The Law and the Right to Care in Old Age

Jonathan Herring
Jon.herring@law.ox.ac.uk
Overview

- The Care Crisis
- Human Rights in English Law
- The Key Human Rights Provisions
- Cases Applying Human Rights
- The Possibilities and Limitations of Human Rights
The Care Crisis
Headlines

- Care homes chain to use CCTV in residents' rooms to help stop abuse
- Plans to hand control of £5bn benefit to councils 'could restrict older people's care'
- The loneliness epidemic among Britain’s elderly
- Essex care home worker sacked over elderly abuse claims
- Hundreds of thousands of elderly people were abused last year
- Elderly suffer most abuse in their homes
- Care home worker jailed for abuse of 89-year-old caught on hidden camera
- Abuse at leading care home leads to police inspections of private hospitals
Care Quality Commission Report: Dignity and Nutrition for Older People

- **CQC** undertook 100 unannounced inspections of acute NHS hospitals in England. Less than half the hospitals (45) were fully compliant with the standards required for nutrition or dignity.

- “Time and time again, we found cases where patients were treated by staff in a way that stripped them of their dignity and respect. People were spoken over, and not spoken to; people were left without call bells, ignored for hours on end, or not given assistance to do the basics of life – to eat, drink, or go to the toilet.”
In 2010 and 2013 the Francis Reports into the treatment of patients at Stafford hospital, found that between January 2005 and March 2009 between 400 and 1,200 patients had died as a result of poor care.

The report concluded that "For many patients the most basic elements of care were neglected...The standards of hygiene were at times awful, with families forced to remove used bandages and dressings from public areas and clean toilets themselves for fear of catching infections."
Mid-Staffordshire

These included cases where:

- Patients were left in excrement in soiled bed clothes for lengthy periods;
- Assistance was not provided with feeding for patients who could not eat without help;
- Water was left out of reach;
- In spite of persistent requests for help, patients were not assisted in their toileting;
- Wards and toilet facilities were left in a filthy condition;
- Privacy and dignity, even in death, were denied;
- Triage in A&E was undertaken by untrained staff;
- Staff treated patients and those close to them with what appeared to be callous indifference.
“I felt unclean half the time. I felt deprived when social services cut me down from two to one bath a week... deprived of feeling like a normal adult. Then they told me I had to stop having the one bath a week I have now because my care was taking longer than the one hour I was allocated. I told them I was double incontinent and why on earth couldn’t I have a bath? Wasn’t I entitled to be properly clean? They told me that time and money would not allow it.”

[Quoted in Not Dead Yet, Julie Neuberger]
Anne Leitrim, a former nurse, died in her flat in Bournemouth. Six years later her body was found there when the bailiffs turned up to repossess the house. Six Christmases and six birthdays had gone by. No neighbours or friends or family notice her not being there. The only people who eventually visited her were interested in recouping money.
Personal Stories (3)

- “...a lady who was on the toilet when the carer came, she shouted, ‘I’m stuck, I need some help.’ The carer shouted up, ‘Can’t do that, but I’ve made you a butty and I’m going now.’ ‘But I’m stuck on the toilet,’ and she said, ‘I’ve made you a butty.’”
- [Reported in Close to Home report]
Human Rights in UK Law
The Nature of Rights

- Rights as a trump against consequentialism
- Legal v Moral Rights
- Absolute v defeasible rights
- Obligations flowing from rights
  - According to the Joint Committee on Human Rights, “the Human Rights Act empowers users of public services who are often in vulnerable circumstances and who would otherwise be powerless in the face of inherently unresponsive systems.”
- Negative and positive obligations
The Nature of Rights: HRA, s. 3(1)

- So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

- “declaration of incompatibility” (S 4.)
The Nature of Rights: HRA, s.6

(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(3) In this section “public authority” includes—

(a) a court or tribunal, and

(b) any person certain of whose functions are functions of a public nature,

but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.
The Key Human Rights Provisions
Article 2 of the ECHR states:

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
   a. in defence of any person from unlawful violence;
   b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
   c. in action lawfully taken for the purpose of quelling a riot or insurrection.
Art 2: key points

- Only applies to intentional taking of life
- It is positive and negative
- Apart from the stated exceptions it is absolute
Key Provisions ECHR art 3

- No one shall be subjected to torture or to inhuman or degrading treatment or punishment.
Art 3 key points

- Article 3 requires proof of some kind of treatment. This indicates that an illness or mental condition itself will not fall within article 3.

- Torture: intentional infliction of mental or physical pain the infliction of severe mental or physical pain or suffering, typically for the purpose of gaining information or as a punishment or intimidation.

- ‘Inhuman treatment’ in article 3 includes actual bodily harm or intense physical or mental suffering.

- ‘Degrading treatment’ includes conduct which humiliates or debases an individual; or shows a lack of respect for, or diminishes, human dignity. It also includes conduct which arouses feelings of fear, anguish or inferiority capable of breaking an individual’s moral and physical resistance.
Art 3 Key points

- Whether the conduct is sufficiently severe to fall into article 3 will depend on the circumstances of the case and that includes the physical and mental effects of the behaviour and the ‘sex, age and state of health of victim.’

- The court will look at the whole behaviour: it can include relationships of coercive control; and persistent infantilisation. Munby (R (A and B)) “thoughtless, uncaring and uncharitable behaviour” relevant.

- It is an absolute right.
Art 5

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

a. the lawful detention of a person after conviction by a competent court;

b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

...
Art 5 application

Cheshire West:

- Lack the capacity to consent to their care/treatment arrangements
- Are under continuous supervision and control
- Are not free to leave.

The Mental Capacity Act allows restrictions and restraint to be used in a person’s support, but only if they are in the best interests of a person who lacks capacity to make the decision themselves. Restrictions and restraint must be proportionate to the harm the care giver is seeking to prevent. The DOLS procedure must be followed.
Article 8

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
Art 8

- Private life: covers ‘protection from physical assaults’; ‘psychological integrity’; ‘a right to personal development, and the right to establish and develop relationships with other human beings and the outside world’

- Family Life: broadly construed to cover wide range of family forms, but still based on heterosexual ideal

- A defeasible right: the concept of proportionality

- Positive and negative
Article 14

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
Art 14: key issues

- Note not a stand alone right

- Not an exhaustive list: age, disability have been included (R (Carson and Reynolds) v. Secretary of State for Work and Pensions [2005] UKHL 37).

- An Art 14 breach requires an especially strong justification

- Equality Act 2010 prohibits age discrimination
Positive duties of protection: Art 2, 3, 8

- The general duty for law and policies always applies

- Specific duties: must be aware or ought to be aware of real and imminent risk of breach

- Must take reasonable and adequate steps
  - Vulnerable people and enhanced duty
  - Must not judge with hindsight
  - Need to show had the state acted a substantial chance breach would not occur
The limitations on the public obligation

Dordevic v Croatia:

Bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, the scope of this positive obligation must, however, be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Not every claimed risk of ill-treatment, therefore, can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising.
Summary of application

- The state has a duty not to infringe rights to protection of life, torture and private life.

- It has a duty in so far as is reasonable to protect these rights from interference of others.
Cases applying human rights
Case 1: YL v Birmingham City Council [2007] UKHL 27

YL was 84 year old with dementia

Lord Scott

- HRA did not apply to Southern Cross. It is a private company not a charity. It has not public funding and can charge what fees it likes. Commercial enterprise in a commercial market.

- Unfair that self funding residents be treated differently from public funded residents
15. Historically, the attitude of the state towards the poor, the elderly and the incapable has not been uniformly benign. But for the past 60 years or so it has been recognised as the ultimate responsibility of the state to ensure that those described in the last paragraph are accommodated and looked after through the agency of the state and at its expense if no other source of accommodation and care and no other source of funding is available.
YL v Birmingham CC

Baroness Hale (dissenting)

67. ...In a state which cares about the welfare of the most vulnerable members of the community, there is a strong public interest in having people who are unable to look after themselves, whether because of old age, infirmity, mental or physical disability or youth, looked after properly.

NB the different perspectives.
McDonald v RB Kensington and Chelsea

- Ms Elaine McDonald, age 68, former ballerina, had home care package and night time carer withdrawn. Proposed use incontinence pad. The authority accepted this was proposed primarily to save the cost of providing the carers (some £22,000 pa).

- Lord Brown noted that ‘There is no dispute that in principle [Article 8] can impose a positive obligation on a state to take measures to provide support and no dispute either that the provision of home-based community care falls within the scope of the article’.

- However, a ‘wide margin of appreciation enjoyed by states’ in striking ‘the fair balance . . . between the competing interests of the individual and of the community as a whole’.

- Margin of appreciation is even wider when . . . the issues involve an assessment of the priorities in the context of the allocation of limited state resources'
Lady Hale (dissenting):
- In the United Kingdom we do not oblige people who can control their bodily functions to behave as if they cannot do so, unless they themselves find this the more convenient course. We are, I still believe, a civilised society.

Lord Walker: “I find it rather regrettable that Lady Hale’s judgment makes so many references to defecation.”
The European Court of Human Rights accepted an interference with Art 8(1). However, it accepted that “the interference pursued a legitimate aim, namely the economic well-being of the state and the interests of...other care-users”. It held that “the decision not to provide...a night-time carer...was ‘necessary in a democratic society’ ... and ... proportionate to the legitimate aim”.

It concluded that both of those criteria were met having regard to the wide margin of appreciation, and was “satisfied that the national courts adequately balanced the applicant’s personal interests against the more general interest of the...[Local authority] in carrying out its social responsibility” of care provision “to the community at large".
A breach of article 8 was found when disabled parents were housed in accommodation that had no toilet facilities on the ground floor. The parents had to use their garden or the floor in the sitting room for toileting. Sullivan J. held that following its assessment the LA “was under an obligation...to take positive steps, including the provision of suitably adapted accommodation, to enable the claimants and their children to lead as normal a family life as possible, bearing in mind the second claimant's severe disabilities”.
The Council had engaged in a 12 week consultation period in which it had actively sought the views of residents, their families, carers, staff and interest groups.

The Council had indicated a willingness to take any steps within its powers to facilitate transfers for residents and to ensure that they remained with their friendship groups.

The Council moved Mrs Watts to a new home which was only three miles from Underhill House.

The Council took into consideration individual assessments in respect of the residents that it moved, as well as the recommendation of Mrs Watts’ own expert psychiatric witness.

The closure of Underhill House was part of a rationalisation of care for the elderly provided by the Council. Underhill House itself was a relatively old building that no longer met the requirements for a modern care home.
Watts v United Kingdom: art 8

- the interference lawful in the sense of being sanctioned by a provision of the domestic law
- the interference in pursuit of a legitimate aim
- the interference proportionate. In addition to the factors listed above, Mrs Watts had, in general, settled in well to her new home. It also referred to the principle of the “margin of appreciation”
In terms of the ECHR, the use of the inherent jurisdiction in this context is compatible with Article 8 .... Any interference with the right to respect for an individual's private or family life is justified to protect his health and or to protect his right to enjoy his Article 8 rights as he may choose without the undue influence (or other adverse intervention) of a third party.
The possibilities and limitations of human rights for older care
Limitations with HR analysis:
1. Private harms overlooked

- As Edwards explains limiting human rights protection from violence to state on citizen’s violence limits the effectiveness of human rights to cases of public violence:

- ‘On a practical level, the effect of distinguishing between the public and the private has ‘rendered invisible’, or at least less important, the many violations that women suffer in private. In this way, it leaves the private or family realm, where the majority of women spend the bulk of their lives, unregulated, unprotected, and susceptible to abuse.’

- YL: Self-funded care homes and private care arrangements

- More generally the focus is on the state
Limitations of Human Rights: 2. The Problems of Enforcement

Restrictions on bringing proceedings:

▪ Funding
▪ Fear
▪ Lack confidence
▪ Lack energy
▪ Lack knowledge or access
▪ “Not want to make a fuss”

The Care Act 2015 requires local authorities to make enquiries if there is an adult who may be at risk of abuse or neglect in their area and to find out what, if any, action may be needed.
Limitations of Human Rights

3. Legalism

A danger that human rights lead to procedural and formalised responses that can work against personalised care and responsiveness. “A tick box” approach (Watts v UK)
Limitations with Human Rights:
4. The difficulties of rationing

- Judges will always be aware that they are not well placed to examine rationing decisions.
- There are even questions of legitimacy over rationing.
Limitation of Human Rights

5. Proof

- Typically take place in private
- Can be relatively minor if seen in isolation
- Can be matters of attitude and tone
- Safeguarding Boards (Care Act 2014)
Limitations of Human Rights
6. Minimal standards

- Human Rights set minimum not maximum standards

- Not everything should be seen as a human rights: avoid “Human rightsism” (Carl Carnder)
Human Rights: The benefits
1. A protection against consequentialism

- Equality and Human Rights commission

Universal, basic human rights are an essential standard, not an optional extra or burdensome red tape. Our evidence indicates that embedding human rights into the way home care is provided delivers high quality care, without necessarily increasing costs.
Human Rights: The benefits:
2. The power of “rights talk”

- We live in an age of rights

- A bulwark against ageism, infantilisation and dehumanisation
Human Rights: The Benefits:
3. An attack on the public/private divide

- They can be used to make “private harms” the responsibility of the state:
  - Care Quality Commission
  - Care Act 2014
Human Rights: The benefits:
4. Legal Tools

- Contrast Judicial Review
- A clear legal framework
Conclusion

- Human Rights are not the sole answer, but have an important role to play
- Human Rights are only as good as the judge and the professionals
- Human Rights work best as an attitude, than a remedy
Closing thought

“Where, after all, do universal human rights begin? In small places, close to home... Unless these rights have meaning there, they have little meaning anywhere.”

Eleanor Roosevelt
Other Sources of Rights

- Article 23 of the Revised European Social Charter:

With a view to ensuring the effective exercise of the right of elderly persons to social protection, the Parties undertake to adopt or encourage, either directly or in co-operation with public or private organisations, appropriate measures designed in particular:

- to enable elderly persons to remain full members of society for as long as possible, by means of:
  a adequate resources enabling them to lead a decent life and play an active part in public, social and cultural life;
  b provision of information about services and facilities available for elderly persons and their opportunities to make use of them;
- to enable elderly persons to choose their life-style freely and to lead independent lives in their familiar surroundings for as long as they wish and are able, by means of:
  a provision of housing suited to their needs and their state of health or of adequate support for adapting their housing;
  b the health care and the services necessitated by their state;
- to guarantee elderly persons living in institutions appropriate support, while respecting their privacy, and participation in decisions concerning living conditions in the institution.