

Mental Health Law Briefing

Solicitors

Number 107

Harassment and sexual assault by staff

The issue of sexual assault by staff in mental health units came into focus earlier this year when the NPSA¹ reported there were 19 alleged rapes (11 by staff) out of 122 incidents relating to sexual safety between November 2003-September 2005. The National Director for Mental Health announced £30m funding for action to enhance safety on mental health wards on 2 November 2006.

Where incidents of this type arise, the most obvious implications are:

1. Regulatory Action

Staff involved in such allegations are likely to be reported to the NMC and can expect to be removed from the register on the basis that such action represents a gross abuse of the nurse's position of trust.

2. Compensation Claim

Although such cases do not often come before the Courts as compensation claims, a recently reported case (albeit settled out of Court)² provides some guidance on the likely quantum of compensation payable.

The Facts

Mrs E was a patient at an older adult mental health assessment unit. She had shortly before been informed that she had an inoperable brain tumour. She alleged that a member of staff had raped her in her room. There was a delay in involving the Police and although criminal proceedings took place, the nurse was acquitted.

Mrs B alleged that the same member of staff had sexually assaulted her. On another occasion she had remembered being forced to drink a particular liquid and waking up afterwards feeling poorly and with a black eye. Her daughter was of the view that her mother had been raped or assaulted.

In each case the Claimants alleged that the NHS Trust responsible for the units was vicariously liable for the assaults undertaken by their employees. They also alleged that there had been insufficient implementation of the recommendations relating to the protection of vulnerable adults and that if proper care had been exercised the assaults would have been avoidable. Damages for the assaults, harassment, lack of therapeutic provision and the psychological effects of the assaults were claimed. In addition, aggravated damages were sought because of the nature of the injuries and, on the basis that there had been a breach of Article 2 of the Human Rights Act in the sense of a failure by the Trust properly to investigate the alleged breaches of Article 3.

¹ National Patient Safety Agency

² E and B v Birmingham & Solihull Mental Health NHS Trust [2006] Health Care Risk Report, September 2006

Settlement

The claims were both settled after their deaths by the estates of the two patients for the sums of £30,000 and £17,500 respectively.

3. Vicarious Liability and Harassment

Inappropriate behaviour by staff may not always lead to sexual assault. Nevertheless it may amount to harassment which could in turn be actionable under the Protection of Harassment Act.

To what extent is an employer responsible for an employee who takes actions that amount to harassment? This has been considered by the Courts who have confirmed that an employer could, in principle, be vicariously liable for harassment carried out by its employee³. Although in theory an employer is only responsible for the tasks undertaken by an employee in the course of his employment, the courts have held⁴ that this is to be interpreted broadly and will cover both harassment and sexual assaults undertaken by employees – albeit that that does not form part of their job description.

Andrew Parsons
© RadcliffesLeBrasseur
November 2006

Update : Mental Capacity Act and Mental Health Act revisions

We can confirm that we are advised by the Department of Health that they are still anticipating that the Mental Capacity Act will come into force in April 2007.

Indeed, the research sections of the Mental Capacity Act have already been the subject of a statutory instrument bringing them into force in 2007. Sections 30-41 come into force on 1 April 2007 subject to the more particular specific rules regarding applications set out in the statutory instrument (SI 2006/2814).

As far as the revisions to the Mental Health Act are concerned, the Department apparently intends to bring these forward when parliamentary time allows.

³ *Majrowski v Guys and St Thomas' NHS Trust* [2006] UKHL34

⁴ *Lister v Hesley Hall Ltd* [2001] 1UKHL22