

Care home and care providers: Litigation risks and damages claims post-COVID-19

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Structure

- Facts and figures
- Claimants
- Risks

Facts and figures

- Rising deaths in care homes
 - ONS – 2,000 deaths in care homes in England and Wales (week ending 17 April)
 - CQC – notified of 4,343 deaths since Easter
 - 26,097 deaths including those in the community
- Back of the queue for testing and personal protective equipment
- New life assurance scheme for eligible frontline carers (announced on 27 April 2020)

Who could bring a claim?

- Employees
- Residents
- Family members
- Care homes...

Types of claim

- Claims in negligence (including under the Law Reform (Misc Provisions) Act 1934 and the Fatal Accidents Act 1976)
- Human Rights Act claims (Articles 2, 3 and 8)
- Contractual claims

Standard of care

- First principles: reasonable care and skill
- Based upon the role performed: *Darnley v Croydon Health Services NHS Trust*
- Context?
 - Triage/emergencies: *Mulholland v Medway NHS Foundation Trust*; *Morrison v Liverpool Women's NHS Foundation Trust*
 - Pandemic: *UCLH v MB*
- Evidence

Employees – PPE

- Health and Safety at Work Act 1974
 - Sections 2 and 3 – general duties
 - S 47
- Control of Substances Hazardous to Health Regulations 2002
- Criminal offence (s 33)
- Insurance position (notification)

Control of Substances Hazardous to Health Regs

- Duty to prevent OR duty to control (reg 7)
- Duty of control: *Dugmore v Swansea NHS Trust*
 - Protection measures appropriate to the activity
 - Consistent with risk assessment
- Protection measures?
- PPE:
 - reg 7(9); reg 9

New life assurance scheme

- Eligibility?
 - Employees of publicly funded care homes
 - Home care
 - Directly employed carers
- Essential to carefully read the terms of the scheme
 - Waive right to bring a claim
 - Fatal Accidents Act 1976, s 4 vs credit given

Human Rights Act claims

- Public authority: s 6(3)(b) HRA 1998 and Care Act 2014

s 73(2): providers are taken to be exercising a **function of a public nature** if the following requirements are met: (a) the care or support is **arranged by an authority or paid for** (directly or indirectly/ whole or in part) by an authority; and (b) the **authority arranges or pays** for the care or support **under a statutory provision**

Article 2...

- Not generally any claim for individual acts of negligent treatment - *Powell v UK* (2000); *Rabone v Pennine Care NHS Foundation Trust* [2012]; cf. *R. (Maguire) v HM Senior Coroner for Blackpool and Fylde* [2019]
- But systems failing...
 - Not taken to A&E (and the operational duty)
 - Denial of access to life-saving treatment:
Lopes Fernandes v Portugal

Article 3...

- Minimum level of severity: *Ireland v UK*; *Pretty v UK* (inhuman treatment)
- Provision of food and necessities: *Limbuela v SSHD*
- Conditions in a care home?
 - *R (Bernard) v Enfield*

Article 8...

- Conditions?
- Contact with family
 - Blanket policies
 - Practical ways of facilitating contact (whilst considering infection control)
- End of life and advance care decision-making
 - DNACPR – consultation: *R (Tracey) v Cambridge University Hospitals; Winspear*

Questions...

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