

By Email and First-Class Post

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Your Ref:

Our Ref: MVA/SLW/00307092/2

Date: 28 May 2021

First by email to:

bcu.corporateclaimswest@wales.nhs.uk

Letter Before Action

Dear Sirs

Re: R (oao (1) Birthrights (2) Dr Lucy Williams and (3) Dr Lorin Davies) v Betsi Cadwaladr University Health Board

We write this letter in accordance with the Pre-Action Protocol for Judicial Review.

We are instructed by the proposed Claimants in relation to a proposed judicial review arising from the Defendant's refusal to allow post-natal visiting on its maternity wards.

The Defendant:

Betsi Cadwaladr University Health Board

The Claimants:

(1) Birthrights

Birthrights is a charity which advocates for pregnant people and new mothers and to improve services and practice throughout the maternity system. Birthrights is currently supporting a number of the Defendant's maternity service users, some of whom are very close to their due date, who are directly affected by the Defendant's post-natal visiting policy.

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(2) Dr Lucy Williams

Dr Williams is one of the Defendant's maternity service users currently being supported by Birthrights. She is due to give birth to her second child on/around 4 December 2021 at Ysbyty Gwynedd, which is run by the Defendant Health Board.

She had a traumatic birth with her first child, who was born in December 2019, also at Ysbyty Gwynedd, and is very anxious about the prospect of her husband having to leave her shortly after the birth of her second child and thus being unable to advocate for her and assist her in caring for her newborn, as he did after the birth of their first child.

Dr Williams has been asked to confirm whether she would prefer to attempt a vaginal birth after caesarean (a 'VBAC') or to have an elective caesarean birth. At present she feels that her freedom to make the best choice for her is constrained by the fact that she will need to consider as a factor how long her husband will be able to stay with her following the birth of their child (her understanding is that he will only be able to remain with her for 30-60 minutes if she has a caesarean section but that he will be able to remain with her for one hour, possibly longer, in the event she has a VBAC).

(3) Dr Lorin Davies

Dr Davies is the husband of Dr Williams. He is anxious that under the current visiting policy he will be unable to advocate for his wife in the postnatal period, should she need advocacy support, and that his ability to bond with his newborn baby will be impacted by the period of time (as yet unknown) for which they will be separated whilst Dr Williams and their child remain in hospital following the birth.

Reference details:

MVA/307092/2

The details of the matter being challenged:

The Defendant's current policy regarding post-natal visiting on its maternity wards.

Background – relevant guidance:

On 30 November 2020 the Welsh Government published the following guidance:

1. “Hospital visiting during the coronavirus outbreak: guidance” (‘the Guidance’);¹ and
2. “Hospital visiting during the coronavirus outbreak: supplementary statement” (‘the Supplementary Statement’).²

The Guidance

The Guidance states that “*The Welsh Government supports a person-centred, flexible approach to visiting*” and the aim of the Guidance was thus “*to assist health boards and trusts to strike a clear balance in terms of the visiting principles between allowing visiting with a purpose and the clear need to maintain robust infection prevention and control strategies at this stage of the pandemic, for the safety of patients, visitors and staff.*”

The Guidance further states that, even at the date of publication (30 November 2020, during the second national lockdown) visiting could be facilitated with the agreement from the nurse in charge of the ward as long as visitors did not have any COVID-19 symptoms and were not aware of having been exposed to someone with COVID-19 in the preceding 14 days. Circumstances in which it was envisaged visiting could be facilitated included:

- An essential support assistant and one birthing partner for women in active labour, preferably from the same household or part of an extended household;
- Children and young people visiting a parent/guardian/carer or sibling in a healthcare setting, accompanied by an appropriate adult.

In addition to the circumstances in which it was envisaged visiting could be facilitated, the Guidance recognised that it “*cannot foresee all requests for visiting nor all patient circumstances. Therefore, health boards and trusts do have the discretion, when operating the guidance, to agree to visiting requests that are not outlined in any of the categories set out above where they are satisfied the benefits to the well-being of the patient or visitor in agreeing a visit outweigh the infection control risks and any other practical difficulties in facilitating access.*”

¹ <https://gov.wales/sites/default/files/pdf-versions/2021/1/3/1610565374/hospital-visiting-during-coronavirus-outbreak-guidance.pdf>

² <https://gov.wales/sites/default/files/pdf-versions/2021/1/3/1610565388/hospital-visiting-during-coronavirus-pandemic-supplementary-statement.pdf>

The Guidance noted that, “*Face-to-face visiting should be with a purpose and not just a social occasion. It is to improve the well-being and aid the recovery of a patient or benefit the well-being of a visitor...*”

The Guidance stipulated that all requests and offers for visits need to be risk assessed and set out considerations to aid decision making, including:

1. Whether the patient/service user met the exceptions for visiting for patients not infected with COVID-19; and
2. **If not:**
 - a. Is the request for visiting with a purpose i.e., to improve the well-being and aid the recovery of a patient or benefit the wellbeing of a visitor?
 - b. Would the patient’s/service user’s health and wellbeing benefit from seeing appropriate visitors?
 - c. Is the patient/service user COVID-19 free and placed on a COVID-19 free ward?
 - d. What is the COVID-19 situation in the healthcare setting?
 - e. Has the patient/service user already received a face-to-face visit from another relative? Visits should preferably be with people from the same household or part of an extended household and ideally be limited to one household/extended household in any given week, however visiting arrangements should take into account individual circumstances, the aim being to limit the number of contacts as far as possible whilst ensuring compassionate arrangements for visiting.

Annex 2 to the Guidance

The Guidance included, at Annex 2, a framework to assist health board to assess visitor access for partners, visitors and other supporters of pregnant women. The purpose of the framework at Annex 2 was to “*assist NHS health boards in Wales to flexibly adapt access for partners, visitors and other supporters in maternity services according to local viral transmission rates.*”

The framework made clear that “*Health boards must tailor policies to the local situation and be innovative in the way that visiting access is enabled.*”

It was suggested that health boards should “*undertake a risk assessed approach, following a meaningful and documented risk assessment, making any necessary changes according to local transmission of the virus to either relax or restate previous levels of restrictions.*” It was anticipated that risk levels would be set predominantly following the overall health board’s risk levels but “*localised risk*

assessments should also be undertaken for individual maternity units/services. This risk assessment should be carried out on a multi professional basis.”

Policies on permitting access to women’s partners, visitors and other supporters were to be *“regularly reviewed, tailored to your local context and take account of:*

- *Current pandemic risk and government policy*
- *NHS recovery phases*
- *Local trends in COVID-19 incidence and prevalence*
- *Physical space in the maternity service*
- *The number of women expected in an inpatient maternity unit (e.g. a postnatal ward), distance between bed spaces and cots as well as flow through ward; and*
- *Staffing of the maternity clinic/unit.”*

The framework set out various steps to reduce the risk of COVID-19 transmission in maternity services.

The Supplementary Statement

The Supplementary Statement reiterates that *“the Guidance sets out the current baseline for visiting in Wales during the pandemic”* but recognises that *“providers of health care to which the Guidance applies may... in response to... falling levels of transmission in their local area, depart from the Guidance.”*

Insofar as the easing of visiting restrictions is concerned, the Supplementary Statement notes that:

“visiting restrictions in the Guidance may be eased beyond those stated, where Health Boards, Trusts or Hospices consider that the community transmission rate in the local areas where premises are located, is at a level where it is considered that the benefits of allowing increased visitation, outweighs the COVID-19 transmission risk.

This decision would need to be made by the Health Board, Trust or Hospices’ Executive Team with their own infection prevention and control teams in collaboration with Public Health Wales based on a risk assessment process to assess whether the rate of infection within the local community or within the setting is low enough to justify easing the visiting restrictions.

The Supplementary Statement requires information on restrictions to be clearly displayed and available to inform patients, including through publication of the Health Board website.

The Defendant's post-natal visiting policy:

The policy as currently set out on the Defendant's website³ states hospital visiting is "only by exception". In the case of maternity services:

- An essential support assistant and one birthing partner is permitted for women in "active labour"⁴.

Further guidance is given on the section of the Defendant's website headed "Maternity".⁵ This states, insofar as is relevant:

- Women admitted to the hospital in their pregnancy cannot have visitors: *"All visiting has been restricted until further notice to reduce potential exposure and transfer of the virus."*
- Women who have been booked for an induction may not have their partner with them, *"We are asking that you come alone for the induction. Once you are in active labour, and being cared for on the Midwifery Led Unit/ labour ward, your birth partner can come to the hospital to be with you throughout the labour and birth."*
- Women in labour are being asked *"that you come in with one birth partner only and that the birth partner is from your household. This will limit the potential exposure and transfer of COVID-19. Once you have given birth we ask that your partner go home as visiting has been restricted on the maternity units."*
- Women who are having a planned caesarean section can travel with their birth partner to the hospital but once there, *"You will be asked to go into the hospital to prepare for the Caesarean and your partner will be asked to sit in the car. Once you are ready for your Caesarean your partner will be phoned and will be escorted into the theater for the birth. Your partner can stay for an hour following the birth then will be asked to go home."*
- *"For the time being, no visitors are being admitted to the maternity wards. This includes your partner, children and immediate family."*

When you are ready to go home your partner, or one family member, can meet you at the entrance to the maternity ward to take you home."

Approach of other health boards

The approach to post-natal visiting adopted by the Defendant is significantly more restrictive than that adopted by other Welsh Health Boards, including boards

³ <https://bcuhb.nhs.wales/covid-19/hospital-visiting/>

⁴ Although under the heading "Visitor access for partners and visitors of pregnant women in Welsh maternity services and neonatal services" no reference is made to essential support assistants, only to "one birthing partner for women in active labour..."

⁵ <https://bcuhb.nhs.wales/covid-19/services-operating-during-covid-19/services-info-2/maternity/>

serving areas with significantly higher COVID-19 incidence rates than those in the areas served by the Defendant.⁶ By way of example:

- Swansea Bay University Health Board allows a named person to visit daily, for at least two hours⁷. The Covid-19 incidence rate for Swansea over the last 7 days is 11.3 cases per 100,000 and for Neath Port Talbot is 11.2 cases per 100,000.
- Cardiff and Vale University Health Board allows women to be accompanied by their birth partner during the labour assessment, active labour and the immediate postnatal period. Women on the postnatal ward can receive a named visitor for two hours per day.⁸ The COVID-19 incidence rate for Cardiff over the last 7 days is 9.0 cases per 100,000 and for Vale of Glamorgan is 8.2 cases per 100,000.

In comparison, a number of the Defendant's hospitals, including Ysbyty Gwynedd, serve areas with COVID-19 incidence rates over the last 7 days below the current national average of 8.8 cases per 100,000 people. The current COVID-19 incidence rate for Gwynedd is just 2.4 cases per 100,000.

Legal Framework:

The separation of either parent from their newly born child constitutes a (particularly severe) interference with their (and their child's) rights under article 8 of the European Convention on Human Rights.⁹ The circumstances of giving birth also engage the rights of the parents and the child under article 8.¹⁰

Separating a child from their parents (or a parent from their birth partner) is therefore a breach of article 8, which is only lawful where it is (a) in accordance with law, and (b) proportionate.

As regards "in accordance with the law", there is no formal law preventing a birth mother from having close contact with a birth partner and/or from preventing a birth partner having contact with a child after birth. Insofar as they are relevant, the Health Protection (Coronavirus Restrictions) (No.5) (Wales) Regulations 2020 ("the 2020 Regulations") permit contact between two people in one household in a regulated premises, such as a hospital, so long as reasonable measures are taken to minimise exposure to COVID-19.¹¹ In deciding what is a reasonable

⁶ <https://public.tableau.com/profile/public.health.wales.health.protection#!/vizhome/RapidCOVID-19virology-Public/Headlinesummary>

⁷ <https://sbuhb.nhs.wales/coronavirus-covid-19/information/visiting-update-10th-may-2021/maternity-services-visiting-update/>

⁸ <https://cavuhb.nhs.wales/our-services/maternity-services/>

⁹ See, for example, *Hanzelkovi v Czech Republic* (App. no. 43643/10), §§67 and 78.

¹⁰ See, for example, *Odievre v France* (2004) 38 EHRR 43, §29; *Ternovszky v Hungary* (2015) 61 EHRR 35, §22; *Dubská v Czech Republic* (2017) 65 EHRR 5, §163.

¹¹ See regulations 15 and 16 of the 2020 Regulations, read with Schedule 1, §8.

measure, a decision-maker must have regard to guidance issued by the Welsh Ministers about those measures.¹²

The guidance issued by the Welsh Ministers¹³ permits close contact of people from one household in indoor public places. It is permissive as regards close contact services and other indoor activities.

The illegality

The effect of the Defendant's policy framework is that Dr Williams and Dr Davies will be separated from each other following the birth of their child. Their child and Dr Davies will also be separated from each other. Dr Williams will be denied the presence of her preferred birth partner, her husband, in the way that she prefers. This is a severe interference with the article 8 rights of Dr Williams, Dr Davies, and their child.

This interference is not "*in accordance with the law*". There is no Regulation, or any guidance of the Welsh Ministers, which permits such a stringent policy framework. The Defendant's policy framework is also in breach of the guidance issued by the Welsh Ministers in November 2020, in that:

- (a) In breach of the Guidance, the Defendant does not facilitate visiting with the agreement from the nurse in charge of the ward as long as visitors did not have any COVID-19 symptoms and were not aware of having been exposed to someone with COVID-19 in the preceding 14 days.
- (b) In breach of Annex 2 to the Guidance:
 - i) The Defendant has failed to tailor its policies to the local situation or to be innovative in the way that visiting access is enabled.
 - ii) The Defendant has failed to regularly review its policies on access to women's partners, visitors and other supporters.
 - iii) The Defendant has failed to take into account material considerations such as the current pandemic risk, government policy, NHS recovery phases, or local trends in COVID-19 incidence and prevalence.
 - iv) The Defendant has failed to undertake a risk assessed approach, following any recent meaningful or documented risk assessments, making any necessary changes according to local transmission of

¹² Regulation 18(1) of the 2020 Regulations.

¹³ <https://gov.wales/alert-level-2-summary>

the virus to relax levels of restrictions. The Defendant last updated its visiting policy on 11 March 2021, when COVID-19 incidence rates in the areas it serves ranged from 30.9 (Wrexham) to 127.1 (Anglesey). The COVID-19 incidence rates in the Defendant's area now range from 2.4 (Gwynedd) to 10.3 (Wrexham).

(c) In breach of the Supplementary Statement:

- i) The Defendant has failed to consider whether to depart from the Guidance in response to falling levels of transmission in their local area.
- ii) The Defendant has failed to ease visiting restrictions beyond those stated in the Guidance where the Defendant should reasonably consider that the community transmission rate in the local areas is at a level where it is considered that the benefits of allowing increased visitation outweigh the COVID-19 transmission risk.

The policy framework itself is also arbitrary and/or irrational for the same reasons. Amongst other examples, it does not explain why a one-hour limit is set for post-natal visits or why different lengths of visits are permitted for caesarean and non-caesarean births.

Further, or in the alternative, the severe interference with article 8 set out above is not proportionate. In addition to the points set out above:

- (a) The Defendant's policy framework does not reflect the local transmission risks of COVID-19.
- (b) The Defendant's policy framework does not reflect the current risk level set by the Welsh government.
- (c) The Defendant's policy framework is more strict than other local Health Boards. There is no proper justification for this difference of approach.
- (d) The Defendant's policy framework does not permit any visits even where visitors do not have any COVID-19 symptoms and are not aware of having been exposed to someone with COVID-19 in the preceding 14 days.
- (e) The Defendant has not carried out any balance between the benefits of increased visitation as against the current local COVID-19 transmission risk.

For the same reasons set out above, the Defendant's policy is also unlawful at common law. It is well-established that, where a public body promulgates in a

public document, albeit non-statutory in form, advice which is erroneous in law, then the Court has jurisdiction to correct the error of law by an appropriate declaration: *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112, at 193. A Court can also quash a policy where it is inherently unfair: *R (Tabbakh) v Staffordshire and West Midlands Probation Trust* [2014] 1 WLR 4620.

Details of the action that the defendant is expected to take:

The Defendant is expected to withdraw its current guidance prohibiting visitors to the post-natal wards.

Details of the legal advisers, if any, dealing with this claim:

Leigh Day
25 St John's Lane
London
EC1M 4LB

Reference details above.

Details of any interested parties:

None identified at this time.

Details of any information sought / documents that are considered relevant and necessary:

Please confirm the current risk rating of the labour/birthing and post-natal wards.

Please provide a copy of the current risk assessments, including the health board's risk assessment, maternity services' risk assessment and the risk assessments of the post-natal ward(s). We would expect the current risk assessments to address not only the risks arising from COVID-19 but also the risks to service users (new mothers and their babies) from the current visitor restrictions.

Please confirm when each disclosed risk assessment was last updated.

Please provide minutes of all meetings/discussions by the Health Board's Executive Team (either internally or in conjunction with the infection and prevention control teams and/or Public Health Wales) regarding visiting restrictions, in particular any minutes discussing the appropriateness of maintaining or easing the current restrictions on post-natal wards. Please provide

copies of the documents produced as part of the risk assessment process on which these discussions and decisions were based.

Address for reply and service of court documents:

Sophie Wells
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25 St John's Lane
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EC1M 3LB

(Please also send any reply to this letter to swells@leighday.co.uk)

Proposed reply date:

Please respond to this letter within the ordinary timeframe for a response under the pre-action protocol for judicial review (14 days).

Yours faithfully

Leigh Day

Leigh Day