InsurewithCare

in collaboration with

Bevan Brittan

Legal Services for Independent Healthcare Providers

DECEMBER 2017 EDITION

CARE QUARTERLY

A quarterly update summarising recent Government publications, legislation, cases and other developments relevant to those involved in the care sector.

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Adult Social Services

Bevan Brittan CQC Bulletins: Bevan Brittan's first CQC Bulletin looks at the increased accountability for providers resulting from CQC's changes to the structure of registration. These changes represent a seismic shift in the scope of regulation of the health and social care sector.
Bulletin 1

Bevan Brittan's second CQC Bulletin examines the impact of CQC's future regulation of adult social care providers on the awarding and challenging of quality ratings.
Bulletin 2

House of Commons Library: Health and social care integration: this briefing paper analyses recent policy and debate on the integration of NHS-provided healthcare and local authority-provided social care in the UK. This has been a key policy priority for successive Governments, with the aim of improving patient care and saving money for the NHS and local authorities. It includes an October 2017 update with information on the proposed review of local authorities' Better Care Fund allocations, for those not meeting targets on delayed transfers of care.

See also the briefing papers on **Adult Social Care Funding (England)** that examines the key funding pressures facing adult social care services in England and evidence of the impacts of these pressures on social care and health services.
20th October 2017

Torbay Council v Torbay Quality Care Forum Ltd [2017] EWCA Civ 1605 (CA): the issue in this case was whether a council setting the "usual cost" of providing care to care home residents was entitled to take into account fees received by care homes from third-party top-ups, from privately-paying residents, and/or in respect of residents with enhanced needs or on Continuing Healthcare, and to deduct an amount representing an assumed fee from the actual cost of meeting the assessed care needs of the individual in question.

The Care Forum, an association representing independent care homes in Torbay, successfully challenged the Council's decision setting the fees it was prepared to pay for providing care to care home residents who were eligible for council-funded care for the year 2014–15. The judge held that the council's decision was unlawful as it had taken into account income streams that were precluded by the National Assistance Act 1948 (Choice of Accommodation) Directions 1992 and DH Circular LAC (2004 (20)).

The court held, allowing the council's appeal, that the judge had misconstrued the 2004 Guidance as requiring it to disregard the effect on care homes' profitability and return of capital of all income streams other than fees paid by local authorities. There was nothing in the Directions or 2004 Guidance which precluded the Council from taking account of the three revenue streams (private fees, top up payments and NHS payments) when making the evaluative judgement of what it would expect to pay for residential care for the elderly. That judgement was informed by a complex model which took account of a very large range of considerations and worked on the best, albeit incomplete, evidence available.
19th October 2017

DH: Ordinary residence – Anonymised determinations 2017: these anonymised documents show how the DH arrives at decisions to resolve disputes in the health and social care sector.
13th October 2017

The role of care homes in end of life care. The National End of Life Care Intelligence Network has published two briefings covering "Care home bed provision and potential end of life care need in people aged 75 or older in England" and "Place and cause of death for permanent and temporary residents of care homes".
19th October 2017

Children's Services

Armes v Nottinghamshire CC [2017] UKSC 60 (Sup Ct): the claimant (C) was abused physically and sexually by foster parents with whom she was placed while in the Council's care. The Council was not negligent in the selection or supervision of the foster parents. She brought a claim against the Council for the abuse which she suffered, either on the basis that they were in breach of a non-delegable duty of care, or on the basis that they were vicariously liable for the wrongdoing of the foster parents. Both the High Court the CA dismissed her case.

The Supreme Court held, allowing C's appeal (Lord Hughes dissenting), that the Council was vicariously liable for the torts committed by the foster parents in this case. It was important not to overstate the extent to which external control was absent from the fostering - the Council controlled who the foster parents were, supervised their fostering, and controlled some aspects of day to day family life, such as holidays and medical treatment. More fundamentally, it was important not to exaggerate the extent to which control was necessary in order for the imposition of vicarious liability to be justified. The possibility that vicarious liability might arise in relation to the provision of elements of family life was consistent with case law. It was not necessary for there to be micro-management, or any high degree of control, in order for vicarious liability to be imposed. The court emphasised that its decision that vicarious liability should be imposed in this case was based on the regime which was in force at the relevant time under the Children and Young Persons Act 1969, the Child Care Act 1980 and the Boarding-Out of Children Regulations 1955 (SI 1955/1377); it would not be appropriate in this appeal to address the situation under present day law and practice. The court agreed with the CA that a local authority was not under a duty to ensure that reasonable care was taken for the safety of children in care, while they were in the care and control of foster parents – that was too broad, and the responsibility on local authorities was too demanding. A local authority was in a position analogous to that of a parent, and a parent did not owe their children an obligation to guarantee that others whom they might ask to help in the management or care of the children would not be careless or deliberately abusive.

18th October 2017

DfE: Working Together to Safeguard Children – Revisions to statutory guidance: seeks views on significant revisions to the statutory guidance on what's expected of organisations to safeguard and promote the welfare of children, along with two statutory instruments: draft Local Safeguarding Partner (Relevant Agencies) (England) Regulations 2018 and draft National and Local Child Safeguarding Practice Review (England) Regulations 2018. These revisions reflect the legislative changes introduced through the Children and Social Work Act 2017. The revised guidance will replace the 2015 version of Working Together to Safeguard Children. The consultation closes on 31 December 2017.

25th October 2017

Review of children and young people's mental health services: phase one report This report confirms many of the issues raised in the Five year forward view for mental health and comments on the difficulties children and young people face in accessing appropriate support for their mental health concerns from a system that is fragmented and where services vary in quality.

26th October 2017

Health & Social Care

CQC: The state of health care and adult social care in England 2016/17: this latest annual assessment of health and social care in England looks at the trends, highlights examples of good and outstanding care, and identifies factors that maintain high-quality care. It states that this year's report shows that the quality of care has been maintained despite some very real challenges. Most of us are receiving good, safe care and many services that were previously rated inadequate have recognised our inspection findings, made the necessary changes and improved. The fact that quality has been maintained in the toughest climate most can remember is testament to the hard work and dedication of staff and leaders. However, as the system continues to struggle with increasingly complex demand, access and cost, future quality is precarious.

10th October 2017

LGSCO: Review of adult social care complaints 2016/17: this latest annual report from the Ombudsman shows that in 2016/17 they upheld 63% of adult social care investigations last year. Councils and care providers acted on more than 1,300 recommendations to put things right where the LGSCO had identified failings – an 11% increase on the previous year. In all but one case, councils and care providers acted positively to implement the recommendations. This report highlights how an individual complaint can result in improving care services for others. These cases demonstrate the power that one person speaking up can have in changing services for the better for everyone.

17th November 2017

Dementia-friendly dentistry. These Good Practice Guidelines enable dental professionals to understand dementia and its implications for dental practice, and adapt their patient management and clinical decisions accordingly.

Employment

DBEIS: Interim enforcement of the National Minimum Wage in the social care sector – "Sleep-in" shifts: this updated guidance announces that the Government has launched a new compliance scheme for social care providers that may have incorrectly paid workers below legal minimum wage hourly rates for sleep-in shifts. Social care employers will be able to opt into the new Social Care Compliance Scheme, giving them up to a year to identify what they owe to workers, supported by advice from HMRC. Employers who identify arrears at the end of the self-review period will have up to three months to pay workers. **There is also guidance for employers**.

1st November 2017

Mental Health

Government Interim response to the Law Commission report on Mental Capacity and Deprivation of Liberty: Written statement - HCWS202 In a written statement the Department of Health states that the Government has made its interim response to the Law Commission's report on Mental Capacity and Deprivation of Liberty. The Government is considering the report and will engage with stakeholders to understand how the changes proposed can be implemented. It will provide its final response to the House of Commons in Spring 2018.

30th October 2017

Improving healthcare access for people with learning disabilities This suite of guidance outlines how social care staff can help people with learning disabilities get better access to medical services. It provides practical tips as well as links to further information and useful resources.

27th October 2017

Quality checking health checks for people with learning disabilities. This audit tool consists of six questions and is designed to support practices, primary care liaison staff and health facilitators to improve the uptake and quality of annual health checks, and reduce the health inequalities experienced by people with learning disabilities.

September 2017

Tinsley (by his Litigation Friend and Property & Affairs Deputy Hugh Jones) v Manchester City Council [2017] EWCA Civ 1704 (CA): T had been compulsorily detained in hospital under s.3 of the Mental Health Act 1983 after he was injured in a road traffic accident that left him with an organic personality disorder. He was awarded damages of £3.5m against the other driver, which included nearly £2.9m for future care. He was discharged from hospital to a mental health nursing home, funded by the Council under s.117 of the 1983 Act. He later left the nursing home, since when the cost of his accommodation and aftercare services had been paid for by T's deputy appointed by the Court of Protection to manage his property and affairs, from the damages received in the personal injury action. The deputy applied for an order that the Council, as relevant local social services authority, comply with its duty to provide aftercare services under s.117. The Council refused, on the basis that T had no need for such provision because he could fund it himself from his personal injury damages. The court ruled that the Council's refusal to provide after care services was unlawful.

The Court of Appeal held, dismissing the Council's appeal, that the Council's argument that its s.117 obligations to provide aftercare services did not require it to provide, or arrange for the provision of, such services if a claimant had funds available for that purpose provided by a tortfeasor, was impossible. Case law made it clear that that charging persons such as T was impermissible. The Council was effectively seeking, in the teeth of the express obligation to provide s.117 services, to recover by the back door what it could not recover by the front. The duty to provide aftercare services was also imposed on CCGs and it was accepted that CCGs could not charge for their services or take patients' means into account when deciding what services to provide. It would be odd if the local authorities could decide not to make provision for aftercare services by reason of any personal injury award but could so decide in relation to "what is essentially a health-related form of care and treatment". It was not immoral or low principled to claim a benefit to which Parliament had made clear T was entitled and there was no suggestion that T did not genuinely believe, at the time of his personal injuries case, that he would access private care rather than state care. Unless there was some specific inhibition on deputies appointed by the Court of Protection arising from the risk of double recovery, there was no reason why T should not claim the benefit to which he might be entitled under s.117.

The court dismissed the Council's double recovery argument that the local authority was not liable under s.117 where an applicant had funds still available from his award. The courts would seek to avoid double recovery by a claimant at the time they assessed damages against a negligent tortfeasor, so if it was clear that a claimant would rely on a local authority's provision of aftercare services, he would not be able to recover the cost of providing such after care services from the tortfeasor. However, it did not follow from this that, if a claimant was awarded damages for his aftercare he was thereafter precluded from making application to the local authority.

11th November 2017

Transition between inpatient mental health settings and community or care home settings. This quality standard covers transitions for children, young people and adults between mental health hospitals and their own homes, care homes or other community settings. It includes the period before, during and after a person is admitted to, and discharged from, a mental health hospital. It describes high-quality care in priority areas for improvement.

September 2017

Modern Slavery

Identifying modern slavery – The role of the healthcare professional. In September 2017, 11 people were jailed for up to 15 years for exploiting at least 18 victims of modern slavery, including one for 26 years. Men, women, and children are trafficked for exploitation in the UK every year and forced to work in prostitution, domestic roles, or manual labour. 12% of health professionals report that they have been in contact with a potential victim of modern slavery within their practice and at the same time 86% of staff do not feel adequately trained to assess and help potential victims of modern slavery. Claire Bentley of Bevan Brittan examines the issues from a healthcare professional's perspective.

23rd October 2017

Information/Data

GDPR Implementation : The Government's Statement of Intent A Bevan Brittan Article assessing the impact of the proposed Data Protection Bill

More information

This publication has been compiled by Bevan Brittan's care team. If you would like more information on any of topics contained within this publication, please contact:

CARLTON SADLER

Senior Associate

0370 194 1633 | 07780 998188

carlton.sadler@bevanbrittan.com

ADRIAN NEALE

Associate

0370 194 8919

adrian.neale@bevanbrittan.com

Bevan Brittan

Bevan Brittan provides support for independent sector providers across the healthcare, adult, social care and the children's social care and education sectors. For more than a decade we have been consistently ranked by Chambers UK Guide as a leading firm in Healthcare.