

RESIDENTS' BELONGINGS

It is not uncommon for a resident's belonging to go astray. Perhaps lost in the system, or taken by other residents, visitors, staff or trespassers.

There are four aspects of the law that are relevant:

1. The Accreditation Standards and Charter;
2. Duty of Care;
3. The law of bailment; and
4. The laws of trespass and theft.

1. *The Accreditation Standards and Charter*

The Charter places an obligation on nursing home owners to provide a 'safe, secure and home-like environment'. This secure environment would extend to taking reasonable precautions to ensure that residents' belongings are safe.

Similarly Accreditation Standard 4.4 requires that nursing home practices will adequately protect the safety and security of residents' belongings.

This means that providers of aged care homes should have adequate security arrangements for residents' belongings and that efforts should be made to avoid residents' personal items being stolen or used by other residents or staff.

2. *Duty of Care*

Under the common law a nursing home owner also owes a duty of care to a resident. This duty includes taking reasonable action to ensure that a residents' belongings are not mistreated in any way.

This duty of care is not fixed. It varies from situation to situation.

A high duty of care would exist where a resident is very dependent on management and staff, perhaps due to his/her dementia, and where

the management and staff have accepted clear responsibility for the safe-keeping of belongings.

In contrast a lesser duty of care would exist where the resident asserts his/her independence and insists that s/he will be responsible for the safety of her/his belongings – refusing management's offer of the use of a safe, for example.

And there are many cases in between.

Facts to consider in assessing duty of care are:

- the degree of independence;
- any statutory standards, such as those outlined in the Charter and the Accreditation Standards;
- internal rules such as house rules;
- current community values, for example, what level of security would a member of the public expect;
- the magnitude of harm, for example, the more valuable the belonging, the greater the duty of care;
- other relevant factors such as assertions by management or staff that belongings are secure or even an offer to 'look after' certain items.

3. *The Law of Bailment*

The law of bailment is part of the duty of care discussed in 2 and also part of the law of contract.

If a nursing home owner (bailee) undertakes to look after a resident's (bailor) belongings then a bailment arises.

If the undertaking is gratuitous, i.e. security is not seen as part of the normal services and the resident is not purchasing 'extra security', case law suggests that the duty is to care for the belongings as if they were your own.

If the bailment is for 'reward', i.e. it can be established that money was paid by the resident to the owner for an undertaking to look after the belongings, then the duty of care is higher. In this case it would be reasonable to argue that there is a contract that the belongings will be cared for. For example, a resident pays to have her/his jewellery placed in the nursing home's safe.

It is certainly arguable that, given the Accreditation Standards and the Charter, and the fact that the residents pay to live in a 'home-like' environment, the home undertakes to ensure the security of the belongings. Consequently their duty of care is greater rather than lesser.

4. *Trespass and Theft*

Trespass to chattels can be defined as the intentional or negligent interference with another person's belongings.

Theft is the intentional deprivation of another person's belongings.

If a resident's belongings have been taken or abused in any way and the resident can prove who stole or damaged the belongings, s/he can sue them for any loss under the law of trespass and/or ask the police to charge the person with theft.

Dealing with situations of lost/stolen belongings

Despite the inherent uncertainties of the law, a resident who can show that her/his belongings have been taken, damaged or lost, and that s/he was not responsible for the loss, has a strong legal argument to demand compensation from the owner.

Of course each situation will need to be assessed according to its individual circumstances and the law as outlined in this fact sheet.

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Empowering older Victorians

Elder Rights Advocacy is the registered business name of Residential Care Rights Inc. (ABN 63 367 539 827) which is part of the National Aged Care Advocacy Program - an Australian Government Initiative.

Note: The information in this fact sheet is general information about the law in Victoria—it is not legal advice.

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