

Number 01

A New Briefing for the Care Homes Sector

The increasing complexity of the legal issues affecting care homes and those who operate them has led to the introduction of this new series of targeted briefings. RadcliffesLeBrasseur specialise in advising the providers of healthcare and have significant experience advising care home operators. Our services cover all aspects, including acquisition or construction, obtaining planning permission, operational healthcare and establishment issues, advice on contracts, employment law, complaints and Care Standards Act compliance, inquests and disputes.

We hope that you find this new briefing series useful.

1. Local Authority Care Home Placing: A Breach of Human Rights?

Although the vast majority of residents move to care homes voluntarily, there are situations where, either through lack of insight or because of the wish to avoid the cost of care, individuals refuse care home placements. Section 47 National Assistance Act 1948 permits the local authority to arrange for a person's removal and subsequent detention and maintenance for an initial renewable period of up to 3 months on the grounds that:

- (1) the person is suffering from grave chronic disease or being aged, infirm or physically incapacitated, as living in unsanitary conditions;
- (2) that the person is unable to devote to himself, and is not receiving from other persons, proper care and attention; and
- (3) that his removal from home is necessary either in his own interests to prevent injury to the health of, or serious nuisance to, other persons.

However, given that the Human Rights Act infers a right to liberty, to what extent can such placements be said to be a breach of Human Rights? This scenario has recently been subject to consideration by the European Court of Human Rights¹.

Following the withdrawal of various charitable services, the resident was removed from her home where she had lived with her son and placed in a nursing home by the local authority because of concerns about her living conditions and the care she was receiving.

The resident objected to this on the basis that it infringed her right to liberty. This argument was rejected by the authorities on the basis that the deprivation of liberty was minimal and because self neglect was a form of "vagrancy" which was to be treated as an exception to the normal right to liberty.

¹ HM –v- Switzerland

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The issue was appealed to the European Court of Human Rights who held that there was no breach of the resident's right to liberty. The Court held that the placement had been in the resident's own interest in order to provide her with necessary medical care and treatment and hygienic living conditions. Therefore this did not amount to a deprivation of liberty in breach of the resident's human rights.

Comment

Although this case was based on the Swiss Civil Code, it is broadly equivalent to the powers given to local authorities in this country under Section 47 of the National Assistance Act. Accordingly, one can assume that where a person is removed from their home in their own interests, then this removal will not amount to a breach of human rights.

2. Use of Cot Sides

Many operators will be aware of the guidance from the Health & Safety Executive² which refers to the more detailed advice provided in the Medical Devices Agency Device Bulletin on the safe use of cot sides³. Inappropriate use of cot sides can of course be dangerous for elderly and confused patients and the most serious risk is of entrapment and asphyxiation.

The MDA guidelines highlight the legal obligation to carry out a formal suitable and sufficient risk assessment which, amongst other things, must establish the resident's need for cot sides, having considered all the alternatives. The guidelines also emphasise the importance of selecting and purchasing appropriate equipment, and ensuring cot sides are compatible with the bed, mattress and accessories in use, and the resident's condition, needs, age and size. Cot sides must be fitted and positioned correctly, and adequately maintained. Manufacturers guidelines should be disseminated and followed.

A recent Inquest case has highlighted the need not only to have a policy in place to cover all these issues but also to ensure staff are aware of this. It is all too easy to fail to do the risk assessment or to ensure the correct equipment is being used. In such circumstances there is obviously the risk of an adverse inquest finding, HSE investigation or worse!

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February 2003

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For more information on Care Home Law contact Andrew Parsons at RadcliffesLeBrasseur on 020 7227 7282, or email: andrew.parsons@rlb-law.com.

Out of office emergency advice available 24hrs on 07802 506 306.

Readers are advised to take specific advice before acting in reliance on the matters set out in this briefing.

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² SIM 7/2002/04

³ MDA:DB2001(04) July 2001

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