegable duty to Reeder.

APPENDIX C

Florida: Consumer Directed Care Research Project, Consumer/Consultant Agreement

CONSUMER DIRECTED CARE RESEARCH PROJECT
Consumer/Consultant Agreement

The purpose of this agreement is to clarify the responsibilities of consumers and consultants, and make sure everyone understands those responsibilities.

Your Responsibilities as a Consumer:

1. Complete mandatory training.
2. Write a purchase plan to show how the budget will be spent each month.
3. Keep all purchases within your monthly budget.
4. Make all purchases which are the same as what is listed on the purchasing plan.
5. Select a representative for assistance with managing finances or decision making, if needed.
6. Develop a reliable back-up plan for coverage when your regular worker is absent because of illness, transportation problems or needing time off.
7. Find and hire workers and fill out employment forms package for each worker.
8. Send employment forms package to the project bookkeeper.
9. Train workers about their job duties and what you can expect from them.
10. Prepare and send workers' time sheets to the project bookkeeper on time.
11. Pay workers as soon as you get the paychecks from the project bookkeeper.
12. Approve invoices from agencies or independent contractors and mail them to the project bookkeeper.
13. Review monthly report from the project bookkeeper.
14. Participate in telephone interviews with the project researchers or University of Maryland, Center on Aging.
15. Use peer support and peer network. (Optional)
16. Report and changes in income and assets to your consultant and the Office of Economic Self Sufficiency.
17. Tell your consultant about your satisfaction with the services he or she is giving you.
18. Contact your consultant when you have questions.
19. Contact your consultant if you have concerns about something, so small problems won't become big problems.

The Consultant's Responsibilities to You:

1. Attend training for consultants and understand Consumer Directed Care philosophy.
2. Provide training to you and adjust the training to meet your needs.
3. Encourage and support you in making independent choices about services, purchases and workers.

4. Review your purchasing plan and back-up plan. Call you if additional information is needed.
5. Talk with you about your satisfaction of the quality of services you are purchasing.
6. Review your monthly budget reports from the project bookkeeper.
7. Be available to you to answer questions or provide technical assistance in resolving problems.
8. Work with you to develop a corrective action plan if you have problems managing your services or the monthly budget.
9. Inform you of peer support opportunities.
10. Inform you about community resources.
11. Coordinate your annual Medicaid redetermination with the Office of Economic Self Sufficiency.

What the Consultant will not do:

1. Interview, hire, train or supervise your workers.
2. Tell your workers if you are unhappy with their work.
3. Fire your workers.
4. Fill out the employment forms package.
5. Find back-up or emergency workers.
6. Write your purchasing plan.
7. Be able to get you extra money if you spend more than your monthly budget.

I understand and accept the responsibilities listed in this agreement.

(Consumer Signature)	(Date)
(Consultant Signature)	(Date)

APPENDIX D

Arkansas: IndependentChoices Representative Screening Questionnaire and Designation of Authorized Representative Form

INDEPENDENTCHOICES
Representative Screening Questionnaire

Name of Participant: _____

Medicaid #: _____ Phone #: (_____)_____

Name of Proposed Represenative: _____

Address: _____

Phone #: (_____)_____ Relationship: _____

If you are not a family member, please describe your relationship, how long you have known the participant and how often you have contact with the participant: _____
_____
_____
_____

Do you receive money from the participant or anyone else to care for the participant?
Yes: _____ No: _____

If yes, please identify the source and purpose of the funds?
_____
_____
_____

After reading the description that outlines the responsibilities of the representative, do you understand your functions and are you willing to volunteer to serve as the participant's representative?
Yes: _____ No: _____

Are you willing to sign a designation form stating that you will serve in this capacity?
Yes: _____ No: _____

Do you understand that you cannot pay yourself for this role and cannot become a paid caregiver? Yes: _____ No: _____

REPRESENTATIVE REQUIREMENTS

DEFINITION:

A representative is a participant's legal guardian, family member or any other person identified by the participant in consultation with the IndependentChoices staff to manage personal assistance with a monthly allowance when the participant is unable to do so independently.

A representative must:

- Show a strong personal commitment to the participant
- Show knowledge about the participant's preferences
- Agree to a visit the participant at least weekly
- Be willing and able to meet all program requirements listed of the participant
- Be at least 18 years old
- Be at least willing to become the payee for Social Security or Supplemental Security Income
- Be willing to submit to criminal background checks, if requested
- Obtain the approval from other family members to serve

A representative CANNOT:

- Be paid for this service
- Be hired by the project participant
- Be known to abuse drugs or alcohol
- Have any history of physical, mental or financial abuse

INDEPENDENTCHOICES
Designation for Authorized Representative

Name of Participant: _____

Medicaid #: _____ Phone #: (_____)_____

Address: _____

City: _____ AR Zip: _____

I hereby designate:

Name: _____

Address: _____

City: _____ State: _____ Zip: _____

to serve as my representative in the IndependentChoices Program. My representative will complete and sign all forms and agrees to meet all documentation requirement of this Program. My representative will use the IndependentChoices monthly allowance to purchase the services and items to meet my personal care needs as listed on the Cash Expenditure Plan and will assure that all items purchased and services received with the IndependentChoices monthly allowance are paid.

_____ _____

Participant's Signature Date

I hereby agree to serve as the representative for the above named participant and understand my responsibilities and duties under the IndependentChoices Program.

_____ _____

Authorized Representative's Signature Date

_____ _____

Witness Signature Date

(Required if either the Participant or Representative sign with a mark.)

APPENDIX E

New Jersey: Representative Description, Procedures for Designation, Screening Form, and Designation of Authorized Representative Form

REPRESENTATIVE DESCRIPTION

New Jersey Department of Human Services
Division of Disability Services, Personal Preference Program
(New Jersey Cash & Counseling Demonstration)

A representative may be a participant's legal guardian, a family member, or any other individual identified who willingly accepts responsibility for performing cash management tasks that the participant is unable to perform. A representative must evidence a personal commitment to the participant and must be willing to follow their wishes and respect their preferences while using sound judgment to act on their behalf. Representatives receive no monetary compensation for this service, and may not serve as an employee of the participant.

Specifically, the representative must be willing to:

- Work with the Cash & Counseling consultant to provide information to develop the cash management plan on the participant's behalf.
- Use the cash grant for the items outlined in the Cash Management Plan as the participant wishes.
- Maintain records, as required by the State, regarding expenditures and activity with the fiscal intermediary.

Representatives may be necessary for participants under certain conditions as defined below.

Voluntary Representative

The participant requests that a representative serve on their behalf, or a consultant recommends that the participant choose a representative and the participant agrees.

Predetermined Representative

The participant has a legal guardian or other court appointed representative in place at the time of enrollment and that individual will serve as the designated representative on the client's behalf.

Mandated Representative

The client is enrolled in Personal Preferences and has misspent funds from the cash allowance, or their functioning has deteriorated in such a way that they are no longer able to manage their cash benefit.

PROCEDURES FOR ESTABLISHMENT OF AN AUTHORIZED REPRESENTATIVE

New Jersey Department of Human Services
Division of Disability Services, Personal Preference Program
(New Jersey Cash & Counseling Demonstration)

Voluntary Representative

When a consultant determines that a representative is necessary for a participant to be successful, and the participant agrees, the potential representative will be identified and given the *Representative Description* to review. The consultant will interview the potential representative and complete the *Representative Screening Questionnaire.* If the potential representative volunteers to serve, then the *Designation of Authorized Representative Form* will be signed and witnessed. A copy will be maintained in the participant file and the original forwarded to the State Program Office.

If the participant cannot identify a person to serve as their representative, and have researched all known support systems, the consultant will call the State Program Office for advice.

Predetermined Representative

When a participant already has a legal guardian or other court appointed representative, the designated representative will be given the *Representative Description* to review and the consultant or marketer will complete the *Representative Screening Questionnaire.* The designee will complete and sign the *Designation of Authorized Representative Form* and will indicate that they are the court-appointed representative. A copy will be maintained in the participant file and the original forwarded to the State Program Office. The court appointed representative may choose to delegate this responsibility to another person, but that person can not be a paid caregiver.

Mandated Representative

In a circumstance where the participant has misspent the cash benefit or has otherwise become unable to manage the cash benefit independently, the consultant will advise the participant that they are notifying the State Program Office of the need for a representative. The consultant will ascertain whether or not the participant is in agreement and then notify the Coordinator of Counseling Services at the State Program Office immediately. The consultant will then notify the State Program Office immediately. The Program Manager

and the Coordinator of Counseling Services will conference and review the consultant's participant file. A home visit will be made to the participant to determine whether or not an agreement can be reached. In those instances where a participant refuses to accept the designation of a representative and is not adhering to the policies of the program, the State Program Office retains the right to withdraw the individual and make arrangements for them to return to the traditional PCA service. The participant will be advised in writing of the decision and their right to appeal. The participant/representative has 20 days from the date of notification of disenrollment to file an administrative review of this decision. Administrative Review requests may be mailed or phoned to the State Program Office staff and must be postmarked or received within 20 days of the termination decision. All notifications of Involuntary Termination must be made in writing and sent by Certified Mail with a receipt to assure that the date the notification was received is documented. Requests received after this 20-day limit will not be reviewed. Reviews will be completed and decisions will be made within 10 days of the request.

REPRESENTATIVE SCREENING QUESTIONNAIRE

New Jersey Department of Human Services
Division of Disability Services, Personal Preference Program
(New Jersey Cash & Counseling Demonstration)

Name of Participant: _____

Medicaid #: _____ Phone #: (_____)_____

Name of Potential Represenative: _____

Address: _____

Phone #: (_____)_____ Relationship: _____

Are you a: family member _____ friend _____ legal guardian _____ of the above named participant in the Personal Preference Program?

If you are not a family member, please describe your relationship and how often you have contact with the participant: _____
_____
_____
_____

Do you receive money from the participant or anyone else to care for the participant?
Yes: _____ No: _____

If so, from whom, and for what purpose? _____
_____
_____
_____

After reading the description that outlines the responsibilities of the representative, do you understand your functions and are you willing to volunteer to serve as the participant's representative? Yes: _____ No: _____

Are you willing to sign a designation form stating that you will serve in this capacity?
Yes: _____ No: _____

Do you understand that you cannot pay yourself for this role?
Yes: _____ No: _____

If you have any questions, please ask the consultant or call (toll free), 1-888-285-3036 before signing the designation form.

DESIGNATION OF AUTHORIZED REPRESENTATIVE

New Jersey Department of Human Services
Division of Disability Services, Personal Preference Program
(New Jersey Cash & Counseling Demonstration)

___ Voluntary ___ Predetermined ___ Mandatory

Name of Participant: _____

Medicaid #: _____ Phone: (_____)_____

Address: _____

City: _____ State: _____ Zip: _____

Consultant's Name: _____ Agency: _____

Phone: (_____)_____

I HEREBY DESIGNATE:

Name: _____

Address: _____

City: _____ State: _____ Zip: _____

Phone: (_____)_____ Fax: (_____)_____

to serve as my representative in the Personal Preferences Program: New Jersey's Cash and Counseling Demonstration. My representative will complete and sign all forms and send information to Personal Preferences Program Staff, as requested. My representative will use Personal Preferences funds to purchase the supports listed on the Cash Management Plan as I direct and will assure that all items purchased and services arranged with Personal Preference Program funds are paid. I understand that my representative receives no monetary compensation for this service.

The consumer should sign or make a mark on the appropriate signature line.

_____ _____

Consumer's Signature Date

I hereby agree to serve as the representative for the above named participant and understand my responsibilities and duties under the Personal Preference Program.

_____ _____

Authorized Representative's Signature Date

_____ _____

Witness Signature Date