

# Massachusetts Judge Dismisses Criminal Charges Against Soldier Home Administrators: What This Means for Other Nursing and Long-Term Care Facilities

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### Who Needs to Know

Skilled nursing facility and nursing home operators.

### Why It Matters

Every case — criminal or civil — presents different issues for nursing homes and their administrators. We are likely to see more cases, particularly in the civil context, trying to hold nursing homes and their administrators liable for illness, injury, and/or death suffered by its patients during the COVID-19 pandemic.

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On November 22, a Massachusetts Superior Court judge dismissed all criminal charges against two former leaders of the Holyoke Soldiers' Home, a hospital and nursing facility for veterans, concerning actions they took during the COVID-19 pandemic that allegedly placed certain residents at an increased risk of contracting COVID-19. Although this case, *Commonwealth v. Walsh*, No. 2079CR00178 (Mass. Super. Ct. Nov. 22, 2021), involved two specific Massachusetts elder care statutes, a number of takeaways and lessons from the ruling could apply more widely to other COVID-19-cases, both in the criminal and civil contexts, brought against nursing homes and other similar facilities.

### Background

In September 2020, a grand jury returned indictments against the facility's superintendent and the medical director, alleging five counts of elder neglect (in violation of G.L. c. 265, § 13k (d½)) and five counts of permitting serious bodily injury to an elder (in violation of G.L. c. 265, § 13K (e)). All of the alleged conduct arose from a single act the defendants took during the early days of the COVID-19 pandemic — merging two dementia units and, thus, comingling the patients in each unit. The commonwealth alleged that this merger decision caused injury to five of the home's residents, including by increasing their exposure to COVID-19.

The defendants moved to dismiss the indictments on the grounds that (1) the *risk* of exposure to COVID-19 does not constitute "serious bodily injury" as required by the statutes; (2) there was insufficient evidence to show that the five named residents ever suffered any actual injury as a result of their merger decision; and (3) neither defendant qualified as a "caretaker," as required and defined under the statutes, because both had administrative roles at the facility.<sup>[1]</sup> The court agreed with the defendants' arguments and dismissed both indictments in their entirety.

## Key Takeaways From the Dismissal

Even though the court grounded most of its ruling in the commonwealth's failure to present evidence sufficient to satisfy the two specific state statutes at issue, the ruling nonetheless contains some key lessons that other nursing homes and administrators could use when facing litigation or an investigation arising out of their own difficult decisions during this pandemic.

**Lesson 1: The risk of patients contracting COVID-19 is not the same as patients actually contracting COVID-19.** One element the commonwealth needed to prove is that the defendants caused "serious bodily injury" to the five named residents. Although the specific language may vary from statute to statute (or claim to claim), proving "injury" or "harm" is a common element in many cases that have been and will be brought against nursing homes. Here, the commonwealth argued that the defendants satisfied this element because their actions substantially increased the *risk* that the patients would contract COVID-19. The court unequivocally rejected this construction. It held that the increased *risk* of contracting COVID-19 did not constitute "bodily injury" in the first instance, and it never decided whether it would be considered "serious." The court stated that the "mere risk of injury is not itself injury" and that absent actual sickness (shown to have been caused by defendants), there was no cognizable injury on which the commonwealth's prosecution could proceed.

**Lesson 2: Causation is difficult to prove where allegations involve COVID-19.** The commonwealth also needed to prove that the defendants created or caused a "substantial likelihood of harm" through their actions. Causation is, of course, a critical element in almost any legal proceeding, and any claims brought against nursing homes necessarily require such a causal nexus between the conduct alleged and the ultimate injury. Here, the commonwealth argued that the defendants' decision to merge the two units increased the patients' exposure to COVID-19, which created a "substantial likelihood of harm." Once again, the court disagreed. Pointing to the lengthy incubation period of the COVID-19 viruses, the court concluded that there was simply no way to tell if the defendants' decision to merge the units actually created a likelihood of harm since the residents could have already been exposed to COVID-19 prior to the merger decision. Accordingly, the commonwealth did not argue that the defendants' decision caused any specific residents to contract COVID-19; it conceded that the long incubation period for COVID-19 made it impossible to determine when the exposure occurred. As illustrated here, the inability to pinpoint (and prove) exactly when and from where an individual may have contracted COVID-19 creates significant causational issues for anyone (the government or civil plaintiffs) seeking to impose liability on nursing homes or other similar facilities.

**Lesson 3: Administrators are not "caretakers."** Lastly, both statutes at issue only apply to "caretakers" of patients, as that term is defined. Once again, although the specific language may vary, the concept that certain types of liability only attaches to individuals providing specific types of "care" to patients may be a common theme across various claims potentially brought against nursing homes and other facilities. Here, the court examined this requirement and found that neither defendant provided the type of required "care" to the patients (i.e., "primary and substantial assistance") such that liability under the statute would attach. Put simply, the court drew a bright-line distinction between facility *administrators* who make high-level decisions regarding the facilities and residents, and actual *caretakers* who provide direct assistance and medical care to the individual residents. The court even took things a step further, concluding that the merger decision at the heart of the indictment was a purely administrative decision because, among other reasons, it was made for staffing reasons rather than for patient care reasons.

## Conclusion

Every case — criminal or civil — presents different issues for nursing homes and their administrators. We are likely to see more cases, particularly in the civil context, trying to hold nursing homes and their administrators liable for illness, injury, and/or death suffered by its patients during the COVID-19 pandemic. Although this case involved two specific Massachusetts statutes, the court's willingness to dismiss the indictment illustrates at least one judge's hesitancy to hold a nursing home and its administrator liable for difficult, obligatory decisions that may have led to an increased chance of COVID-19 exposure. The court's reasoning also provides a defense roadmap for other nursing homes and administrators who may face similar charges (albeit under different statutes). As illustrated by this court's decision, it is hard to establish a clean line of causation involving COVID-19 exposure. And while prosecutors and plaintiffs may be able to *allege* a direct nexus between conduct and COVID-19 injuries to individual defendants, those theories may not stand up to close scrutiny from defense counsel.

Troutman Pepper closely tracks and monitors all developments bearing on liability for nursing homes. We have developed a [tracking tool](#) that follows operational guidance, immunity provisions, and whistleblower laws in 17 jurisdictions. We also have assembled a dedicated team focused on advising health care entities, including nursing homes, throughout the COVID-19 crisis and its aftermath.

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[1] The defendants also argued that the statutes should be constitutionally void for vagueness as applied. The court agreed with this argument as well had it found that the statutes applied to the defendants.

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