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Articles

Older people and people with disability in residential care are amongst the most vulnerable to physical and psychological harm perpetrated by others and through neglect. The recent Royal Commission into Aged Care Quality and Safety (Aged Care Royal Commission) and the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Disability Royal Commission) found widespread preventable harm and injury to older people and people with disability. Harm to older people and people with disability was exacerbated during the COVID-19 pandemic. Given the failure of public regulation to prevent and compensate injuries to older people and people with disability in residential care, this article explores the promise of private law remedies, particularly in tort. Part A discusses the prevalence and nature of injuries to people in residential aged care and to people with disability in residential care. Part B discusses harm in aged care and disability care as systemic, structural, hybrid public/private harms and considers public regulatory failure. Part C addresses the potential for private law remedies, particularly in tort, in aged care and disability care injury cases. Finally, Part D discusses regulatory responses to compensation for injury proposed by the Aged Care Royal Commission and by the Disability Royal Commission and the Australian Government's response to date.

Where a medical practitioner breaches their duty to warn prior to administering treatment, liability is readily found in favour of the patient if they would never have undergone treatment of and, in favour of the medical practitioner if the patient would have consented irrespective of the breach. However, establishing liability where the patient would have delayed treatment if the breach had not occurred presents a unique challenge for the law of negligence as evidenced by the divergent and divided opinions in Chappel v Hart and Chester v Afshar. This article examines each of the judgments in these cases as well as the seminal case of Wallace v Kam to distil three broad approaches to establishing liability in cases where consent would have been delayed but for the breach of the duty to warn. The article also proposes a fourth approach that overcomes some of the tensions that exists with established legal policies that operate to limit the scope of a defendant's liability.