

# Care of the elderly

*Lucy Wilton examines the claims which may arise from care of the elderly*

In October 2011, the Care Quality Commission (CQC) published an overview report regarding its Dignity

and Nutrition Inspection programme. This had been instigated by the Secretary of State for Health to review

the standards of dignity and nutrition provided to older people in NHS hospitals.

The CQC carried out 100 unannounced inspections between March and June 2011 and reported that, of the hospitals reviewed, 20 had failed to meet one or both of the outcomes against which they were being measured (respecting and involving service users and meeting their

nutritional needs). Dame Jo Williams, chair of the CQC, acknowledged in her foreword to the report that:

*“One in five of our inspections – and we looked at only two wards per hospital, on just one day of the year – picked up care that posed risks to people’s health and wellbeing.”*

The CQC has announced that it will be continuing with the Dignity and Nutrition inspection programme in 2012 and will pay visits to 50 additional NHS hospitals and 500 adult social care services. Yet clearly this is a drop in the ocean when you consider that, according to the *Delivering Dignity* report published by the Commission on improving dignity in care for older people in June this year, over 400,000 people aged over 65 are currently living in over 18,000 care homes.

Legal claims arising from the care provided to older people in hospital will involve substantially the same investigations as other clinical negligence claims, though there may be some greater need to consider possible underlying health issues and the claimant’s pre-injury morbidity and mortality.

However, claims arising from potentially inadequate care in elderly care homes are perhaps less frequent and may give rise to discrete issues for the personal injury practitioner. It is helpful in this context to be aware of the relevant regulatory backdrop, though as referred to below there may be no direct means of civil redress for a client whose care home is guilty of regulatory infractions.

### What is social care?

The CQC was set up by the Health and Social Care Act 2008 (HSCA 2008) to “protect and promote the health, safety and welfare of the people who use health and social care services”. Section 9(3), HSCA 2008 defines social care as encompassing all forms of personal care and other practical assistance provided for individuals who, for a variety of reasons (including age, illness, disability, pregnancy, childbirth or dependence on alcohol or drugs), are in need of such care or assistance.

The Health and Social Care Act 2008 (Regulated Activities) Regulations 2010 (the 2010 regulations) set out various outcomes which regulated health and social care providers are required

to achieve. These include a general provision that proper steps must be taken to ensure that each ‘service user’ is protected against the risks of receiving care or treatment that is inappropriate or unsafe for them (reg 9(1)).

Regulation 9(1) goes on to state that such protection is to be achieved by:

- n carrying out an assessment of the needs of the service user; and
- n planning and delivering care and, where appropriate, treatment, in such a way as to meet their individual needs, ensure their welfare and safety, reflect good practice and avoid unlawful discrimination.

Clearly then, to comply with the regulations, care homes and other social care providers must carry out an assessment of the needs of each service user and put together a plan specifying what these are and what measures are required to ensure their health and safety. If the home etc fails to comply with the care plan or risk assessment, or indeed fails to compile these in the first place, they will not only fall foul of their regulatory obligations but could conceivably be sued in negligence if this has resulted in an injury.

### Acceptable practice

Neither HSCA 2008 nor the 2010 regulations provide a civil remedy to service users where the relevant standards/outcomes are not achieved. However, the 2010 regulations arguably provide an indication of what is considered to be acceptable practice and cover many of the areas in which negligence claims often arise in the care home setting. For example, reg 13 deals with the management of medicines, reg 14 deals with nutrition and reg 16 deals with the safety, availability and suitability of equipment. These, and the other relevant regulations, can provide a helpful guide when drafting letters of claim.

Where injuries are allegedly caused by a lack of medical care, expert evidence will most likely be required to establish whether a breach of duty has occurred, as with a clinical negligence claim.

Practitioners will then need to consider whether a claim should lie against the home itself and/or whether the care or treatment was provided by an outside agent, such as a GP or district nurse.

Even in the latter scenario, a home is under a regulatory obligation to involve other appropriately qualified and regulated health care providers in the service users’ care (reg 24). This may involve conducting a fresh risk assessment and altering the care plan to reflect their change in circumstances or, ultimately, referring the service user on if they cannot be adequately protected against the risk of inappropriate or unsafe treatment in the care home setting. Again, the 2010 regulations do not provide a specific civil remedy for the service user where this regulation is breached but this could arguably be *de facto* evidence of negligence.

### An increasing problem

Why should we focus so much attention on the care afforded to older people, as opposed to any other sector of society? One answer is that, as a matter of practicality, this is a problem which could affect us all and which is only going to get bigger. Life expectation has increased and in 2010 it was calculated that 17% of the UK population was aged 65 and over (as cited in both the draft and final versions of the *Delivering Dignity* report).

Another possible answer is more ideological. In the draft *Delivering Dignity* report (published for consultation in February 2012), the commission’s co-chairs stated that, “[h]ospitals and care homes should be beacons for the rest of the community demonstrating how we are all richer when older people are respected, valued and celebrated”. On the basis of the CQC’s 2011 findings from its 2011 inspection programme, it seems clear that we may be some way off achieving this benchmark.

In its conclusion to June’s final report, the commission stated that part of its longer-term action plan was to empower people to secure change, including by giving patients, relatives and carers mechanisms to influence how care is delivered and by highlighting gaps in service provision.

I believe legal challenges will form an important part of this process and it is to be hoped that raising awareness of the care issues older people face may remove the stigma which taking such action can attract.

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