

ARTICLE

ADDRESSING LIABILITY ISSUES IN CONSUMER-DIRECTED PERSONAL ASSISTANCE SERVICES (CDPAS): THE NATIONAL CASH AND COUNSELING DEMONSTRATION *

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I. INTRODUCTION

Government-sponsored programs offering consumer direction and consumer choice in personal assistance services are not a new or unusual concept.¹ 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,”² has been in existence for almost thirty years.³ As of 2002, “One-hundred thirty-nine . . . programs offering consumer-directed home and community-based (HCB) support services were identified [nationwide],”⁴ and these programs served an estimated 468,000 individuals.⁵ 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 Article: liability issues related to consumer direction.

First, 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 most sophisticated research effort to date designed to evaluate the safety, efficacy, and economic feasibility of consumer-directed care, will likely increase demand for services.⁶ The program⁷ randomly assigned Medicaid recipients in

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1. 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 service 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 & Susan Flanagan, *Highlights: Inventory of Consumer-Directed Support Programs*, <http://aspe.hhs.gov/daltcp/reports/highlight.htm> (accessed June 30, 2005).

2. *Id.*

3. The California IHSS program has been in effect since 1974. *Bonnette v. Cal. Health & Welfare Agency*, 704 F.2d 1465, 1467 (9th Cir. 1983).

4. Doty & Flanagan, *supra* n. 1.

5. *Id.*

6. Cash & Counseling Demonstration, <http://www.cashandcounseling.org/about> (accessed July 15, 2005); The Robert Wood Johnson Foundation, www.rwjf.org/about/mission.html (accessed July 15, 2005).

7. The program is described in greater detail in Section I(A).

three states, Arkansas, Florida, and New Jersey, who were eligible for home care and were interested in managing their own support and services, to two groups: an “experimental” group, which received CDPAS, and a “control” group, which received traditional agency care.⁸ Although the analysis of the data collected in the Cash and Counseling Demonstration is ongoing, initial reports support the conclusion that CDPAS significantly increase consumer satisfaction without compromising consumer health or safety.⁹

The second factor to increase the demand for services is the Independence Plus initiative of DHHS’ Centers for Medicare and Medicaid Services (CMMS), 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.”¹⁰ 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 states to develop additional CDPAS programs.¹¹

The final factor is the increased consumer demand for such services among both younger and older people with disabilities. Younger people with disabilities were the original proponents of CDPAS as part of the “independent living” movement.¹² But older consumers have caught on too. As recently reported by the AARP,

8. Cash & Counseling Demonstration, *supra* n. 6.

9. Leslie Foster et al., U. of Md. Ctr. on Aging, *Does Consumer Direction Affect the Quality of Medicaid Personal Assistance in Arkansas?* <http://www.hhp.umd.edu/aging/Ccdemo/products.html> (last updated Mar. 19, 2003).

10. Independence Plus, *A Demonstration Program for Family or Individual Directed Community Services*, <http://cms.hhs.gov/independenceplus/summary.pdf> (accessed Oct. 1, 2003) (hard copy on file with the Authors).

11. Ctrs. for Medicaid & St. Operations, *Independence Plus, § 1115 Demonstration Version: A Demonstration Program for Family or Individual Directed Community Services* 16, <http://www.cms.hhs.gov/independenceplus> (accessed Nov. 21, 2005); *see also* Ctrs. for Medicaid & St. Operations, *Independence Plus, 1915(c) Waiver Program for Family or Individual Directed Community Services* 12, <http://www.cms.hhs.gov/independenceplus> (accessed Nov. 21, 2005).

12. Marie R. Squillace & James Firman, *The Myths and Realities of Consumer-Directed Services*, http://www.consumerdirection.org/reso_mandr.htm (accessed June 30, 2005).

“Persons 50 and older with disabilities, particularly those age [fifty to sixty-four], 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.”¹³ In June 2001, the Assistant Secretary for Planning and Evaluation in DHHS 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”¹⁴ in Washington, D.C. One of the key themes 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.”¹⁵

As CMMS 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.¹⁶ 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.”¹⁷ A recent study of consumer-directed care in Washington State similarly concluded that “[t]here was no evidence of problems with quality of care or consumer safety attributable to self-directed care.”¹⁸

13. AARP, *Beyond 50 2003: A Report to the Nation on Independent Living and Disability* 8, http://assets.aarp.org/rgcenter/illbeyond_50_il_1.pdf (accessed Oct. 1, 2003) (hard copy on file with the Authors). 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.*

14. Marie R. Squillace, *Independent Choices: National Symposium on Consumer-Directed Care and Self-Determination for the Elderly and Persons with Disabilities—Summary Report*, <http://aspc.hhs.gov/daltop/reports/01cfsum.pdf> (accessed Feb. 2002). This report was prepared for the DHHS, Assistant Secretary for Planning and Evaluation, Office of Disability, Aging and Long-Term Care Policy.

15. *Id.* at 7.

16. Foster, *supra* n. 9, at 1 (noting that “some stakeholders fear that eliminating [home healthcare] agency involvement jeopardizes consumer health and safety”).

17. *Id.* at v.

18. Heather M. Young & Suzanne K. Sikma, *Evaluation of the Implementation of Self-Directed Care in Washington State* 17, <http://www.aasa.dshs.wa.gov> (accessed Sept. 30, 2002).

The purpose of this Article is 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 CDPAS. The distinguishing feature of this structure is that key supportive services are provided to the consumer without compromising the consumer's ultimate decisionmaking 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.¹⁹

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 approximately eighteen months that began in December 1998 for Arkansas, November 1999 for New Jersey, and in June 2000 for Florida.²⁰

19. Barbara Phillips & Barbara Schneider, *Moving to Independent Choices: The Implementation of the Cash and Counseling Demonstration in Arkansas* 132, <http://aspe.hhs.gov/daltcp/reports/movingic.htm> (accessed Nov. 21, 2005).

20. Barbara Phillips, et al., *Lessons from the Implementation of Cash and Counseling in Arkansas, Florida, and New Jersey* 3, <http://aspe.hhs.gov/daltcp/reports/cclesson.htm> (accessed Nov. 21, 2005). These variations are further described in Sections II–V. For a detailed discussion of the programs in Arkansas and New Jersey, see Phillips & Schneider, *supra* n. 19, and Barbara Phillips & Barbara Schneider, *Enabling Personal Preference: The Implementation of the Cash and Counseling Demonstration in New Jersey*, <http://aspe>

First, 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.²¹ Then, consumers who elect CDPAS are assigned to consultants²² who help the consumer with several essential components of the program.²³

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. 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. The consultant 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 Article, these agencies are referred to as the "fiscal agent" because this is the term used in the Cash and Counseling Demonstration.²⁴

Once the spending plan has been completed and the workers hired, consultants maintain regular contact with the consumer,

.hhs.gov/daltcp/reports/enablepp.htm (accessed Nov. 2005). The Florida implementation report is pending as of this writing.

21. Phillips et al., *supra* n. 20, at 12.

22. *Id.* at 18. 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. *Id.*

24. *Id.* at 10–15. 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.

and consultants and/or fiscal agents periodically review consumer records to check for errors or overspending.

B. The Scope of This Article

This Article focuses primarily on liability issues that are likely to arise in a CDPAS program modeled on the structure of the Cash and Counseling Demonstration. 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 may be asserted and in which potential liability under state adult protective services (APS) statutes may arise.

It is important to note that the liability issues we discuss are governed almost exclusively by state law, 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 decisions²⁵ dealing with consumer-directed care.²⁶ 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 when we have not been able to iden-

25. 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 LexisNexis).

26. 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 the fact that many potential defendants are likely to be judgment proof, and that the close and often familial relationships between consumers, providers, and authorized representatives may deter potential lawsuits between these parties.

tify an analogous situation, our analysis is necessarily more speculative.

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 CDPAS, 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, in which the defendant engaged in “conduct that amounts to a legal wrong and that causes harm for which courts will impose civil liability;”²⁷ (2) contract claims, in which the defendant breached an agreement between the parties; and (3) claims for violation of a right created by statute, such as a failure to make a report of abuse as required by a state APS 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 injuries to intangible interests, such as those involving good reputation, privacy, or emotional distress. However, the claims that

27. Dan B. Dobbs, *The Law of Torts* § 1, 1 (West Group 2000).

are most likely to be asserted in the context of CDPAS are negligence claims.

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;”²⁸ 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.”²⁹ As we discuss in Section II(A), cases involving home healthcare 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 following are the defenses that are most likely to be asserted in the context of consumer-directed care.

Contributory or comparative negligence, including assumption of risk. Under traditional common law, any contributory negligence by the plaintiff constituted a complete bar to a claim of negligence.³⁰ However, most states now apply comparative fault, “reducing the plaintiff’s recovery in proportion to the plaintiff’s fault.”³¹ Similarly, the defense of assumption of risk, which also barred recovery under traditional common law, has in most states now been either abolished or merged with the concept of contributory negligence.³² “Assumption of risk” is not easily defined (traditionally, “assumed risk always seemed to be a way of talking about some other established legal doctrine”),³³ but in the context of comparative negligence, “assumption of the risk” refers to risk-

28. *Id.* at 265.

29. *Id.* at 633.

30. *Id.* at 494. Contributory negligence is defined as the “negligence of a plaintiff in failing to exercise care for herself that is one of the causes of her harm.” *Id.* at 495.

31. *Id.* at 503.

32. *Id.* at 538–539.

33. *Id.*

assuming conduct on the part of the plaintiff that falls short of consent to accept all risks generated by the defendant.³⁴

*Workers' Compensation.*³⁵ 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.³⁶ 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.³⁷ 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;³⁸ 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."³⁹ It is important to note that the exclusive remedy provision of workers' compensation usually does not apply when injury is caused by a third party.⁴⁰ Thus, when 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 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

34. *Id.*; *Herrle v. Est. of Marshall*, 53 Cal. Rptr. 2d 713, 715–716 (Cal. App. 4th 1996).

35. Susan Flanagan is writing a comprehensive article on the workers' compensation program and its applicability to CDPAS, entitled *Accessing Workers' Compensation Insurance for Consumer-Employed Personal Assistance Workers: Issues, Challenges, and Promising Practices*.

36. Dobbs, *supra* n. 27, at 1098. Some states permit employers to opt out of workers' compensation and some categories of employees, such as domestic employees, may be excluded from mandatory coverage. *Id.*; 82 Am. Jur. 2d *Workers' Compensation* § 112 (2003).

37. Dobbs, *supra* n. 27, at 1098.

38. *Id.*

39. *Id.*

40. *Id.*

authorized representatives, or workers and authorized representatives.⁴¹

Governmental immunity. In the introduction to Section V, 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), we discuss the importance of the consumer's choice in the decision of whether or not to participate in CDPAS.

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 such as personal, corporate, and vicarious liability.

The application of vicarious liability to CDPAS has been a persistent worry of states undertaking such programs, because it poses the dilemma of control.⁴² 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 workers and thus strictly liable for the negligent conduct of those workers. 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."⁴³ Whether the label can or must be applied varies under

41. *Id.* at 751–753.

42. Marshall B. Kapp, *Enhancing Autonomy and Choice in Selecting and Directing Long-Term Care Services*, 4 *Elder L.J.* 55, 95–96 (1996).

43. Charles P. Sabatino & Simi Litvak, *Liability Issues Affecting Consumer-Directed*

different statutes and in different contexts. Thus, one must constantly ask: “Employer for what purpose?”⁴⁴ 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 injuries 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.⁴⁵ But unlike simple employment situations involving two parties—employer and 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.

Personal Assistance Services—Report and Recommendations, 4 Elder L.J. 247, 258–261 (1996); see also Susan A. Flanagan & Pamela S. Green, *Consumer-Directed Personal Assistance Services: Key Operational Issues for State CDPAS Programs Using Intermediary Services Organizations*, <http://aspc.hhs.gov/daltcp/reports/cdpas.pdf> (accessed June 30, 2005) (prepared for the DHHS, Office of the Assistant Secretary for Planning and Evaluation, Washington, D.C., October 24, 1997).

44. Sabatino & Litvak, *supra* n. 43, at 258.

45. *Id.*

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

Both the case law involving home healthcare 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 and by negligently creating hazards in the consumers' homes.⁴⁶ 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.⁴⁷ 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 when 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.⁴⁸

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 on the possibility that extreme neglect or

46. *Supra* sec. II(A)(1), II(A)(2). For simplicity, throughout this Article, 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.

47. *Supra* sec. II(C).

48. *See id.* (discussing third-party permutations).

clearly sub-standard care by workers could result in civil or criminal liability for abuse under state 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.⁴⁹

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.⁵⁰ New Jersey elected to permit spouses to act as workers,⁵¹ and Florida permits all legally responsible relatives to act as workers.⁵² 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 CDPAS.⁵³

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.

49. *Supra* sec. II(A)(3)(a).

50. Phillips & Schneider, *supra* n. 19, at xii; 42 C.F.R. § 440.167 (2005). 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.

51. Phillips & Schneider, *supra* n. 19, at xiii.

52. E-mail from Lou Comer, Consumer Directed Care Project Dir., St. of Fla. Dept. of Elder Affairs, to Sandra L. Hughes, Consultant, ABA Commn. on L. and Aging (Oct. 29, 2003) (on file with the Authors).

53. Dobbs, *supra* n. 27, at 751–757.

A. Worker Liability Risk

1. Negligent Caregiving

Although there are no reported decisions in negligence suits between consumers and workers arising from CDPAS, the substantial number of reported cases involving alleged negligence by employees of home healthcare 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.⁵⁴

a. 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.

In *Headley v. Maxim Healthcare Services, Inc.*,⁵⁵ 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 healthcare agency moved for summary judgment, arguing that the plaintiff's claim was one for medical malpractice, rather than ordinary negligence, and that the claim 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 be-

54. 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 Article discusses only the most significant of these cases in detail.

55. 716 N.E.2d 1241, 1243 (Ohio Com. Pleas 1999).

56. *Id.* at 1242.

57. *Id.* at 1243.

ing transported to the shower, not while she was receiving medical care.⁵⁸

*Williams v. Metro Home Health Care Agency*⁵⁹ also illustrates the judicial acceptance of ordinary negligence as the proper analysis, even though the care provider in that case was a nurse.⁶⁰ 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 decubitus ulcers, the nurse actually visited him only once a week.⁶¹ The plaintiff claimed that “as a result of the nurse’s negligent care, he developed an ulcer that required surgical” treatment.⁶² The defendants moved for summary judgment based on the plaintiff’s failure to name an expert witness to establish the standard of care, and the trial court denied the motion.⁶³ 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.”⁶⁴

Thus, the nature of the claim is determined, not by whether the actor is a health professional, but by the nature of the task at issue.⁶⁵

b. 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.

58. *Id.*

59. 817 So. 2d 1224 (La. App. 4th Cir. 2002).

60. *Id.* at 1226.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 1229.

65. *See also Rogers v. Crossroads Nursing Serv., Inc.*, 13 S.W.3d 417, 419 (Tex. App. 13th Dist. 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 [healthcare] industry, but rather is governed by the standard of ordinary care”).

In *Rosenthal v. Bologna*,⁶⁶ the client had contracted with the defendant home healthcare 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.⁶⁷ Over the weekend the client attempted to move on his own from his wheelchair to his walker and refractured his hip.⁶⁸ 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.⁶⁹ The court state that "[t]his 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 [healthcare] provider."⁷⁰

In *Walker v. EHCCI*,⁷¹ a multiple sclerosis patient did not receive timely emergency care because she had been left unattended by her home-care worker.⁷² The defendants argued "that their only obligations to [the] plaintiff were 'cooking, cleaning, and other household tasks.'"⁷³ 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.⁷⁴ Based on this evidence, the court found that "[c]learly, defendants owed a duty of care to [the] plaintiff beyond contractual obligations to cook and clean."⁷⁵

These two cases point to the same conclusion: the "[s]tate's interest in the health and welfare of its citizens"⁷⁶ argues in favor

66. 620 N.Y.S.2d 376 (N.Y. App. Div. 1st Dept. 1995).

67. *Id.* at 377.

68. *Id.*

69. *Id.*

70. *Id.* at 378.

71. 621 N.Y.S.2d 301 (N.Y. App. Div. 1st Dept. 1995).

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Rosenthal*, 620 N.Y.S.2d at 378.

of a duty of care that 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.⁷⁷ 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.⁷⁸ Leaving the consumer alone risks violating that duty.⁷⁹ 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 that are incidental to the provision of personal assistance services.⁸⁰

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.⁸¹

77. *Id.* at 377–378.

78. *Id.*

79. See also *Esposito v. Personal Touch Home Care, Inc.*, 733 N.Y.S.2d 468 (N.Y. App. Div. 2d Dept. 2001) (reversing summary judgment for the home [healthcare] service in favor of the patient who died while the aide left him unattended); *Villarin v. Onobanjo*, 714 N.Y.S.2d 90 (N.Y. App. Div. 2d Dept. 2000) (denying motion to dismiss for failure to state a claim because the plaintiffs had stated viable causes of action against home nurse who left early when the patient and a relative died in a house fire during the nurse's working hours); *Willis v. New York*, 697 N.Y.S.2d 656 (N.Y. App. Div. 2d Dept. 1999) (finding there was a question of fact as to whether home healthcare aide leaving early breached the duty of care to the plaintiff, when the plaintiff was injured in a home fire during the aide's working hours).

80. 621 N.Y.S.2d at 301–302.

81. See generally C.T. Drechsler, *Liability of Physician Who Abandons Case*, 57 A.L.R.2d 432 (1958) (collecting cases applying the general rules and principles of malpractice to the abandonment of a case by a physician).

c. Negligent Administration of Care

The above examples involve a failure to be there; that is, torts 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 healthcare 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 CDPAS.⁸² 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, pre-trial motions and post-trial appeals typically focused on issues of whether the defendant was negligent or even reckless in caring for the plaintiff.

Home-care agencies have also been sued for alleged negligence in helping a patient perform other tasks.⁸³ Virtually any

82. For example, in *Lee v. Health Force, Inc.*, 702 N.Y.S.2d 108 (N.Y. App. Div. 2d Dept. 2000), 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 that employed her. *Id.* at 109. 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. *Id.* 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. *Id.*; see also *Gaylord v. Homemakers of Montgomery, Inc.*, 675 So. 2d 363 (Ala. 1996) (plaintiff claiming that she had sustained severe burns on her legs and required hospitalization after being given a bath by an employee of the defendant home healthcare agency); *Keel v. W. La. Health Servs.*, 803 So. 2d 382 (La. App. 3d Cir. 2001) (holding that a certified nurse assistant employed by the defendant home healthcare 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).

83. For example, in *Calick v. Double A Prop. Assocs.*, 674 N.Y.S.2d 694, 695 (N.Y. App. Div. 2d Dept. 1998), the client was injured when she slipped on a puddle in an elevator while being assisted by her home-care attendant. The attendant argued that she was not negligent because she looked into the elevator, as was her custom, and saw no puddle. *Id.* The trial court agreed and granted the defendant's motion to set aside the jury's verdict for the 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. *Id.* However, the appellate court upheld the trial court's decision setting aside the verdict against the building management company, which was also a defendant. *Id.* at 695–696. 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.*; see also *Headley*, 716 N.E.2d at 1241 (discussed *supra* at pages

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, and 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.

In *Rogers v. Crossroads Nursing Service, Inc.*,⁸⁴ the plaintiff was receiving home healthcare services from the defendant agency while he recovered from back surgery. 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.”⁸⁵ The agency argued that the case fell under the state's Medical Liability 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.⁸⁶ 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 standard of

266–267).

84. 13 S.W.3d 417, 418 (Tex. App. 13th Dist. 1999).

85. *Id.*

86. *Id.*

safety within the [healthcare] industry, but rather is governed by the standard of ordinary care.”⁸⁷

The critical issue in *Daniels v. Senior Care, Inc.*,⁸⁸ was whether the negligence of a home-care worker who acted as a live-in companion caused a home fire that killed both the worker and the elderly woman for whom she provided care. 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 decedent to accumulate papers and magazines on the heater, when she was under a duty to prevent decedent from doing so, or, alternatively, [because she] placed these combustibles on the heater herself.”⁸⁹ The trial court rejected these arguments and granted the defendant’s motion for summary judgment, but the appellate court disagreed.⁹⁰ Citing testimony from the fire marshal regarding the likely cause of the fire, the appellate court held that the “[p]laintiffs . . . submitted a probative factual scenario showing that Defendant’s breach of its duties to decedent was a proximate cause of her death.”⁹¹

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 of these cases and in all of the cases discussed in the preceding section, the plaintiff asserted a claim against the home healthcare 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 CDPAS 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 per-

87. *Id.* at 419.

88. 21 S.W.3d 133, 134–135 (Mo. App. 2000).

89. *Id.* at 138.

90. *Id.* at 139.

91. *Id.*

sonal 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.

3. Abuse or Neglect

Under limited circumstances, personal assistance workers also face the risk of liability under state 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 that constitutes abuse or neglect.⁹² 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, as 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

92. Audrey S. Garfield, Student Author, *Elder Abuse and the States' Adult Protective Services Response: Time for a Change in California*, 42 *Hastings L.J.* 859, 874–875, 890–891 (1991).

greatly from state to state. Although the APS statutes in several states protect only the elderly,⁹³ the APS laws in most states apply to both older and younger adults who are vulnerable due to physical and/or mental impairment.⁹⁴ Typical of such states is Florida's law, 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.⁹⁵

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 is required to report abuse is the scope of the mandatory reporting provision. Only six states do not mandate reporting of suspected abuse.⁹⁶ 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.⁹⁷

93. For example, Oregon protects only persons age sixty-five or older, and Connecticut, Massachusetts, Nevada, and Rhode Island protect only persons age sixty or older. Conn. Gen. Stat. Ann. §§ 17b-450(1), 17b-451(a) (1998); Mass. Gen. Laws ch. 19A, §§ 14, 15(a) (1999); Nev. Rev. Stat. §§ 200.5092(5), 200.5093(4) (2003); Or. Rev. Stat. Ann. §§ 124.050(3), 124.060 (2003); R.I. Gen. Laws § 42-66-8 (1998).

94. 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." Natl. Ctr. on Elder Abuse, *Elder Abuse Law Background Information*, <http://www.elderabusecenter.org/default.cfm?p=backgrounder.cfm> (last updated May 20, 2003).

95. Fla. Stat. § 415.102(26) (2005).

96. The six states whose APS statutes do not provide for mandatory reporting are Colorado, New Jersey, New York, North Dakota, South Dakota, and Wisconsin. Lori A. Stiegel, *Recommended Guidelines for State Courts Handling Cases Involving Elder Abuse* 74, 84, 88, 90 (ABA 1995).

97. These states are Delaware, Florida, Indiana, Kentucky, Louisiana, Mississippi, Missouri, New Hampshire, New Mexico, North Carolina, Oklahoma, Rhode Island, South Carolina (mandates reporting only by any person "who has actual knowledge" of abuse), Tennessee, Texas, Utah, and Wyoming. Del. Code Ann. tit. 31, § 3910(a) (1997); Fla. Stat. § 415.1034(1)(a) (2005); Ind. Code § 12-10-3-9(a) (2002); Ky. Rev. Stat. Ann. § 209.030(2) (1999); La. Stat. Ann. § 14:403:2(C) (2004); Miss. Code Ann. § 43-47-7(1)(a) (2004); Mo.

The other twenty-seven 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.⁹⁸ Three other states require reporting by persons who have assumed responsibility for the care of a vulnerable adult.⁹⁹ 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.”¹⁰⁰ Because mandatory reporting provisions are amended occasionally to add 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

Rev. Stat. § 660.255 (2000); N.H. Rev. Stat. Ann. § 161-F:46 (2005); N.M. Stat. Ann. § 27-7-30(A) (2003); N.C. Gen. Stat. § 108A-102(a) (2003); Okla. Stat. tit. 43A, § 10-104(A) (2004); R.I. Gen. Laws § 42-66-8 (1998); S.C. Code Ann. § 43-35-25(A) (2005); Tenn. Code Ann. § 71-6-103(b)(1) (2004); Tex. Human Resources Code Ann. § 48.051(a), (c) (Supp. 2004); Utah Code Ann. § 62A-3-305(1) (2004); Wyo. Stat. Ann. § 35-20-103(a) (2003). Some of these “any person” states somewhat redundantly also list categories of individuals who are required to report suspected abuse.

98. Ala. Code §§ 38-9-2(3), 38-9-8(a) (2004); Alaska Stat. §§ 47.24.010(a)(14), 47.24.900(3) (2004); Neb. Rev. Stat. §§ 28-353, 28-372(1) (1995); S.C. Code Ann. §§ 45-35-10(2), 43-35-25(A) (2005).

99. Arizona mandates reporting by any “person who has responsibility for the care of an incapacitated or vulnerable adult,” Ariz. Rev. Stat. § 46-454(A) (2005); 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 he or she receives compensation, including . . . any elder or dependent adult care custodian,” Cal. Welfare & Inst. Code Ann. § 15630(a) (West Supp. 2004); and Maine by “[a]ny person who has assumed full, intermittent or occasional responsibility for the care or custody of the incapacitated or dependent adult, regardless of whether the person receives compensation,” 22 Me. Rev. Stat. Ann. § 3477(1)(B) (2005).

100. 35 Pa. Consol. Stat. Ann. §§ 10225.103, 10225.701(a)(1) (2003); *see also* Idaho Code § 39-5303(1) (2002) (“home-care worker”); Iowa Code § 235B.3(2)(c) (2005) (“in-home home-maker-home health aide”); 22 Me. Rev. Stat. Ann. § 3477(1)(A)(21) (2005) (“unlicensed assistive personnel”); Ohio Rev. Code Ann. § 5101.61(A) (Anderson 1998) (“any senior service provider”); and Va. Code Ann. § 63.2-1606(A)(6) (2004) (“[a]ny person providing full, intermittent or occasional care to an adult for compensation”).

do so.¹⁰¹ Recent statistics on the prevalence of elder abuse indicate that abuse of vulnerable adults is perpetrated most often by family members.¹⁰² 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.¹⁰³ 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.¹⁰⁴ While there are no ready answers to these conflicts, workers who are mandatory reporters should be made aware of their reporting obligations 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).¹⁰⁵

101. 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, 185–192 (1998) (listing thirty-seven states penalizing failure to report as a misdemeanor).

102. Pamela B. Teaster, *A Response to the Abuse of Vulnerable Adults: The 2000 Survey of State Adult Protective Services* 34, <http://www.elderabusecenter.org/pdf/research/apsreport030703.pdf> (July 13, 2005). The research findings in the 2000 Survey of State APS 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%.

103. For example, in New Jersey, sixty-three percent of the consumers hired relatives as providers, and in Florida, fifty-nine percent 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, 14 <http://www.openminds.com/indres/njcash.pdf> (2002).

104. 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.

105. 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.” Ark. Code Ann. § 5-28-202(b) (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 fails to do so . . . is civilly liable for the damages proximately caused by the failure.” Iowa Code § 235B.3(12). 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.” Mich. Comp. Laws § 400.11e(1) (1997).

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 for worker liability under an APS statute is sub-standard 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).¹⁰⁶

106. In *Cmmw. v. Waskovich*, the defendant, Charles Waskovich, had entered into a care arrangement with Kenneth Andrews, an elderly gentleman who had been living alone. 805 A.2d 607, 609 (Pa. Super. 2002). 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. *Id.* After Mr. Andrews died from "pneumonia and severe infection related to bedsores," Waskovich was convicted on charges of neglect of a care-dependent person resulting in serious bodily injury. *Id.* at 610. 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." *Id.* "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." *Id.* at 611. 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.

Id. at 610–611.

In *Caretenders, Inc. v. Cmmw.*, a client who had been receiving home-care from the defendant agency since September 1987 was observed on January 15, 1998, by her treating physician to have developed several decubitus ulcers. 821 S.W.2d 83, 84–85 (Ky. 1991). The client was admitted to the hospital on February 9, 1998 with "multiple extensive decubiti on her body. *Id.* The area over her sacrum was larger and extended to the bone; "[a doctor at the hospital] reported that she appeared unwashed and dirty and smelled of necrotic material." *Id.* at 85. 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 'any caretaker who knowingly and willfully abuses, neglects, or exploits an adult' . . . is guilty of a Class C felony." *Id.* at 85–86. 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." *Id.* at 88. "Caretaker" is defined as "an individual or institution who has the responsibility for the care of the adult as a result of a family relationship, or who has assumed the responsibility for the care of the adult person voluntarily, or by contract, or agreement." *Id.* at 85–86. The jury convicted the agency, but not the three nurses, and the jury's verdict was upheld on appeal. *Id.* at 85, 89.

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 judgment proof by definition. All Medicaid recipients must meet certain income and asset limitations in order to qualify,¹⁰⁷ 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 bringing such a claim might make economic sense.

First, the Medicaid asset tests permit recipients to retain their home as an asset,¹⁰⁸ and particularly in the case of older Medicaid beneficiaries, these homes may have substantial value.¹⁰⁹ At the same time, state property 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 worker’s most likely claim is for an injury resulting from alleged negligence in providing a safe workplace—the workplace being the consumer’s residence.¹¹⁰

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 rep-

107. ABA, *Legal Guide for Older Americans* 78–79 (Random House 1998).

108. *Id.* at 79.

109. 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 78–79.

110. Note that two duties of care may be involved here. The consumer, as an employer, has a duty to provide a reasonably safe workplace. Dobbs, *supra* n. 27, 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*.

representative as a defendant on the theory that the representative is the joint employer of the worker.¹¹¹ In cases in which the representative independently (that is, without consultation or direction from the consumer) performs most of the functions of an employer (e.g., hiring the worker, setting the worker's hours, and assigning the tasks to be performed by the worker), as is likely to be the case if the consumer suffers from dementia, the representative may be found to be a joint employer, or even the sole employer.¹¹²

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.¹¹³ Conversely, in cases where the consumer and any other likely defendants *are* 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.¹¹⁴

111. See *Evans v. Webster*, 832 P.2d 951, 954 (Colo. App. 1991) (noting "[t]hat a worker can simultaneously be the employee of two persons is well-recognized in the law.").

112. 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.

113. 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.

114. 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. App. 4th Cir. 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

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.¹¹⁵ Conversely, most privately employed individual providers are not covered by workers' compensation and, thus, their only recourse is to seek tort damages.¹¹⁶ In some of these cases, the actual recipient of the 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

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.* 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, "thereby 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.*

115. *Supra* sec. I(D) (briefly discussing the workers' compensation system).

116. The issue of workers' compensation coverage for CDPAS providers, including the extent to which providers are currently covered by state workers' compensation laws, is extensively analyzed in Susan Flanagan, *Assessing Workers' Compensation Insurance for Consumer-Employed Personal Assistance Service Workers: Issues, Challenges and Promising Practices*, <http://aspe.hhs.gov/daltcp/reports/paswork.pdf> (accessed Nov. 19, 2005).

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 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.¹¹⁷ 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.¹¹⁸ However, in the case of care workers, who are categorized as invitees,¹¹⁹ the legal standard is the same whether 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 foreseeable."¹²⁰

117. Dobbs, *supra* n. 27, at 591.

118. *Id.* at 592, 616. According to Dobbs, a 1998 decision by the North Carolina Supreme Court

counted [eleven] jurisdictions that had adopted the reasonable care standard across the board and [fourteen] 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, 886–887 (N.C. 1998)).

119. *Id.* at 602. Section 332(3) of the *Restatement (Second) of Torts* 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."

120. Dobbs, *supra* n. 27, at 602. Section 343 of the *Restatement (Second) of Torts* (1965) 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

Given this “duty of reasonable care, the invitee’s suit is an ordinary negligence case and the ordinary rules of negligence apply.”¹²¹

Several slip and fall cases illustrate the risk a consumer runs if the consumer fails to maintain reasonably safe conditions in the home. In *Dapp v. Larson*,¹²² a home health aide was injured when she fell down the porch steps at the client’s residence. 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.¹²³ The trial court granted the defendant’s motion for summary judgment on the grounds that the plaintiff had failed to demonstrate either the existence of a dangerous condition or that the defendant had notice of that condition.¹²⁴ 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.¹²⁵

The plaintiff, in *Rolfe v. Betts*,¹²⁶ made the novel argument that his contract with the defendant to provide home healthcare services enhanced the duty of care owed by the defendant. 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.¹²⁷ 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 predated the storm, and that even if the ice did not pre-date the storm, the in-home services contract constituted “unusual circumstances” justifying a departure from the normal rule.¹²⁸ The court

(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.

121. Dobbs, *supra* n. 27, at 603.

122. 659 N.Y.S.2d 130, 131 (N.Y. App. Div. 3d Dept. 1997).

123. *Id.*

124. *Id.*

125. *Id.* at 132.

126. 1998 WL 310826 at *1 (Conn. Super. June 5, 1998).

127. *Id.*

128. *Id.*

denied the motion for summary judgment because there was a factual dispute as to whether the plaintiff's "claimed injuries resulted from new ice or old ice," but the court also noted that there was nothing in the contract to "support the proposition that the plaintiff was owed an enhanced duty of care, or suggest that the defendants agreed to become absolute insurers of the plaintiff's safety."¹²⁹

Home-care workers have also asserted claims of liability for injuries caused by allegedly hazardous furnishings and appliances and by household pets.¹³⁰

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 of 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 courts¹³¹ and legal

129. *Id.* at **1–2.

130. In *Baxter v. Cramco, Inc.*, a home-care worker sought compensation for injuries she suffered when she sat on a chair that collapsed. 425 S.E.2d 191, 192 (W. Va. 1992). Her suit named her employer, her employer's husband, and the manufacturer of the chair as defendants. *Id.* 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. *Id.* at 193.

In *Singer v. Super. Ct. of L.A. 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. 83 Cal. Rptr. 2d 355, 356 (Cal. App. 2d Dist. 1999). The primary issue on appeal was whether the potential damages in her lawsuit for personal injury and wrongful discharge were sufficiently great to satisfy the \$25,000 jurisdictional threshold for an action in superior court. *Id.* at 357. 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 the defendants' failure to advise whether [the dog] had been inoculated against rabies." *Id.* at 358.

131. See e.g. *Herrle*, 53 Cal. Rptr. 2d at 719 (finding that mentally impaired patients owe no duty to protect care providers from injuries associated with caring for the patients); *Anicet v. Gant*, 580 So. 2d 273, 276–277 (Fla. 3d Dist. App. 1991) (holding that a violently insane patient is not liable to care provider for injuries caused by the patient); *Gould v.*

commentators¹³² 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.¹³³

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 disease¹³⁴ 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.¹³⁵ 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.

Vincinelli v. Musso,¹³⁶ 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

Am. Fam. Mut. Ins. Co., 543 N.W.2d 282, 287 (Wis. 1996) (finding that mentally disabled patient cannot be liable to care provider for injuries).

132. See e.g. Sarah Light, Student Author, *Reflecting the Logic of Confinement: Care Relationships and the Mentally Disabled under Tort Law*, 109 Yale L.J. 381, 411–412 (1999) (arguing that mentally impaired patients should owe no duty to protect care providers from injuries based on the nature of the patient-provider relationship). Additional commentators are cited by Ms. Light and in the cases cited *supra* n. 131.

133. E.g. *supra* n. 131.

134. Alzheimer's Assn., *Statistics about Alzheimer's*, http://www.alztx.org/info/statistics_about_alzheimers.htm (accessed July 14, 2005) (stating that "[b]y 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").

135. E.g. *supra* n. 131.

136. 818 So. 2d 163 (La. App. 1st Cir. 2002).

defendants with mental disabilities.¹³⁷ 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.¹³⁸ However, before discussing these cases, it is helpful to review cases that articulate the legal principles and policy considerations regarding liability that have arisen in institutional settings.

In the first such case, *Anicet v. Gant*,¹³⁹ the Florida Third 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.¹⁴⁰ 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;"¹⁴¹ that in large part for this reason he had been "confined to the hospital ward designed for the lowest functioning and most dangerous patients;"¹⁴² 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 well aware."¹⁴³ In determining liability, the court cited two policies that support the usual rule, which is reflected in the *Restatement (Second) of Torts*,¹⁴⁴ that a mentally disabled plaintiff is "liable in the same generalized way as is an ordinary person for both 'intentional' acts and 'negligent' ones"¹⁴⁵—"that as between an innocent injured person and an incompetent injuring one, the latter should bear the loss"¹⁴⁶—and that imposing such liability encourages placement of the disabled

137. *Id.* at 167.

138. See *White v. Muniz*, 999 P.2d 814, 814–815 (Colo. 2000) (involving a resident of an assisted living facility); *Maher v. Scollard*, 1993 WL 19615 at **1–3 (Ohio App. 1st Dist. Jan. 29, 1993) (involving a home-care recipient).

139. 580 So. 2d 273 (Fla. 3d Dist. App. 1991).

140. *Id.* at 274.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Restatement (Second) of Torts* § 238B (1965).

145. *Anicet*, 580 So. 2d at 275.

146. *Id.*

person in an institution so as to prevent harm to others.¹⁴⁷ 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,¹⁴⁸ and second, and probably more significant, "Gant was not an innocent member of the public unable to anticipate or safeguard himself . . . he was employed to encounter, and knowingly did encounter, just the dangers which injured him."¹⁴⁹ 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."¹⁵⁰

In each of the above footnoted 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

147. *Id.*

148. *Id.* at 276.

149. *Id.* at 275–276.

150. *Id.* at 277 (emphasis in original). The Wisconsin Supreme Court reached a similar conclusion in *Gould v. American Family Mutual Insurance Co.*, 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. 543 N.W.2d at 283. The Court held that "a person 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." *Id.* at 287. The Court considered the same policy rationales for imposing liability despite mental incapacity as *Anicet*, but also relied on a third rationale for imposing liability that had not been considered in *Anicet*, that the Restatement rule discourages tortfeasors from simulating mental incompetence. *Id.* The Court found that this rationale did not apply because it was hard to imagine that someone would feign the symptoms of a mental disability and subject themselves to commitment in an institution "in order to avoid being held liable for damages for some future civil act." *Id.*

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. 53 Cal. Rptr. 2d at 719. 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." *Id.* at 715. 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." *Id.* at 715–716.

was critical that the plaintiff had been hired to manage the very risks that resulted from the impairment. The courts have also considered whether liability should be imposed on mentally impaired defendants who were *not* living in a secure institution, and in each case, either the courts found no liability or reduced the plaintiff's liability.¹⁵¹ These cases suggest that it is quite possible

151. The plaintiff in *Vincinelli* had been hired by the client's son to work as a sitter/companion to his mother, who had Alzheimer's disease. 818 So. 2d at 164. The plaintiff suffered injuries after slipping and falling on ice cream that the mother had spilled about an hour earlier when she went to get herself something to eat. *Id.* 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." *Id.* at 164–165. The court held that she did not because

[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.

Id. at 166. 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.

Id. at 166–167.

Maher is an unreported decision in which a registered nurse who was providing home-care was twice physically assaulted by her patient. 1993 WL 19615 at *1. 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. *Id.* at **2–3. In *Maher*, the patient, "in a confused mental state, grabbed [the nurse] forcefully by the wrists and fingers and threw her against a window frame and radiator." *Id.* at *1. Two months later, the patient "again injured Maher's wrists, slamming them against the bed rails." *Id.* 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, and the appellate court 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." *Id.* at **1, 3.

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*, 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. 999 P.2d at 815. A few

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 CDPAS 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 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.¹⁵² 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.¹⁵³

Although real, as we explain in subsections III(B)(3)(a) and III(B)(3)(b), the threat of claims for wrongful discharge and other employment law violations should not discourage consumers from

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." *Id.* The next day, the defendant was diagnosed with dementia caused by Alzheimer's. *Id.* 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." *Id.* 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. *Id.*

152. James M. Fischer, *Understanding Remedies* § 260 (Matthew Bender 1999); 82 Am. Jur. 2d *Wrongful Discharge* § 3 (2003).

153. 82 Am. Jur. 2d *Wrongful Discharge* § 1.

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.¹⁵⁴ 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.¹⁵⁵ The Arkansas Independent Choices "Personal Care Assistant Agreement" specifies both that "[t]his agreement may be terminated by the Participant/Representative due to unsatisfactory [a]ssistant performance or by the [assistant]"¹⁵⁶ and that "[t]he 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."¹⁵⁷ 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.

154. Ark. Dept. of Human Servs., *Independent Choices Personal Care Assistant Agreement* (1998); *Consumer Directed Care Research Project—Consultant Training Manual—Florida* (2000) (available at <http://www.communitylivingta.info/search> Consultant Training Manual) [hereinafter *Consumer Directed Care*].

155. *Consumer Directed Care*, *supra* n. 154, at 73.

156. Ark. Dept. of Human Servs., *supra* n. 154.

157. *Id.* at 3.

Litigation by home-care workers against home healthcare agencies demonstrates the importance of including language in the consumer/worker agreement that permits the 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*,¹⁵⁸ 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.’”¹⁵⁹ 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.¹⁶⁰ 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.¹⁶¹

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.”¹⁶² 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

158. 691 A.2d 1201 (Me. 1997).

159. *Id.* at 1202–1203.

160. *Id.* at 1203–1204.

161. *Id.*; see also *Ashman v. Assoc. Health Servs.*, 1998 WL 310687 (Wash. App. Div. 2 June 12, 1998). In *Ashman*, 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. 1998 WL 310687 at *2. The court found 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.” *Id.* at *5.

162. Fischer, *supra* n. 152, at § 261.

seeking approximately equivalent replacement employment, further reducing any possible damage award and making a legal action for lost wages even less attractive.¹⁶³

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 anti-discrimination laws (e.g., discharge based on sex, race, religion, or national origin) or reasons of public policy (e.g., discharge of a whistleblower).¹⁶⁴ 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.¹⁶⁵ For example, Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment based on race, color, religion, sex, and national origin,¹⁶⁶ applies only to an employer “who has fifteen or more employees for each working day in each of twenty or more calendar weeks.”¹⁶⁷ Although Section 1981 of the Civil Rights Act of 1866,¹⁶⁸ which, inter alia, prohibits racial discrimination in employment agreements,¹⁶⁹ 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

163. John F. O'Connell, *Remedies in a Nutshell* 294 (West 1985).

164. 82 Am. Jur. 2d *Wrongful Discharge* §§ 3, 53.

165. EEOC, *Employers and Other Entities Covered by EEO Laws* ¶¶1–3, http://www.eeoc.gov/abouteeo/overview_coverage.html (last updated Aug. 13, 2003) (on file with the Authors).

166. 42 U.S.C. § 2000e-2(a) (2000).

167. 42 U.S.C. § 2000e(b).

168. 42 U.S.C. § 1981 (2000).

169. The United States 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; thus, that groups such as Arab-Americans may bring an action under Section 1981. See *St. Francis College v. Al-Khazraji*, 481 U.S. 604, 613 (1987) (noting that “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”).

against a consumer a possibility.¹⁷⁰ 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.¹⁷¹

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.¹⁷² To minimize the possibility of such a claim, it may be wise to advise consumers to avoid discharging a worker in circumstances that could be interpreted as retaliatory.

170. “Although Title VII and the ADA [Americans with Disabilities Act] cover only employers with [fifteen] 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.” *St. Fair Empl. Prac. Ls.*, 8A Lab. Rel. Rep. (BNA) 451:1 (2003).

171. *Id.* at 451:55–57, 115.

172. See *Spierling v. First Am. Home Health Servs., Inc.*, 737 A.2d 1250 (Pa. Super. 1999) (holding that the termination of a staff nurse supervisor for a home healthcare agency did not violate the state’s narrow public policy exception to the doctrine of employment at will when the supervisor reported evidence of suspected fraud to the Medicare fraud hotline); *Clark v. Tex. Home Health Inc.*, 971 S.W.2d 435 (Tex. 1998) (holding that the Texas Nurse Practice Act provided protection against retaliation when three home healthcare agency nurses, who participated in a peer review committee investigating an alleged medication error by one of the agency’s nurses, were discharged immediately after they told their employer that they intended to report the incident to the Texas Board of Vocational Nurse Examiners); *Fundamentals of Empl. L.* 131–236 (Karen E. Ford et al. eds., 2d ed., ABA 2000) (comparing wrongful discharge law throughout the United States).

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 former employee to recover large tort awards, including punitive damages, which are not normally available in a breach of contract case.¹⁷³

While the kinds of employment law claims discussed in this Section are much less likely to occur in the context of CDPAS than in the context of agency care, the following steps can be taken to protect consumers:

173. *Fundamentals of Empl. L.*, *supra* n. 172, at 237. One example of a case involving several “tag-along torts” is *James v. In Home Services, Inc.* 1995 WL 479647 (Minn. App. Aug. 15, 1995) (unpublished). 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. *Id.* at *5. 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. *Id.* at *1. The agency discharged her because it believed that she was a convicted felon and that she had falsified her employment application. *Id.* 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 the claims of defamation, intentional infliction of emotional distress, and punitive damages. *Id.* at *2–4. These claims were reinstated because the agency “took no steps to verify the information which the deputy may have provided, even though it could easily have done so.” *Id.* at *4; *see also Kuechle v. Life’s Companion P.C.A.*, 653 N.W. 2d 214 (Minn. App. 2002) (upholding a decision for the plaintiff, a nurse employed by a home healthcare agency, on claims of defamation, disability discrimination under the ADA, and reprisal under the Minnesota Human Rights Act).

- 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, the employer is vicariously liable for any tort committed by the employee within the scope of employment.¹⁷⁴

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 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.

174. See *supra* sec. I(D) (discussing the doctrine of respondeat superior).

The issues that arise in the first situation are illustrated by the case of *Smith v. Ford*.¹⁷⁵ In *Ford*, an employee whose duties included personal care of her employer argued that she was entitled to workers' compensation. 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."¹⁷⁶ Instead of or in addition to seeking recovery from the car's driver, the employee filed a claim for workers' compensation.¹⁷⁷ 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.¹⁷⁸

The opinion in *Ford* 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.¹⁷⁹ It is quite possible that the driver was not at fault or was uninsured and judgment proof,¹⁸⁰ 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 CDPAS 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.

175. 472 So. 2d 1223 (Fla. 1st Dist. App. 1985).

176. *Id.* at 1225.

177. *Id.*

178. *Id.* at 1227.

179. See Dobbs, *supra* n. 27, at 1104; *supra* nn. 35–40 and accompanying text (discussing workers' compensation).

180. 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.

In *Schmidt v. County of Kern*,¹⁸¹ a case involving a worker who provided personal assistance services under the California In-Home Supportive Services (IHSS) program, suggests the possibilities for such claims.¹⁸² In *Schmidt*, the IHSS worker was taking the consumer to an appointment with her physician when the consumer “began experiencing problems with her oxygen.”¹⁸³ The worker then drove to the hospital emergency room and parked the car and left it running while he sought medical assistance.¹⁸⁴ 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.”¹⁸⁵ The physician subsequently sued the county, claiming that the county was the employer of the worker and, therefore, was vicariously liable for his negligence.¹⁸⁶ The jury found that the county was not liable because it was not the worker’s employer, and the appellate court upheld the verdict.¹⁸⁷

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.”¹⁸⁸ 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.¹⁸⁹

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

181. 2001 WL 1338407 (Cal. App. 5th Dist. 2001).

182. *Id.*

183. *Id.* at *2.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.* at *5; see also *Patrick v. Macon Hous. Auth.*, 552 S.E.2d 455 (Ga. App. 2001) (dealing with question of who was the employer for liability purposes).

188. See *infra* sec. V(D) (discussing the risk that the state or county may be found to be the employer of a CDPAS provider).

189. 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.

court's ruling for the defendant suggests that there is little risk that the worker would be found liable.

In *Leifer-Woods v. Edwards*,¹⁹⁰ the plaintiff was injured when she was struck by a motorized wheelchair operated by a patient who had multiple sclerosis.¹⁹¹ She filed suit against the home health aide who was caring for the patient at the time and against the agency that employed the aide.¹⁹² The defendants moved for summary judgment on the ground that they had no duty to control the patient's conduct.¹⁹³ 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 that third person so as to prevent him or her from causing physical harm to another."¹⁹⁴ 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.¹⁹⁵

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 will discuss in the next section, 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) above, 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 pro-

190. 281 A.D.2d 462 (N.Y. App. Div. 2d Dept. 2001).

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.* (citing, inter alia, *Restatement (Second) of Torts* § 315).

195. *Id.* at 463.

vide 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.¹⁹⁶ 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 APS.¹⁹⁷

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.¹⁹⁸ 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.

1. 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”—

196. *See supra* sec. II(A)(3)(b).

197. *See supra* sec. 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 supra* sec. II(B)(1). 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.

198. *See Dobbs, supra* n. 27, at 582–584.

are those in which the court imposes fiduciary duties based on a qualitative evaluation of the relationship.¹⁹⁹

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.²⁰⁰

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,²⁰¹ but more importantly, “The duty that is distinctive of fiduciaries arises out of a concern that the fiduciary will take advantage of the beneficiary. It is not a concern about inadvertent harm, but about self-interested behavior.”²⁰²

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. Nevertheless, individuals who are considering becoming representatives should be given complete information regarding their responsibilities, including the associated liability risks.

2. 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

199. D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 Vand. L. Rev. 1399, 1412–1413 (2002).

200. The authorized representative would also seem to fall within the theory of fiduciary relationships proposed by Professor D. Gordon Smith. Under Professor 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.”

201. *Id.* at 1409.

202. *Id.* at 1408.

the context of CDPAS, 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 does 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 was incompetent or unfit for the job 'may be liable to a third party whose injury was proximately caused by the employer's' failure to exercise due care."²⁰³ 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";²⁰⁴ and that "through the negligence of the employer in hiring the employee, the latter's incompetence, unfitness or dangerous characteristics proximately caused the injury."²⁰⁵

In this context, 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.

203. *Lingar v. Live-In Companions, Inc.*, 692 A.2d 61, 65 (N.J. Super. App. Div. 1997) (citing *Di Cosola v. Kay*, 450 A.2d 508, 514 (N.J. 1982)).

204. *Di Cosola*, 450 A.2d at 516.

205. *Id.*

Alternatively, in cases in which a parent is the authorized representative for his or her minor child, two theories of parental liability would potentially apply.²⁰⁶ First, “Every state legislature has enacted, in some form, a parental liability statute.”²⁰⁷ Although these statutes “impose liability on parents without regard to the parents’ fault,”²⁰⁸ the amount of damages that can be recovered under such statutes is typically quite limited.²⁰⁹ Alternatively, a tort claim could be brought under the rationale of Section 316 of the *Restatement (Second) of Torts*, which places no limit on damages. Section 316 provides the following:

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.²¹⁰

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 and knows of the need.”²¹¹ In the context of consumer-directed care, this means that a parent who is his or her child’s authorized

206. 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).

207. *Id.* at 336.

208. *Id.* at 337.

209. *Id.* at 337–338; 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, 190–194 (2002).

210. *Restatement (Second) of Torts*, § 316.

211. Dobbs, *supra* n. 27, at 892.

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,²¹² and that the theories of liability discussed above have not been applied in the context of CDPAS. However, even if these theories 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.

III. LIABILITY RISK OF FISCAL AGENTS

The role of fiscal agents (also called fiscal intermediaries) in the Cash and Counseling programs, and in similar CDPAS 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 is to issue paychecks to workers based on time sheets prepared and submitted by the consumer, after calculating all required payroll deductions.²¹³ If the fiscal agent 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 Sections III(A) and 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.²¹⁴ In some

212. See generally Gratz, *supra* n. 209; Morgridge, *supra* n. 206.

213. Fiscal agents also pay invoices for goods and services included in the consumer's spending plan. Doty & Flanagan, *supra* n. 1, 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 Sections III(A) and III(B) would apply to a claim arising from the fiscal agent's error.

214. *Infra* sec. III(C).

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 for reporting any such problems or discrepancies either to the consultant who advises the consumer or to the state or county agency administering the program.²¹⁵ 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.²¹⁶

A third possible source of liability arises from state APS laws.²¹⁷ 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 and potentially liable for criminal and civil penalties if the fiscal agent fails to do so.²¹⁸ 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.²¹⁹ In such cases, the liability risks discussed in Sections III(A) and 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

215. Fla. Dept. of Elder Affairs, *Final Narrative Report: Consumer Directed Care Project 6-7* (2002).

216. 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, such instructions and standards may be cited by a plaintiff in a negligence action as evidence of the relevant standard of care.

217. *Infra* sec. III(D).

218. *See infra* sec. III(D) (explaining situations when an agent has a duty to protect patients who are severely disabled and are receiving home-care).

219. *Lessons Report, supra* n. 20, at 26.

with APS. 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 Internal Revenue Service (IRS) 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.²²⁰ 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.²²¹

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.

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

220. Doty & Flanagan, *supra* n. 1 (discussing "intermediary service organizations" and "consumer-directed workers"). Under Section 3504 of the Internal Revenue Service Code and IRS Revenue Procedures 70-6 and 80-4, 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.

221. Although there is a Pennsylvania workers' compensation decision finding a fiscal agent to be the employer of a consumer-directed care provider, Flanagan, *supra* n. 35, this administrative decision is an anomaly. See IRS Revenue Proc. 70-6 (discussing the relationship between the employer and employee).

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.²²² 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.²²³ However, if the error is not corrected quickly and the worker terminates services to the consumer as a result, and if the

222. 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. E-mail from Lou Comer, Consumer Directed Care Project Dir., St. of Fla. Dept. of Elder Affairs, to Sandra L. Hughes, Consultant, ABA Commn. on L. and Aging (Oct. 27, 2003) (on file with the Authors).

223. 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, Exec. Dir., N.J. Off. on Disability Servs., to Sandra L. Hughes, Consultant, ABA Cmmn. on L. and Aging (Mar. 6, 2003) (on file with the 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.

loss of services results in serious injury to the consumer,²²⁴ the consumer may in theory bring a breach of contract action against the fiscal agent.

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.²²⁵ 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.²²⁶ 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;²²⁷ and (2) the harm to the plaintiff must have been contemplated by the parties.²²⁸

Plaintiffs in the Cash and Counseling program, and in other CDPAS that require the consumer to develop emergency "back-up plans" as an essential component of the program,²²⁹ are likely to encounter considerable difficulty proving causation. The purpose

224. See *supra* sec. II(A)(1); *supra* nn. 66–81 and accompanying text (discussing cases alleging provider liability for abandonment or failure to work as scheduled).

225. 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 fiscal agent that the fiscal agent 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. U. of Md. Ctr. on Aging, Cash and Counseling, *A Second Glance*, <http://www.hhp.umd.edu/AGING/CCDemo/secondglance.html> (accessed Nov. 2003) (on file with the Authors). 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).

226. Dan B. Dobbs, *Law of Remedies: Damages—Equity—Restitution* vol. 776 (2d abridged ed., West 1993).

227. *Id.*

228. *Id.* at 776–777.

229. The requirement of such plans in consumer-directed care programs is the norm. Natl. Assn. of St. Units on Aging & Natl. Council on Aging, *Four Core Functions of Quality Management*, Consumer Choice News (D.C.) 9 (Jan. 2003) ("Each state administering a 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.").

of such a “back-up plan” is to provide uninterrupted care in 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.²³⁰ 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, 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.²³¹

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.”²³² Under New York law, for example,

Contemplation may be expressed 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.”²³³

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

230. *Id.*

231. *Cf. Izraelewitz v. Mfrs. Hanover Trust Co.*, 465 N.Y.S.2d 486, 488–489 (N.Y.C. Civ. Ct. 1983) (The Bank was not required to refund money to the consumer after merchant’s refusal to accept returned product because consumer had failed to take advantage of back-up plans offered by merchant.).

232. Dobbs, *supra* n. 226, at 776–777.

233. 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).

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 caused the harm (the serious medical injury to the consumer).²³⁴ 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."²³⁵ 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.

234. Dobbs, *supra* n. 27, 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* n. 152, 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 serves 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.")

235. Dobbs, *supra* n. 27, at 462.

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,²³⁶ 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,²³⁷ 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 recover lost pay.²³⁸ Because these laws often include provisions for attorney’s fees,²³⁹ enforcement through administrative proceedings,²⁴⁰ and damages and penalties in addition to the lost wages,²⁴¹ including criminal penalties,²⁴² they are a very effective remedy for workers who seek to recover unpaid wages.

236. *Supra* sec. I(D) (discussing contributory and comparative negligence).

237. 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 that everyone owes a duty of reasonable care to others to avoid physical harms.” Dobbs, *supra* n. 27, 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* n. 152, at 115.

238. *See generally* 51B C.J.S. *Labor Relations* § 1355 (2003) (“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.”).

239. *See e.g.* Neb. Rev. Stat. Ann. § 48-1231 (LEXIS 2004) (Workers may recover attorney’s fees if they recover a judgment exceeding the amount of pay disputed.).

240. *See e.g.* Idaho Code § 45-617 (2003) (providing that wage claims may be pursued through administrative proceedings).

241. *See e.g.* Idaho Code §§ 45-607, 45-608(4) (Employer may have to pay extra wages or fines if it fails to pay all wages due.); Neb. Rev. Stat. Ann. § 48-1232 (Willful non-payment of wages results in recovery of double the amount of wages due.).

242. *See e.g.* Utah Code Ann. § 38-24-12 (2001) (Employer who fails to pay wages is guilty of a misdemeanor.); Wash. Rev. Code Ann. § 49.48.020 (West 2002) (Employers violating wage statutes are guilty of a misdemeanor.).

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 contributory 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.²⁴³ Here, too, the plaintiff is likely to encounter problems proving liability, causation,²⁴⁴ 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.²⁴⁵

243. For a discussion of the difficulties in proving a claim of negligent infliction of emotional distress, see *infra* nn. 252–255 and accompanying text.

244. 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* n. 152, at 122–123 (“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.”).

245. 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 recklessly, (3) by extreme and outrageous conduct.” Dobbs, *supra* n. 27, at 826.

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.²⁴⁶ In New Jersey, the fiscal agent will not cut checks beyond a consumer's allowance.²⁴⁷ Moreover, if inappropriate requests are made, the fiscal agent alerts the state agency. Either the consultant or the state agency staff would investigate the situation.²⁴⁸ 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 any problems. 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.²⁴⁹

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.²⁵⁰ But establishing a duty of care is not the same as establishing liability. In Arkansas, if the consumer persists in having problems spending within the cash allowance, the consumer can be dis-enrolled from the CDPAS pro-

246. 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. St. of Fla. Dept. of Elder Affairs, *Final Narrative Report: Consumer Directed Care Project 6-7* (St. of Fla. Dept. of Elder Affairs Aug. 2003). "The interim reports along with the running total availability ensured state office staff a more accurate review of consumer expenditures." *Id.* at 6. For CDPAS program that assign consultants the responsibility for fiscal monitoring, the analysis of potential liability in this section would apply.

247. E-mail from William Ditto, *supra* n. 223.

248. *Id.*

249. E-Mail from Sandra Barrett, Asst. Dir., Ark. Div. of Aging and Adult Servs., to Sandra L. Hughes, Consultant, ABA Commn. on L. and Aging (Mar. 5, 2003) (on file with the Authors).

250. The question of whether a duty of care exists is a legal question that is decided by the judge, not the jury. Dobbs, *supra* n. 27, at 583. 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.

gram 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 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.²⁵¹

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."²⁵² 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."²⁵³ Even if a plaintiff could convince the court that for a normally constituted disabled person, dis-enrollment from a CDPAS program result 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 that would make success unlikely.²⁵⁴ 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.²⁵⁵

251. 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.

252. *Id.* at 836.

253. *Id.*; *see id.* at 851–852 (discussing the requirement that the defendant's conduct must severely distress a "reasonable person who is normally constituted").

254. *Id.* at 836–839.

255. Compare *Meredith v. Hansen*, 697 P.2d 602, 604 (Wash. App. Div. 1985) (refusing to impute the stepfather's contributory negligence to the plaintiffs in an action by stepsons against driver for negligent infliction of emotional stress caused by witnessing the defendant's car strike and kill their stepfather); *Sorrells v. M.Y.B. Hospitality Ventures of Asheville*, 424 S.E.2d 676, 678-679 (N.C. App. 1993) (refusing to impute the son's negligence to the plaintiff parents in an action for negligent infliction of emotional stress caused by

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.”²⁵⁶ Although this immunity has most typically been applied to companies that manufacture products for the government in accordance with government specifications,²⁵⁷ or that construct buildings, highways, and other public works,²⁵⁸ more recently some state courts have extended this derivative immunity to professionals who provide services under contract to the government.²⁵⁹ 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.²⁶⁰ Because it is highly unlikely that an injury to the consumer resulted from the

defendant’s employees continuing to serve alcohol to plaintiff’s intoxicated son who later died in a car accident) *with Godfrey v. Steinpress*, 180 Cal. Rptr. 95, 106 (Super. App. Dept. 1982) (finding California authority “persuasive on limiting contributory negligence to simple negligence cases”).

256. A.E. Korpela, *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 Servs., Inc. v. Mutka*, 735 N.E.2d 790 (Ind. 2000) (holding that appellant was not entitled to political subdivision status under the Indiana Tort Claims Act).

257. See Dobbs, *supra* n. 27, at 737–741 (discussing liability and immunity of contractors hired to provide a particular product or service for the federal government).

258. See generally Korpela, *supra* n. 256, at 390–397 (discussing the application of the immunity rule to particular types of work).

259. See Jeffrey L. Janik & W. Wayne Siesennop, *Government Immunity for Professional Independent Contractors*, 71 Wis. Law. 14 (Mar. 1998) (discussing a Wisconsin appellate case that extended governmental immunity to a professional independent contractor that had designed a replacement roadway and bridge) (available at http://www.wisbar.org/AM/Template.cfm?Section=Wisconsin_Lawyer&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=50173) (accessed Nov. 21, 2005).

260. See e.g. *Vanchieri v. N.J. Sports & Exposition Auth.*, 514 A.2d 1323, 1326 (N.J. 1986) (holding that a public contractor will not be held liable for work performed in accordance with plans and specifications provided by a public entity); *Est. of Lyons v. CNA Ins. Co.*, 558 N.W.2d 658, 663 (Wis. App. Dist. 1996) (holding that a government contractor “is 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”).

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 a fiscal agent who is sued for failure to monitor expenses or detect problems.²⁶¹

D. Potential Liability under State APS 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 nature²⁶² and being inflicted by a worker, a family member, or the consumer's authorized representative.²⁶³ If the fiscal agent is operating in one of the seventeen states that require "any person" to report suspected abuse,²⁶⁴ the fiscal agent must report the suspected abuse and may risk significant civil and criminal penalties if he or she fails to do so. In the states that do not provide for universal mandatory reporting, but, instead, list occupational categories that 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 for a fiscal services agency. However, because there are exceptions,²⁶⁵ and because state APS laws are frequently amended, fiscal agents should check the laws in

261. It is much more likely that an injury or damages resulted from the Fiscal Agent's *failure* to comply with government specifications.

262. 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, misuse, or concealment of funds, property or assets of a vulnerable elder." Natl. Ctr. on Elder Abuse, *Frequently Asked Questions*, <http://www.elderabusecenter.org/default.cfm?p=faqs.cfm> (accessed Oct. 12, 2005).

263. For a more thorough discussion of state laws protecting vulnerable adults from abuse and neglect, review *supra* Section II(A)(3).

264. *Supra* n. 97 (listing the seventeen states that require "any person" to report suspected abuse and providing citations to these state's mandatory reporting laws).

265. 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 division (B) of [S]ection 5101.60 of the Revised Code." Ohio Rev. Code Ann. § 5101.61(A)(1) (Anderson 2000). Division B defines "adult" as "any person sixty years of age or older within this state who is handicapped by the infirmities of aging or who 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." Ohio Rev. Code Ann. § 5101.60(B).

their states to determine whether they are subject to a mandatory reporting requirement.²⁶⁶

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.²⁶⁷ Consultants also had 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.²⁶⁸ In Arkansas and New Jersey, these services are provided by consultants²⁶⁹ employed by private agencies that contract with the state²⁷⁰ to provide consultant services. Florida contracts with both agencies and individuals to serve as consultants.²⁷¹ Because the

266. The fiscal agent 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 infra* n. 357 and accompanying text (discussing an indemnity clause Arkansas uses in its contracts with the two agencies that provide fiscal agent and consultant services to the state).

267. The experimental phase of the three programs refers to the approximately eighteen months between the time each state began enrolling consumers to the time of the on-site evaluation by Mathematica Policy Research, Inc. Enrollment began in December 1998 for Arkansas, November 1999 for New Jersey, and June 2000 for Florida. Phillips et al., *supra* n. 20, at 3.

268. To the extent that CDPAS 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.

269. 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.

270. Throughout this Article, 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, and counties).

271. E-mail from Lou Comer, Consumer Directed Care Project Dir., St. of Fla. Dept. of Elder Affairs, to Sandra L. Hughes, Consultant, ABA Commn. on L. and Aging (June 2, 2003) (on file with the Authors).

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 factors.

First, the consultant helps determine whether an authorized representative is needed and participates to varying degrees in the selection of an authorized representative, when the consumer is unable to direct the consumer's care or if the consumer elects not to do so.

Second, the consultant helps the consumer develop an acceptable written plan for spending the cash allowance, including a back-up plan.

Third, the consultant is responsible for advising the consumer about hiring, training, and supervising CDPAS workers.

Fourth, the consultants are responsible for monitoring consumer satisfaction, safety, use of funds through initial home visits, telephone calls, reviews of receipts and worker's time sheets, periodic reassessments, and for initiating action to correct problems where necessary.

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 APS law to report abuse or neglect of the consumer.²⁷²

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.

First, 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.

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

272. *Supra* sec. III(E).

Third, although the consultant can and should answer questions and facilitate decisionmaking 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.

Fourth, 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 reapplied.

Finally, 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.²⁷³ *Caulfield v. Kitsap County*,²⁷⁴ a case discussed in greater detail in Sections III(D) and IV(C), illustrates this point.²⁷⁵ 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

273. 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 programs. 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 Fiscal Agent is responsible for the consumer's safety should be avoided.

274. 29 P.3d 738 (Wash. App. Dist. 2d 2001).

275. *Id.* at 745.

incorporates the Aging and Adult Services Field Manual, which enumerates minimum requirements for COPES [the home-care program] case managers. *The contract thus provides evidence of the reasonable standard of care for case-workers managing COPES in-home placements.*²⁷⁶

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.”²⁷⁷ 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.”²⁷⁸

On the other hand, program documents may also contain statements that can be helpful to a consultant in defending a claim of negligence, particularly when 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: “writ[ing] a purchas[ing] plan;” “train[ing] workers about their job duties and what you expect from them;” and “contact[ing] your consultant if you have concerns about something, so small problems [do not] become big problems.”²⁷⁹ The consultant’s responsibilities to the consumer include: “provid[ing] training;” “review[ing] . . . [the] purchasing plan and backup plan;” and “review[ing] . . . monthly budget reports from

276. *Id.* at 746 (emphasis added).

277. *Guidelines for Consultants*, Fla. Agency For Health Care Administration (Dec. 1999).

278. *Consumer Directed Care Research Project: Quality Management Plan*, Fla. Agency for Health Care Administration (Dec. 1999).

279. Fla. Agency for Health Care Administration, *Consumer Directed Care Research Project: Consumer/Consultant Agreement*, <http://www.communitylivingta.info/openfile.php/fid/1964/did/786> (accessed July 17, 2005).

the project bookkeeper.”²⁸⁰ The agreement also lists “[w]hat the [c]onsultant will *not do*,” including “interview[ing], hir[ing], train[ing] or supervis[ing] your workers;” “find[ing] back-up or emergency workers;” and “writ[ing] your purchasing plan.”²⁸¹

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.²⁸²

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.²⁸³

In Arkansas, “The question of who to select as a representative was usually settled naturally,”²⁸⁴ 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.”²⁸⁵ Although the state has not adopted formal criteria and procedures

280. *Id.*

281. *Id.*

282. 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. *Infra* sec. III(C).

283. 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).

284. Phillips & Schneider, *supra* n. 19, at 91.

285. *Id.* at 94.

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.²⁸⁶

In addition, the representative must review a list of “representative requirements” and then complete and sign the “IndependentChoices Representative Screening Questionnaire.”²⁸⁷ The representative is designated and the forms are usually completed under the supervision of the consultant.²⁸⁸ These 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.²⁸⁹

286. IndependentChoices, *Designation for Authorized Representative*, <http://www.communitylivingta.info/openfile.php/fid/1964/did/786> (accessed July 17, 2005).

287. IndependentChoices, *Representative Screening Questionnaire*, <http://www.communitylivingta.info/openfile.php/fid/1964/did/786> (accessed July 17, 2005). 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.” *Id.*

288. Phillips & Schneider, *supra* n. 19, at 92.

289. 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 St. of Ark. and the Phillips County Dev. Ctr., Attachment IV at 4–5; Contract for fiscal year 2003 between the St. of Ark. and Aspen Mgt. Group, LLC, Attachment IV at 4–5.

Similarly, in New Jersey, “Usually the choice of a person to serve as representative was obvious and grew out of the current relationships of the consumer.”²⁹⁰ 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.²⁹¹ However, the primary purpose of this questionnaire is apparently to help the prospective representatives decide “whether they wish[] to undertake this role,”²⁹² 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.²⁹³

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 person who is a potential representative attends the enrollment presentation and, if indicated and the individual agrees, his or her name is en-

290. Rpt. from Phillips & Schneider to U. of Md. Ctr. on Aging, *Enabling Personal Preference: The Implementation of the Cash and Counseling Demonstration in New Jersey* 116 (Mar. 2003) (copy on file with the Authors).

291. 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.

292. Phillips & Schneider, *supra* n. 20, at 116.

293. 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.”

tered on the application as the consumer's representative.²⁹⁴
The consumer has the right to appeal the consultant's appointment of a representative to the state.²⁹⁵

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 decisionmaking 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 the capacity to direct his or her own services, but nev-

294. E-mails from Lou Comer, Consumer Directed Care Project Dir., St. of Fla. Dept. of Elder Affairs, to Lori Simon-Rusinowitz, Research Dir., Cash and Counseling Demonstration and Evaluation at the U. of Md. Ctr. on Aging (Aug. 9, 2002 and Oct. 29, 2003) (on file with the Authors).

295. E-mail from Lou Comer, *supra* n. 271 (stating that 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 Dir., N.J. Office on Disability Servs., to Sandra L. Hughes, Consultant, ABA Commn. on L. and Aging (July 2, 2003) (on file with the Authors); E-mail from Sandra Barrett, Asst. Dir., Ark. Div. of Aging and Adult Servs., to Sandra L. Hughes, Consultant, ABA Commn. on L. and Aging (July 1, 2003) (on file with the Authors).

ertheless elects to designate a representative.²⁹⁶ 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 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."²⁹⁷

Thus, for example, in *Bartels v. County of Westchester*,²⁹⁸ 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."²⁹⁹ The plaintiff's allegations included

296. *E.g.* Phillips & Schneider, *supra* n. 19, at 94 (indicating that the consumer may not wish to assume the responsibilities associated with consumer-directed care. In Arkansas, for example, about half the participants elected to designate an authorized representative.).

297. Sonja A. Soehnel, *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).

298. 429 N.Y.S.2d 906 (App. Div. 2d Dept. 1980).

299. *Id.* at 907.

the charge that “the county acted negligently in the selection of . . . foster parents.”³⁰⁰ 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.”³⁰¹

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 describe in a later Section of this Article,³⁰² 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 microwave oven to heat pre-cooked meals) and home modifications (for example, installation of grab bars in the bathroom).³⁰³ Within the constraints of that allowance, consumers also have discretion in setting the pay rate and scheduling the hours worked by workers.³⁰⁴ An essential tenet of CDPAS

300. *Id.* at 909.

301. *Id.* at 910; *see also Babcock v. St.*, 809 P.2d 143 (Wash. 1991) (alleging 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.).

302. *Infra* sec. V(F).

303. Phillips & Schneider, *supra* n. 19, at xii, 28.

304. *Id.* at 61, 64, 119–120.

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.³⁰⁵

The consultant also has the primary responsibility for approving standard spending plans. In Arkansas, the state has prepared a list of goods and services clearly covered by the cash benefit. "If all . . . the uses of cash were on the list of approved uses . . . , the counselor could approve the cash plan."³⁰⁶ 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."³⁰⁷ 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.³⁰⁸

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, two lawsuits against case managers responsible for overseeing medical care in connection with a workers' compensation claim suggest that the

305. Consultants are responsible for communicating to the consumers that the consultant's role is primarily advisory, in this and all other aspects of CDPAS. Consultant training in all three states emphasizes that the role of a consultant is quite different from that of a traditional case manager.

306. Phillips & Schneider, *supra* n. 19, at 74.

307. Phillips et al., *supra* n. 20, at 162.

308. E-mail from Lou Comer, *supra* n. 52.

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.³⁰⁹

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-up 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 ap-

309. 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. 691 N.E.2d 499, 501 (Ind. App. 1998). 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. *Id.* 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. *Id.* at 503. 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. *Id.* 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.

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 intentional infliction of emotional distress. 612 N.W.2d 10, 14 (S.D. 2000). 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." *Id.* at 17. Like the court in *Vakos*, the South Dakota Supreme Court 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." *Id.* at 16. 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." *Id.* at 17. 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. *Id.*

proval 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 CDPAS. The experience in CDPAS has been that most of the workers hired are family and friends,³¹⁰ 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 decisionmaking, 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)³¹¹ or failed to provide any assistance at all.

310. *E.g.* Phillips & Schneider, *supra* n. 19, at 81 (stating that in Arkansas, about ninety-five percent of the participants in IndependentChoices hired a family member or friend to act as a provider).

311. In Florida, background checks were required only in the program for developmentally disabled consumers. E-mail from Lou Comer, *supra* n. 52. In Arkansas, background

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 is *Reeder v. State of Nebraska*.³¹² 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 Nebraska's Aged and Disabled Medicaid Waiver program.³¹³ As required for workers hired directly by consumers, rather than being 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."³¹⁴ After Perales had been providing care for Reeder for about two months, he developed decubitus ulcers on his feet.³¹⁵ Although Reeder consulted a podiatrist and Perales followed the podiatrist's treatment orders, the ulcers did not heal properly and Reeder's feet became infected.³¹⁶ 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.³¹⁷ Reeder filed suit against the State of Nebraska based on two theories of liability:

[F]irst, 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.³¹⁸

On appeal of the trial court's decision granting summary judgment on both theories to the state, the Nebraska Supreme Court reversed and remanded the case for trial on the issue of whether Perales was an employee of the state or an independent contrac-

checks are optional. Phillips & Schneider, *supra* n. 19, at 99.

312. 578 N.W.2d 435 (Neb. 1998).

313. *Id.* at 438.

314. *Id.*

315. *Id.* at 439.

316. *Id.*

317. *Id.*

318. *Id.*

tor,³¹⁹ 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.'"³²⁰ The 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 [healthcare] professionals and are not authorized to make medical . . . judgments. The fact that they maintain periodic contact with clients who receive [healthcare] benefits pursuant to the act and maintain a general interest in their welfare does not, in our judgment, amount to an undertaking to qualitatively assess or intervene in [healthcare] provided to the clients.³²¹

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 competent to provide the services" he required.³²² 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.

319. *Id.* at 441. In Section V(D), we discuss the Nebraska 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. 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.

320. *Id.* at 441 (quoting from appellant's reply brief).

321. *Id.*

322. *Id.* at 439.

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.³²³ 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 frequency of home visits and telephone calls by the consultant.³²⁴ Especially in the case of consumers whose physical and/or mental disabilities have diminished their capacity

323. U. of Md. Ctr. on Aging, *Cash and Counseling, A Second Glance*, <http://www.inform.umd.edu/AGING/CCDemo/Secondglance.html>. (last accessed Oct. 1, 2003) (on file with the Authors). 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 assess the situation, (2) order 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.

Phillips & Schneider, *supra* n. 19, at 78; *see also* Phillips et al., *supra* n. 20, at 137 (explaining that consultants report suspected neglect or exploitation of the consumer to the state, which then assigns a Medicaid nurse to investigate the problem). The issue of the state's potential liability for failure to take appropriate corrective action is discussed in Section V(C).

324. Phillips & Schneider, *supra* n. 19, at 34; E-mail from Lou Comer, Consumer Directed Care Project Dir., St. of Fla. Dept. of Elder Affairs, to Sandra L. Hughes, Consultant, ABA Commn. on L. and Aging (Oct. 7, 2003) (on file with the Authors); Phillips et al., *supra* n. 20, 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?" and "Is there any misuse of funds?" The Continuing Educ. and Prof. Dev. Program, Sch. of Soc. Work, Rutgers, the St. U., *Personal Preference: The New Jersey Cash and Counseling Demonstration 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.

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*,³²⁵ discussed below. Although much of the opinion deals with whether the defendant county was immune from liability under the public duty doctrine,³²⁶ 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 CDPAS.

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.³²⁷ 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 relation[ship] exists between the actor and the other which gives to the other a right to protection.³²⁸

In *Caulfield*, 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 State, 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.³²⁹ The plaintiff, who suffered from multiple sclerosis and needed twenty-

325. 29 P.3d at 738.

326. 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. See *Caulfield*, 29 P.3d at 741.

327. Dobbs, *supra* n. 27, at 874–875.

328. *Restatement (Second) of Torts* § 315.

329. *Caulfield*, 29 P.3d at 740. COPES is a Medicaid home and community-based waiver program.

four-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.³³⁰ 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.³³¹ Pursuant to an inter-agency 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.”³³² Nonetheless, the county social worker did not promptly contact or visit the consumer.³³³ 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 911.³³⁴ 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.³³⁵

At trial, the jury returned a verdict finding that the county, DSHS, and the worker were negligent and proximately caused the consumer’s injuries, and apportioned damages totaling \$2,626,707.³³⁶

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.³³⁷ However, the court’s reasoning in holding

330. *Id.*

331. *Id.*

332. *Id.*

333. *Id.*

334. *Id.* at 740–741.

335. *Id.* at 741.

336. *Id.* The jury “allocated fault [forty] percent to the County, [forty] percent to DSHS, and [twenty] percent to Sellars [the care provider].” *Id.*

337. *Id.*

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 the 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.³³⁸

Although the result in *Caulfield* may appear to conflict with the decision of the Nebraska Supreme Court in *Reeder*,³³⁹ 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.³⁴⁰ The Court 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."³⁴¹ Thus, the fact that caseworkers "maintain periodic contact with clients who receive [healthcare] benefits pursuant to the

338. *Id.* at 745.

339. 578 N.W.2d 435 (Neb. 1998).

340. *Id.* at 438, 442.

341. *Id.* at 442.

act and maintain a general interest in their welfare does not . . . amount to an undertaking to qualitatively assess or intervene in [healthcare] provided to the clients.”³⁴²

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, 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.³⁴³ In contrast, in *Caulfield*, the caseworker knew the consumer needed twenty-four-hour care and was unable to make telephone calls or otherwise instigate complaints about his care.³⁴⁴ 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.³⁴⁵ The transfer of responsibility to a county-level caseworker, per program procedures, did not cause a break in this duty.³⁴⁶ 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 all 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

342. *Id.*

343. *Id.* at 438, 442.

344. 29 P.3d at 745.

345. *Id.* at 740.

346. *Id.* at 743.

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 law³⁴⁷ 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,³⁴⁸ 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 whether this requirement applies only to individuals who currently work as social workers or to anyone with training as a social worker.³⁴⁹ Other states have general categories that are likely to be interpreted as covering consultants—these states include Ohio (“senior service provider”);³⁵⁰ West Virginia (“social service worker”);³⁵¹ Minnesota (“a professional or professional’s delegate while engaged in . . . social services”);³⁵² Maryland (“human service worker”);³⁵³ and Nebraska (“human services professional or paraprofessional”).³⁵⁴ Consultants should therefore check the laws in their states to de-

347. For a more complete discussion of state laws protecting vulnerable adults, see Section II(A)(3).

348. See *supra* n. 97 (listing these states and the citations for their mandatory reporting laws).

349. See e.g. Alaska Stat. § 47.24.010(a)(9) (2004); Ark. Code Ann. § 5-28-203(a)(1)(I) (Supp. 2001); Ariz. Rev. Stat. Ann. § 46-454(A) (West 2005).

350. Ohio Rev. Code Ann. § 5101.61(A) (Anderson 2004). “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.” Ohio Rev. Code Ann. § 5101.60(B).

351. W. Va. Code Ann. § 9-6-9(a) (LEXIS 2003).

352. Minn. Stat. Ann. § 626.5572 subd. 16(1) (West Supp. 2005).

353. Md. Fam. L. Code Ann. § 14-302(a) (2004).

354. Neb. Rev. Stat. § 28-372(1) (Supp. 2004).

termine whether they are subject to a mandatory reporting requirement.

Consultants may also be required to report suspected abuse under the internal policies of the CDPAS 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.³⁵⁵ The Arkansas mandatory reporting law applies to “any social worker,” “a case manager,” and “a case worker.”³⁵⁶ The contracts provide that the agencies must

[d]emonstrate 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.³⁵⁷

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.

V. LIABILITY RISK FOR STATES AND OTHER GOVERNMENT ENTITIES

States that sponsor Medicaid CDPAS 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 state³⁵⁸ 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

355. Ark. Code Ann. § 5-28-203(a)(1)(I)–(K) (2001).

356. *Id.*

357. *Supra* n. 289.

358. 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 CDPAS program that is structured along the lines of the Cash and Counseling Demonstration.

are not unique to CDPAS, 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 CDPAS. 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.³⁵⁹

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.³⁶⁰

The state usually has some responsibility for resolving serious problems that arise in consumer-directed personal assistance services, although the consultants perform 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.³⁶¹

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

359. *Supra* sec. V(A).

360. *Supra* sec. V(B).

361. *Supra* sec. V(C).

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 employment³⁶² and 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 non-delegable duty of the state.³⁶³

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.³⁶⁴ In addition to individual back-up plans, the waiver templates require that state programs have "a viable system in place for assuring emergency [back-up] and emergency response capability in the event those providers of services and supports essential to the individual's health and welfare are not available."³⁶⁵ 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 have been supplanted by a tort claims act or similar legislation; and in yet other states, immunity is determined by a combination of common and statutory law.

For this reason, it is impossible to address in this Article whether a claim would be barred by the governmental immunity law of a particular state. However, the following brief summary of

362. *Supra* sec. V(D).

363. *Supra* sec. V(E).

364. 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 *supra* n. 11.

365. *Supra* n. 11.

governmental immunity law provides some guidance and will be referred to in our discussion of specific potential claims against the state.

Historically, with the exception of certain claims under federal law, the states enjoyed complete “sovereign immunity” from suit.³⁶⁶ However, “Almost all states have now enacted tort claims statutes waiving the blanket common law immunity of the state and its agencies.”³⁶⁷ Although some claims are permitted under these statutes, others are not. In some states, “discretionary,” but not “ministerial,” decisions are immune from suit.³⁶⁸ However, many courts hold that when the discretion that is exercised involves a decision that can be judged under a professional standard of care, discretionary function immunity does not apply.³⁶⁹ “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.’”³⁷⁰ For example, in *Nakahira v. State of Hawaii*,³⁷¹ 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.³⁷²

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.”³⁷³ Examples of planning activities include the assessment of competing priorities, weighing of budgetary considerations, and allocation of scarce resources.³⁷⁴ 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

366. Dobbs, *supra* n. 27, at 715–716.

367. *Id.* at 716.

368. *Id.* at 717.

369. *Id.* at 721.

370. *Id.*

371. 799 P.2d 959 (Haw. 1990).

372. *Id.* at 962.

373. Dobbs, *supra* n. 27, at 722.

374. 57 Am. Jur. 2d *Municipal, County, School, and State Tort Liability* § 78 (2001).

to a particular class of individuals, the duty is not one enforceable in tort.”³⁷⁵ The most common 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.³⁷⁶

At common law, municipalities were not considered sovereigns and therefore did not enjoy sovereign immunity.³⁷⁷ 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.³⁷⁸ For example, in a negligence action brought by a plaintiff who was injured when he attempted to dive into a gravel pit lake resulting from excavation 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.³⁷⁹ As with sovereign immunity, many states have now adopted statutes that modify the common law rules regarding local public entity immunity.³⁸⁰

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”³⁸¹), but not for ministerial acts (for example, “driving cars, posting warning signs, or moving office furniture”³⁸²). “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.”³⁸³ Under some state statutes, “the employee

375. Dobbs, *supra* n. 27, at 723.

376. *Id.*

377. *Id.* at 718.

378. *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 718–719.

379. *Radloff v. St.*, 323 N.W.2d 541, 542–544 (Mich. App. 1982).

380. Dobbs, *supra* n. 27, at 719.

381. *Chamberlain v. Mathis*, 729 P.2d 905, 910 (Ariz. 1986).

382. *Id.*

383. Dobbs, *supra* n. 27, at 735.

is simply immune to claims for negligence committed within the scope of his employment.”³⁸⁴ State statutes may also provide that “the public entity must 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.”³⁸⁵

Finally, it should be noted that if a state is concerned about potential liability in connection with its CDPAS 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.³⁸⁶

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).³⁸⁷ Instead, the states relied on “self-screening” by potential participants.³⁸⁸ Although 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,³⁸⁹ 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

384. *Id.* at 736.

385. *Id.* at 733.

386. 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 creating partial or total immunity against civil damages for the governmental unit.).

387. Phillips et al., *supra* n. 20, at 27; Phillips & Schneider, *supra* n. 19, at 25–26 (discussing decisions in Cash and Counseling states).

388. Phillips et al., *supra* n. 20, at 27, 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.

389. *Id.* at 26.

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.”³⁹⁰

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 CDPAS.³⁹¹

On the other hand, there may be a greater risk of liability for *including* a consumer who either is not a suitable candidate for CDPAS or lacks the capacity to make a choice about participation in CDPAS.³⁹² 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 pro-

390. *Id.* at 27.

391. For example, in *Couch v. Visiting Home-care Services of Ocean County*, 746 A.2d 1029 (N.J. Super. App. Div. 2000), 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. *Id.* at 1033. Both the county, and a home-care agency that 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. *Id.* at 1031–1032. The trial court entered an order requiring continuation of the services, and the county and the agency appealed. *Id.* at 1032. 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.” *Id.* However, the appellate court was “persuaded that the real issue was the right of these medical providers to withdraw from a case when in their professional opinion it would be improper and unsafe to continue,” thus apparently viewing the county’s decision as a medical decision, rather than a benefit eligibility decision. *Id.* 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. *Id.* at 1033.

392. A decision regarding suitability for participation in CDPAS 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.

gram. 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 is essential that either the consumer or the consumer's properly designated legal surrogate or representative, in the case of a consumer who lacks capacity,³⁹³ agree to participation in CDPAS. Agreement to participate involves three elements:

1. The consumer's choice to participate is 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).
3. The consumer has the capacity to understand the relevant information and make a choice.³⁹⁴

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 a 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 had to make sure the consumer can safely participate in the program. Such monitoring will also protect the

393. See *infra* sec. V(C) (discussing the appropriate procedures for selection of an authorized representative).

394. For a discussion of the applicability of the concept of consent to CDPAS, see Sabatino & Litvak, *supra* n. 43, at 310–314.

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, 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 representative does not raise significant liability concerns (1) when the consumer has the capacity to designate the representative³⁹⁵ 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,³⁹⁶ and the representative who is designated mismanages the consumer's care,³⁹⁷ 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.³⁹⁸ Although none of the states have yet experienced prob-

395. This includes the capacity to decide whether an authorized representative is necessary or desirable.

396. 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.

Phillips & Schneider, *supra* n. 20, at 19–20.

397. 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 Dir., St. of Fla. Dept. of Elder Affairs, to Sandra L. Hughes, Consultant, ABA Commn. on L. & Aging (June 9, 2003) (on file with the Authors).

398. 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. *Supra* sec. IV(A). (discussing the issue of the consultant's potential liability).

lems 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 governmental immunity is intended to protect from second guessing by the courts in negligence actions.³⁹⁹ 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.⁴⁰⁰ 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.⁴⁰¹ Appointment of a representative, like guardianship, is a legal mechanism for substitute decisionmaking, although the

399. See *Ross v. Consumers Power Co.*, 363 N.W.2d 641, 448 (Mich. 1984) (stating that “the ‘discretionary/ministerial’ test . . . grants immunity to individuals only to the extent necessary to guarantee unfettered [decisionmaking]. ‘Discretionary’ acts have been defined as those which require personal deliberation, [decisionmaking] and judgement.”); *Mahan v. N.H. Dept of Admin. Servs.*, 693 A.2d 79, 83 (N.H. 1997) (stating that the discretionary function exception “applies and immunity attaches when a decision entail governmental planning or policy formulation, involving the evaluation of economic, social, and political considerations”).

400. The Supremacy Clause prohibits state immunity rules from barring claims asserting violations of rights stemming from the United States Constitution. U.S. Const. art VI, cl. 2.

401. These cases have held that because guardianship involves the deprivation of both liberty and property interests, due process is required before a guardian can be imposed. Constitutional deficiencies cited in these cases have included the following: 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 Dept. of Soc. Servs.*, 781 P.2d 106, 108 (Colo. App. 1989) and *St. ex. rel. Shamblin v. Collier*, 445 S.E.2d 736, 741 (W. Va. 1994); and failure to place the burden of persuasion on the party seeking guardianship, *Hedin*, 528 N.W.2d at 581.

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. States may want to consider taking some or all of the following steps to avoid such a challenge.

If a consumer does have the 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.

Even when 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 the 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:

1. 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?).
2. If the state has a statute that designates a default surrogate for medical [decisionmaking], that surrogate can be designated as the representative, unless the consultant knows of contraindications.

3. The consultant should assess reasonably available representatives. Relevant screening questions that the Cash and Counseling states already use include the following: 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.
4. The state should require heightened monitoring for consumers whose care is being directed by a representative, as is currently the practice in Arkansas.⁴⁰²

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, "When 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."⁴⁰³ The state Personal Preference office then reviewed the nurse's report of the assessment.⁴⁰⁴ "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 personal care assistance (PCA) if appropriate."⁴⁰⁵ Similar state oversight procedures were adopted in Arkansas⁴⁰⁶ and in Florida.⁴⁰⁷

402. *See supra* sec. IV(A).

403. Phillips & Schneider, *supra* n. 20, at 137.

404. *Id.*

405. *Id.* at 137–138.

406. 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. Phillips

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 serious problem.⁴⁰⁸ 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*, a case that is described in detail in Section IV, graphically illustrates the harm and potential liability that can result from ignoring a serious complaint or problem in connection with CDPAS.⁴⁰⁹ 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.⁴¹⁰ 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).'"⁴¹¹ If a case falls

et al., *supra* n. 20, at 112–113.

407. In Florida, the consultant management tools consist of requiring a representative, replacing a representative, executing a corrective action plan, and 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. E-mail from Lou Comer, *supra* n. 52. These actions are preceded by discussing issues, counseling, and providing technical assistance to consumers. *Id.*

408. It should be emphasized that there is little or no risk of liability when the state does not have knowledge of a problem. For example, in *Reeder*, the facts of which are described in Section IV, 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 [healthcare] services provided to Reeder." *Reeder*, 578 N.W.2d at 442.

409. 29 P.3d at 741.

410. 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." Dobbs, *supra* n. 27, at 723.

411. 29 P.3d at 742.

within an exception to the public duty doctrine, the government will be found to owe a duty of care to the plaintiff.⁴¹² Under Washington state law, the “special relationship” exception to the public duty doctrine applies when “(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.’”⁴¹³ 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 case-worker . . . , including case management and crisis intervention, which (3) gave rise to justifiable reliance by Caulfield through his acceptance of the case manager’s detailed duties.⁴¹⁴

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.⁴¹⁵ 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.

412. *Id.* at 743.

413. *Id.*

414. *Id.*

415. *Id.*

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."⁴¹⁶ 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 takes 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.⁴¹⁷

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 the consumer, is the worker's employer, or even that the state is the joint employer of the worker for purposes of personal injury liability. The precise standard used to determine the existence of an employment relationship can vary depending on the context (e.g., a claim for workers' compensation, or an allegation of a violation of the federal Fair Labor Standards Act), but the central issue, in general terms, is always whether the alleged employer exercises control over the employee.⁴¹⁸ 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."⁴¹⁹ With re-

416. Phillips & Schneider, *supra* n. 19, at 4.

417. See *supra* sec. II(C) (discussing respondeat superior liability of consumers as employers).

418. Dobbs, *supra* n. 27, at 917.

419. *Id.*; see also *Restatement (Second) of Agency* § 220, (listing the factors in determining whether an employment relationship exists).

spect 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?

Under 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.⁴²⁰

420. The New Jersey consultant training manual notes that “[b]y 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 Educ. and Prof. Dev. Program, Sch. of Social Work, Rutgers, the St. U., *Personal Preference: The New Jersey Cash and Counseling Demonstration, Training Manual*, outline for Day Three at 4 (1997). In CDPAS programs in other states, the “states commonly paid wages directly to workers.” Phillips & Schneider, *supra* n. 19, at 7.

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. St. of Neb.*, 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. 544 N.W.2d 855, 858 (Neb. 1996). The plaintiff, Ms. Pettit, had injured her back while providing chore services to Mrs. Poels, an elderly and disabled Medicaid recipient. *Id.* The Nebraska 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” and (2) “[i]t was Pettit and Poels who set up the daily routine of how to accomplish tasks involving Poels, and it was Poels who arranged her schedule for appointments and errands.” *Id.* at 861.

In *Reeder*, discussed in Section IV, 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. 649 N.W.2d at 508. 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. *Id.* at 517. In doing so, the appellate court 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. *Id.* at 512–517. The factors supporting independent contractor status included the following: (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 of services”); (2) “Perales’ completion of her duties was not directly supervised by DHHS but was actually supervised by her client. . . .” *Id.* at 514; (3) Perales was working as a skilled provider; and (4) DHHS was not in the business of providing healthcare. *Id.* at 514–517.

Several cases have considered the employment status of workers in the California In-Home Supportive Services (IHSS) program, a CDPAS program that initially was structured quite differently from the Cash and Counseling Demonstration but now has strong similarities. 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 courts 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*,⁴²¹ 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 FLSA.⁴²² 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."⁴²³

In 1984, in *In-Home Supportive Services v. Workers' Compensation Appeals Board*,⁴²⁴ the California Court of Appeal reached a slightly different conclusion.⁴²⁵ In that case, an IHSS worker sought workers' compensation from the state.⁴²⁶ 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.⁴²⁷ 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 Demonstration states:

421. 704 F.2d 1465 (9th Cir. 1983).

422. *Id.* at 1470.

423. *Id.*

424. 152 Cal. App. 3d 720 (Cal. App. 3d Dist. 1984).

425. *Id.*

426. *Id.* at 724.

427. *Id.*

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 control when it discerns that the work the state is paying for is not being performed in accordance with the assessment of need.⁴²⁸

In 1990 and 2001 decisions, the California Court of Appeal 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*,⁴²⁹ the plaintiff argued that the county was the employer of IHSS providers for purposes of collective bargaining.⁴³⁰ 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.”⁴³¹ 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.”⁴³² In *Schmidt v. County of Kern*,⁴³³ 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.⁴³⁴ The jury found that the county was not the worker’s employer, and the appellate court upheld the decision.⁴³⁵

428. *Id.* at 731.

429. 225 Cal. App. 3d 761 (Cal. App. 2d Dist. Div. 7 1990)

430. *Id.* at 764.

431. *Id.* at 773.

432. *Id.* at 766.

433. 2001 WL 1338407 (Cal. App. 5th Dist. 2001).

434. *Id.* at *2.

435. *Id.* at *4.

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.⁴³⁶

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 when the state contracts with an individual to provide consultant or fiscal agent services,⁴³⁷ 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 to-

436. It should be noted that New Jersey has applied for and received a federal grant to develop a worker registry. Phillip & Schneider, *supra* n. 20, at 127–128. 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).

437. For example, Florida contracts with both agencies and with individual support coordinators trained to be consultants. E-mail from Lou Comer, *supra* n. 52.

tality 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.⁴³⁸ *Reeder* 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."⁴³⁹ 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 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.⁴⁴⁰

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.

438. Dobbs, *supra* n. 27, at 917; *supra* sec. IV(D) (discussing the indicia of an employment relationship).

439. Dobbs, *supra* n. 27, at 917.

440. 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.

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.⁴⁴¹

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.⁴⁴²

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.

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*,⁴⁴³ 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.⁴⁴⁴ 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."⁴⁴⁵ This relationship, especially in the context of the "many state obligations and responsibilities toward its developmentally

441. *Id.* at 920.

442. *Williams v. Dept. of Corrections*, 481 S.E.2d 272, 276 (Ga. App. 1997).

443. 801 So. 2d 193 (Fla. 4th Dist. App. 2001).

444. *Id.* at 194.

445. *Id.* at 195–196.

disabled citizens,”⁴⁴⁶ created a duty to protect her from foreseeable harm in connection with the county-sponsored transportation services. “That duty was nondelegable,”⁴⁴⁷ 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 CDPAS 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.⁴⁴⁸ As described earlier, the plaintiff, an individual paralyzed from the neck down, developed serious decubitus ulcers in his heels while being cared for by an LPN who had been provided under the state’s Medicaid home-care waiver program.⁴⁴⁹ The Court relied on statutory provisions setting forth the responsibilities of DSS to find that the agency did not have a non-delegable duty to Reeder:

We do not read [Nebraska Statutes Sections] 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 related to a statutory duty to provide compensation for health services, not a duty to provide the actual services.⁴⁵⁰

446. *Id.* at 196.

447. *Id.*

448. *Reeder*, 649 N.W.2d at 520; *Reeder*, 578 N.W.2d at 441–442.

449. *Reeder*, 578 N.W.2d at 439.

450. *Id.* at 441–442; *see also Thornton v. Cmmw.*, 552 N.E.2d 601 (Mass. App. 1990) (holding that the Massachusetts Department of Youth Services (DYS) did not have a non-delegable duty of care to a child committed to DYS, and the state therefore was not liable for the alleged negligence of a private agency that had contracted with DYS to conduct a residential program).

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 CDPAS, 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,⁴⁵¹ and there is legal authority that such in-

451. Contract for fiscal year 2003 between the St. of Ark. and the Phillips County Dev. Ctr., Attachment III at 7–8; Contract for fiscal year 2003 between the St. of Ark. and Aspen Mgt. 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.

Id. 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. *Id.*

demnification clauses do not violate public policy.⁴⁵² 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,⁴⁵³ 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.⁴⁵⁴ 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

452. See e.g. *Fresh Cut Inc. v. Fazli*, 630 N.E.2d 575, 578 (Ind. 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.").

453. The cases involving "abandonment" by a care provider which 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.

454. 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 III(B).

and planned for on an individual basis, the [s]tate also has system procedures in place. . . .⁴⁵⁵

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 the implementation of the 911 system for emergency telephone help in critical situations.⁴⁵⁶ 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.”⁴⁵⁷

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 several 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

455. *Demonstration Version*, *supra* n. 11, at 16; *Waiver Version*, *supra* n. 11, at 12.

456. E-mail from Carol Schultz, Med./Healthcare Program Analyst, Fla. Agency for Health Care Administration, to Sandra L. Hughes, Consultant, ABA Commn. on L. and Aging (Oct. 20, 2003) (copy on file with the Authors).

457. *Id.*

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 CDPAS, the state is required to “assure” emergency back-up care for consumers.⁴⁵⁸ 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 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 in which 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.”⁴⁵⁹ Here, the language of the Medicaid waiver template can be interpreted as creating a nondelegable 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

458. *Demonstration Version*, *supra* n. 11.

459. *Williams*, 481 S.E.2d at 276.

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. The state may have the following options available:

- 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.

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 healthcare 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 healthcare 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. 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.

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.⁴⁶⁰ 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, they 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. When 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.

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 when 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

460. Vicarious liability should be distinguished from direct liability. Direct liability applies when 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 means "let the master answer." *Supra* sec. I(D) (explaining these concepts in greater detail).

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.⁴⁶¹ 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.⁴⁶²

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 generally workers do not have sufficient income or assets to pay a judgment in a damage action (that is, the worker is "judgment proof"). Thus, a lawsuit is not likely to materialize.⁴⁶³ 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 APS laws. A worker who engages in gross 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.

1. 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 in-

461. See the discussion in the introduction to Section III 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.

462. Phillips et al., *supra* n. 20.

463. 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.

come 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.⁴⁶⁴

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.⁴⁶⁵

Failure to report abuse or neglect. A worker may be a mandatory reporter under the state’s APS law and may therefore be both civilly and criminally liable for failure to report abuse or neglect that comes to the attention of the worker. However, liability can easily be avoided by complying with the APS law.⁴⁶⁶ 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.⁴⁶⁷

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.

464. *Supra* sec. II(A)(1).

465. *Supra* sec. II(A)(2).

466. *Supra* sec. II(A)(3)(a).

467. *Supra* sec. II(A)(3)(b).

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.

2. Other Risks

Inability to recover compensation for on-the-job injuries. The worker may be injured on the job by the consumer,⁴⁶⁸ by a third party,⁴⁶⁹ or as a result of the negligence of the owner or renter of the consumer's home.⁴⁷⁰ 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.

3. 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.⁴⁷¹

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

468. *Supra* secs. II(B)(1), II(B)(2).

469. *Supra* sec. II(C).

470. *Supra* sec. II(B)(1).

471. 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." Phillips & Schneider, *supra* n. 20, at 103.

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, contracting with community resources to provide free basic training sessions, or seeking 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 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 workers are 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.

1. Consumer Liability Risks

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. 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 both for 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.⁴⁷² 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 homeowner has an obligation to maintain a reasonably safe workplace. The difference is that under agency-provided care, workers compensation coverage is universal, and when such coverage exists, 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.⁴⁷³

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.⁴⁷⁴

472. *Supra* sec. II(B)(1).

473. *Supra* sec. II(B)(2).

474. *Supra* sec. II(C).

2. 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.⁴⁷⁵

3. 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 of this subsection 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.

475. *Supra* secs. II(A)(1), II(A)(2).

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,⁴⁷⁶ 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 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,

476. Both the Section 1115 and the Section 1915(c) waiver templates provide, "Upon family or individual request, the [s]tate makes available, at no cost, provider [background] checks, including criminal background checks." *Waiver Version, supra* n. 11, at 27.

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.

1. 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.

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.

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, 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.

2. 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.⁴⁷⁷

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.

477. 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 on file with the Authors.)

1. Fiscal Agent 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 fiscal agent 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.⁴⁷⁸

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.⁴⁷⁹

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.⁴⁸⁰

Liability for failure to report abuse or neglect. A fiscal agent may be a mandatory reporter under the state's 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 fiscal agent. Liability can easily be avoided by complying with any applicable APS reporting requirements.⁴⁸¹

478. *Supra* sec. III(A).

479. *Supra* sec. III(B).

480. *Supra* sec. III(C).

481. *Supra* sec. III(D).

2. 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 fiscal agent.

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; 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 consultants is critical to the liability risk analysis, for liability risk follows function. For example, there is a point at which consultants 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 responsibil-

ity 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 at all times that it is the role of the consumer, not the consultant, to make decisions regarding the consumer's care.

1. Consultant Liability Risks

Liability for negligent designation of an authorized representative. To the extent that the consultant takes on the 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.

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.⁴⁸²

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.

482. *Supra* sec. IV(B).

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.

Liability for failure to report abuse or neglect. A consultant may be a mandatory reporter under the state's 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.

2. 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.⁴⁸³

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 decisionmaking 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

483. Florida's Consumer Directed Care Research Project's "Consumer/Consultant Agreement," which clearly defines the responsibilities of consumers and consultants, is a good model. The consumer's responsibilities include writing purchasing plans, training workers, defining performance expectations, and encouraging open lines of communication between the worker and the consumer. The consultant's duties include providing consumer training and reviewing monthly budgets.

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 back-up 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 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.

1. 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.⁴⁸⁴

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.⁴⁸⁵

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.⁴⁸⁶

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 workers' compensation if the worker is injured on the job. However, in the Cash and Counseling model, when the consumer, and not the state (or fiscal agent), controls the key employer functions (hiring/firing, assigning and scheduling tasks, training, and supervising), the risk of such liability is negligible.⁴⁸⁷

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.⁴⁸⁸

484. *Supra* sec. V(A).

485. *Supra* sec. V(B).

486. *Supra* sec. V(C).

487. *Supra* sec. V(D).

488. *Supra* sec. 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 in which 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.⁴⁸⁹

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 back-up 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 back-up system fails, and the consumer suffers injury as a result.⁴⁹⁰

2. 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

489. *Supra* sec. V(E).

490. *Supra* sec. V(F).

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 the following: (1) a procedure whereby consumers who have the 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).⁴⁹¹ 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 the following: (1) execution of an employment agreement by the worker and the consumer, and (2) consistent identification of the consumer as the worker's

491. These procedures, which are described in greater detail in Section IV(B), include the following: (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 decisionmaking, 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.

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.⁴⁹²

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 V and in Section IV(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 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 against 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.

492. 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, *supra* n. 27, at 917.