COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

SUPERIOR COURT
CRIMINAL ACTION
NO. 2079CR00178

HAMPDEN COUNTY
SUPERIOR COURT
FILED
NOV 22 2021
[signature]
CLERK OF COURTS

COMMONWEALTH

vs.

BENNETT WALSH and a related case[1]

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTIONS TO DISMISS

Defendants Bennett Walsh ("Mr. Walsh") and David Clinton ("Dr. Clinton") were each indicted on five counts of elder neglect, in violation of G.L. c. 265, § 13K (d ½), and five counts of permitting serious bodily injury to an elder, in violation of G.L. c. 265, § 13K (e). The indictments against both are limited to a single, solitary act—a decision they made on March 27, 2020, during the early days of the Covid-19 pandemic. On that day, facing unprecedented staff shortages due to nurse and certified nurse-assistant callouts, the defendants decided to merge two dementia housing units at the Soldiers' Home in Holyoke.

The Commonwealth alleges that this decision alone caused serious body injury to five specified veterans residing at the Soldiers' Home by increasing their exposure to Covid-19 and causing them to suffer dehydration and malnutrition. Both defendants move to dismiss the indictments against them, on the grounds that: (1) there was no reasonably trustworthy evidence submitted to the grand jury that any of the five named veterans ever contracted Covid-19 as a result of the dementia unit merger, or that any of the five suffered dehydration and malnutrition or any other serious bodily injury as a result of that dementia unit merger; (2) there was no reasonably trustworthy evidence that any of the five named veterans suffered any neglect as a

[1] *Commonwealth* v. *David Clinton*, Hampden County Superior Court Docket No. 2079CR00177

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result of that decision; and (3) neither Mr. Walsh nor Dr. Clinton—whose duties at the Soldiers Home are entirely and exclusively administrative—is a "caretaker," as required and defined in G.L. c. 265, § 13K (a).

I substantially agree with the arguments advanced in both Mr. Walsh's and Dr. Clinton's motions to dismiss. The five named veterans were *already* exposed to Covid-19 before the dementia unit merger ever occurred. There was insufficient reasonably trustworthy evidence presented to the grand jury that, had these two dementia units not been merged, the medical condition of any of these five veterans would have been materially different. Therefore, because the evidence does not support a finding of probable cause to believe Mr. Walsh or Dr. Clinton committed any crime, I must dismiss the indictments against both.

FACTUAL AND PROCEDURAL BACKGROUND

The following facts are taken from the record of evidence presented to the grand jury, with some facts reserved for later discussion.[2] Indictments 20-0178-1 through 20-0178-5, against Mr. Walsh, pertain to the alleged neglect of veterans A.P., G.T., G.E., R.C., and R.T.[3] (collectively, "five named veterans"), while indictments 20-0178-6 through 20-0178-10 pertain to the alleged serious bodily injury of those veterans. Likewise, indictments 20-0177-1 through 20-0177-5, against Dr. Clinton, pertain to the alleged neglect of the five named veterans, while indictments 20-0177-6 through 20-0178-10 pertain to the alleged serious bodily injury of those veterans.

[2] The grand jury transcripts are cited Tr.[date:month-day]/[page].

[3] The grand jury transcripts contain the five veterans' full names, in which light I have conducted my review of the evidence presented. For reasons of medical privacy, however, and because the parties do so, I continue to refer to the veterans by their initials.

In early 2020, Covid-19 began spreading rapidly throughout the world, including the United States. On March 10, 2020, the World Health Organization designated the outbreak as a Pandemic Health Emergency. On March 13, the Massachusetts Department of Public Health ("DPH") issued an order for nursing homes to shut down visitation, effective March 16. Despite this, many elderly residents of nursing homes and long-term care facilities in Massachusetts contracted Covid-19. In addition, many nursing home staff became sick, or failed to report to work because of mandatory quarantine periods following exposure to Covid-19 or because of concerns about contracting the virus.[4]

At that time, Mr. Walsh was the superintendent of the Soldiers' Home, a long-term care facility providing care for approximately 226 veterans. Tr.9-14/13-14. Mr. Walsh was responsible for acting as its administrative head and appointing, among others, the Soldiers' Home's medical director, Dr. Clinton. As medical director, Dr. Clinton was "responsible for any medical, surgical, outpatient facilities within the Soldiers' Home" and was "also responsible for making recommendations" to Mr. Walsh regarding hiring doctors, nurses, and assistants. G.L. c. 6, § 71. Significantly, the Commonwealth failed to present the grand jury with any evidence that the duties of either Mr. Walsh or Dr. Clinton included providing any clinical or other direct care to any veteran.

As a result of concerns about the potential spread of Covid-19 among the veterans and staff, in March 2020 Mr. Walsh, Dr. Clinton, and the rest of the Soldiers' Home executive team began holding twice-daily meetings to discuss infection control practices and plan responses to any outbreak. Tr.9-14/51; Ex. 2A, 2O, 2Q, 2A-C, 2A-J. Although staff at the Soldiers' Home

[4] For instance, on March 27, 2020, the Executive Office of Health and Human Services ("EOHHS") advised a union representative for the Soldiers' Home's care staff that they were aware of "another double digit call out" of "approximately 12 staff for second shift and expected to rise."

attempted to educate veterans regarding safety protocols to reduce their risk of contracting Covid-19, such as handwashing, social distancing, and masking, they were unable to guarantee that all veterans would follow these protocols. Ex. 2I, 2J. In particular, it was common for veterans diagnosed with dementia, who resided in Care Center 1 of the Soldiers' Home, to wander throughout the common areas of that housing unit and in and out of other veterans' rooms. Tr.9-14/65. This was unavoidable. As a matter of medical ethics, these veterans could not be "physically or chemically restrained" from wandering. Tr.9-14/86-87. As late as March 26, 2020, DPH confirmed to staff at the Soldiers' Home that it was "not appropriate" to confine veterans with dementia to their rooms, even as an infection control measure. Ex. 2J. At that time—before the unit merger, the *sole* criminal act alleged on these indictment—the five named veterans all resided in Care Center 1, and all five had *already* been exposed to one or more roommates who had *already* tested positive for Covid-19.[5] Tr. 9-24/53-54, 58-59, 62-63, 68-69.

Callouts among nursing staff became "very bad" during the week of March 23, 2020. Tr.9-14/90. Many nurses "were afraid of contracting" Covid-19 or were "afraid that they had been exposed . . . or that they were symptomatic." Tr.9-14/36. Due to the callouts, there was "not enough clinical help to safely care for the veterans" under the Soldiers' Home's usual setup. Tr.9-14/100, 172.

On March 27, Mr. Walsh contacted Francisco Ureña, the Secretary of Veterans' Services, to "formally request national guard assistance (medical personnel wise) to assist in our staffing for this pandemic" to provide medical assistance and help alleviate the staffing

[5] Two of the five named veterans, G.E. and G.T., were roommates with each other and with several other individuals; it was one of these *other* individuals who tested positive for Covid-19 prior to the unit merger.

shortage.[6] Ex. 2B-P. Secretary Ureña's sole response to Mr. Walsh's plea for National Guard medical assistance was that he was "trying to get some calls in," (Ex. 2B), leaving Mr. Walsh's request in limbo; no National Guard members were deployed to the Soldiers' Home until March 31, the day after Mr. Walsh's removal as superintendent. In addition, to best utilize the depleted nursing staff, Mr. Walsh and Dr. Clinton agreed that all the veterans in Unit 1-North and Unit 2-North of Care Center 1 would be merged into a single care unit (hereinafter, "merged unit"), segregated by Covid-19 status. Tr.9-14/37, 106-107, 112-113. As part of this merger, nine veterans who had been exposed to Covid-19 but were assessed as asymptomatic—including the five named veterans—were moved out of their rooms and into temporary beds in Care Center 1's dining room. Tr. 9-24/53-54, 58-59, 62-63, 68-69.

Throughout late March, the number of Covid-19 cases and deaths at the Soldiers' Home rose rapidly. On March 20, the Soldiers' Home had no confirmed Covid-19 cases, although it reported that one veteran in Unit 1-North had a test pending. Ex. 2C. On March 22, 2020, that test returned a positive result for Covid-19 and Mr. Walsh notified the Soldiers' Home staff accordingly. Ex. 2D. By March 27, the day of the unit merger, there were a total of seven confirmed Covid-19 cases throughout the Soldiers' Home, including four confirmed cases in Unit 1-North and one confirmed case in Unit 2-North. Ex. 2A-J, 2A-G. By March 30, the day Mr. Walsh was removed as superintendent, there were fourteen confirmed cases and six veterans had died after testing positive for Covid-19. Ex. 2A-J. Twenty-three more veterans were awaiting test results and three had died while test results were pending. Ex. 2A-J. In addition, thirty staff members were absent due to quarantine requirements following Covid-19 exposure. Ex. 2A-J.

[6] At 1:04 p.m. on March 27, EOHHS told Mr. Walsh that it had "asked how to request assistance from the National Guard." Ex. 2P. At 1:24 p.m., Mr. Walsh emailed Secretary Ureña to formally request National Guard assistance Ex. 2B-P.

On March 30, 2020, Mr. Walsh was put on administrative leave and Valenda Liptak, a registered nurse and the CEO of Western Massachusetts Hospital, took administrative charge of the Soldiers' Home. Tr.9-14/132; Ex. 2T. Ms. Liptak testified before the grand jury that when she first arrived at the Soldiers' Home and toured the merged unit, two veterans told her that they were hungry. Tr.9-14/138-39. She also observed that the ratio of care staff to veterans appeared to her to be insufficient to clothe, feed, and hydrate all the veterans and that there were a number of veterans wandering in the common spaces and in and out of rooms. Tr.9-14/139. As a result, she immediately directed that the veterans be separated and hydrated. Tr.9-14/139-40. She also testified that the problem with consolidating Unit 1-North and Unit 2-North was that "you're now exposing them [the veterans] to multiple people who were probably already [Covid-19] positive based on the test results of how many were positive on that unit, so it's just you're increasing the odds." Tr.9-14/159-60. Significantly, Ms. Liptak did not testify that any of the five named veterans, or any others, were in fact dehydrated or malnourished at any point.

Jillian Orzechowski, a social worker at the Soldiers' Home, testified that she became concerned that some veterans[7] in the merged unit were not receiving adequate food, water, or pain medication. Tr.9-14/178-179. Michael Miller, the son of another veteran (not one of the five veterans named in the indictments) in the merged unit, testified that when he visited his father on the weekend of March 27- 29, his father was unable to take medication due to difficulty swallowing and Mr. Miller personally attempted to keep him hydrated. Tr.9-17/191, 203. Ms. Liptak, Ms. Orzechowski, and Mr. Miller all described the merged unit as disorganized, chaotic, and confused. Tr.9-14/139, 176; Tr.9-17/192-93. But none of the three witnesses, nor any other witness, testified to the grand jury that *any* of the five veterans named in the indictments

[7] Ms. Orzechowski did not identify any of the five named veterans – or any specific veterans at all – as the subjects of her concern.

experienced any adverse symptoms while housed in the merged unit, or that their only exposure to Covid-19 was *after* they moved to that unit.

Vanessa Lauziere, the chief nursing officer at the Soldiers' Home, also testified before the grand jury pursuant to an immunity agreement. Tr.9-14/42-43. Ms. Lauziere testified that "[t]he primary employees at the home who provide direct care to veterans are nurses and certified nursing assistants." Tr. 9-14/48. She identified Dr. Clinton as "the ultimate sort of decision maker on medical decisions" at the Soldiers' Home and agreed that in terms of "clinical" matters he was "the top of the chain of command." Tr.9-14/57-58. She also testified that she "would imagine" that as superintendent, Mr. Walsh could overrule Dr. Clinton's decisions. Tr. 9-14/58.

The Commonwealth also presented testimony from two medical experts, Dr. Asif Merchant and Dr. Ronald Rosen. Dr. Merchant testified that the merger was "not good infection control," which presented a risk that the five named veterans (among others) would contract Covid-19. Tr.9-24/79. But he testified that it was *not possible* to know the Covid-19 status of the five named veterans at the time of the merger, because they *already* had been exposed to Covid-19 before the merger but not yet been tested. Tr.9-24/55, 59, 63-64, 67-68, 70.

With respect to R.C., Dr. Merchant was asked, "[G]iven that [R.C.] was living in a room with . . . symptomatic people, what did that tell you regarding [R.C.'s] potential COVID status on the date of the consolidation?" Tr.9-24/55. He responded, "Well, we *wouldn't know* what his COVID status was, you know, if he wasn't tested. But he was exposed, yes." *Id.* The Commonwealth inquired further, "So despite being in a room with individuals who are COVID symptomatic, can you just assume that [R.C.] was also infected?" Tr.9-24/55-56. Dr. Merchant responded, "*No, you can't assume anything in medicine,* you know." Tr.9-24/56. Among the five named veterans, R.C. is one of the two who did not test positive for Covid-19 on March 31. Ex. 14. There was no evidence presented to the grand jury that R.C. ever contracted Covid-19.

With respect to G.E., Dr. Merchant was asked, "So [G.E.] was in a room with one confirmed positive and another individual exhibiting symptoms. And what does that tell you regarding [G.E.'s] status, COVID status [prior to the merger]?" Tr.9-24/59. He responded, "Well, it *doesn't tell me* about his status, but yes, he's exposed to COVID-19, yes." *Id.*

With respect to R.T., Dr. Merchant was asked, "So [R.T.], *prior* to the consolidation, was in a room with three other individuals exhibiting COVID symptoms. What did that tell you regarding [R.T.'s] COVID status?" Tr.9-24/63. He responded, "That he was exposed to COVID-19." *Id.* The Commonwealth inquired further, "Okay. But can we assume that he had COVID as of 3/27?" Tr.9-24/64. Dr. Merchant responded, "*No*, you can't assume that." *Id.*

With respect to G.T., Dr. Merchant testified as follows:

> "Q. Alright. So [G.T.], he was administered a COVID test on March 31; is that right?
> A. Yes.
> Q. Alright. Okay. And that test in fact came back negative on April 2?
> A. That's correct
> Q. Okay. The fact that [G.T.] was negative on 3/31 . . . assuming that test was correct, [G.T.] was negative on 3/27; is that correct?
> A. Yes.
> . . .
> Q. Okay. And as we stated earlier, [there was a] third roommate in this room along with [G.T.] and [G.E.]?
> A. Right.
> Q. And [the third roommate] had in fact tested positive for COVID on 3/27; is that right?
> A. Yes.
> Q. Again, assuming that that test was correct, [G.T.] did not have COVID as to the time of the [merger]; is that right?
> A. Yes.
> . . .
> Q. Okay. Similar to [R.C.], the fact that [G.T.] ultimately tested negative as of 3/31, this is another example of why you *cannot necessarily assume* someone is COVID-positive *just because they've been exposed*; is that correct?"

> A. Yes, and I think this is consistent with my other observations at other skilled nursing facilities where *not everybody who's exposed to it will contract the disease*. It's, you know, sometimes it's surprising but it does happen all the time."

Tr.9-24/66-68. As with R.C., there was no evidence presented to the grand jury that G.T. ever contracted Covid-19.

Finally, with respect to A.P., Dr. Merchant was asked, "[I]t's fair to say that even though he had roommates who were displaying symptoms, he, as you said, [was] relatively asymptomatic; is that right?" Tr. 9-24/70. He responded, "Yes." *Id.* The Commonwealth inquired further, "Okay. And it certainly *doesn't* mean that he had necessarily contracted COVID as of 3/27; is that correct?" *Id.* Dr. Merchant responded, "That's correct." *Id.*

Thus, for example, according the Commonwealth's expert testimony presented to the grand jury, G.E., R.T., and A.P., who were all asymptomatic on March 27 but tested positive on March 31, had *already* been exposed to Covid-19 *prior* to the unit merger, and therefore, may or may not have *already* contracted Covid-19, and have *already* been in an incubation period *before* they were moved to the merged unit. Tr.9-24/60-61, 64, 71. The incubation period for Covid-19 ranges from two days to two weeks, with an average of four or five days. Tr. 9-24/228.

Dr. Rosen similarly testified that the merger likely increased the risk of exposure to Covid-19 to the *already* exposed named veterans. Tr.9-24/128. He characterized the decision to move the five named veterans and others into the dining room as a decision that "since the veterans had *already* had some kind of exposure [from their previous roommates] that it would be *okay to continue exposing* them . . . ." Tr.9-24/133. Neither Dr. Merchant nor Dr. Rosen testified that the five named veterans—or any other veterans housed in either the merged unit or any other housing area—*ever* became dehydrated or malnourished.

Following the grand jury's issuance of the indictments, Mr. Walsh filed a motion to dismiss on April 21, 2021, arguing that the indictments against him under §13K (e) should be dismissed because his conduct was not wanton or reckless, because exposure to Covid-19 alone does not constitute "serious bodily injury," and because there was insufficient evidence that the five named veterans had suffered serious bodily harm in the form of dehydration or malnutrition. Dr. Clinton also filed a motion to dismiss on May 24, 2021, arguing that as an administrator he is not a "caretaker" a defined in G.L. c. 265, § 13K (a) and that there was no evidence of any of the five named suffered any "serious bodily injury" within the meaning of § 13K (e).

Mr. Walsh then filed three additional motions to dismiss on July 26, 2021. The first, entitled "Motion to Dismiss All Counts," argues that Mr. Walsh is also not a statutory "caretaker" and that, if he is now construed to be one, the statute is void for vagueness as applied. The second, entitled "Motion to Dismiss Counts 6-10 Alleging a Violation of Mass. Gen. Laws. C. 265:13K (D1/2)," reiterates the argument that Mr. Walsh's conduct was not wanton or reckless and further argues that the merger of the dementia units did not result in "neglect" of the five named veterans because it did not create a substantial likelihood of harm.[8]

DISCUSSION

Ordinarily, courts do not inquire into the sufficiency of the evidence presented to a grand jury. *Commonwealth* v. *Robinson,* 373 Mass. 591, 592 (1977). However, "'[t]he grand jury must be presented with evidence on each of the . . . elements' of each offense charged in order for an

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[8] Mr. Walsh's third, entitled "Motion to Dismiss Commonwealth v. O'Dell," argues that the overall presentation of evidence to the grand jury was unfair and misleading because it suggested that Mr. Walsh could and should have sent veterans for care at Holyoke Medical Center; suggested that Mr. Walsh had legal authority to overrule Dr. Clinton's medical decisions; and failed to present exculpatory evidence regarding the care provided to the five named veterans and the medical opinions offered by individuals the Commonwealth's investigator interviewed. In light of my order, I need not address the merits of the O'Dell motion, and procedurally, will deny it without prejudice.

indictment to stand." *Commonwealth* v. *Hanright*, 466 Mass. 303, 312 (2013) (abrogated on other grounds by *Commonwealth* v. *Brown*, 477 Mass. 805 (2017)), quoting *Commonwealth* v. *Moran*, 453 Mass. 880, 884 (2009). If the grand jury does not at least "hear sufficient evidence to establish the identity of the accused . . . and probable cause to arrest him," the indictment must be dismissed. *Commonwealth* v. *McCarthy*, 385 Mass. 160, 163 (1973), citing *Connor* v. *Commonwealth*, 363 Mass. 572 (1973), and *Lataille* v. *Dist. Ct. of E. Hampden*, 366 Mass. 525 (1974).

The evidence before the grand jury must consist of "reasonably trustworthy" information sufficient to warrant a reasonable or prudent person in believing that the defendant has committed the offense. *McCarthy*, 385 Mass. at 162-163, citing *Commonwealth v. Stevens*, 362 Mass. 24, 26 (1972), quoting *Beck v. Ohio*, 379 U.S. 89, 91 (1964). Otherwise, the indictment against him is "fatally defective." *Connor*, 363 Mass. at 574.

In making this determination, I review the evidence and the *permissible* inferences therefrom. *Commonwealth* v. *Club Caravan, Inc.*, 30 Mass. App. Ct. 561, 566-567 (1991). Because these indictments are premised upon alleged bodily injuries and medical determinations, "[e]xpert testimony is required where an inference is 'beyond [the] common knowledge and experience of the ordinary lay[person]'" (quotation omitted). *Commonwealth v. Walters*, 485 Mass. 271, 291 (2020), quoting *Commonwealth v. Scott*, 464 Mass. 355, 363 (2013).

Probable cause does not require "evidence sufficient to warrant a conviction," but it must be "more than mere suspicion." *Commonwealth* v. *Hason,* 387 Mass. 169, 174 (1982). Such a standard "is necessary if indictments are to fulfil their traditional function as an effective protection 'against unfounded criminal prosecutions.'" *McCarthy*, 385 Mass. at 163, quoting *Lataille*, 366 Mass. at 532. It is founded upon "a proper concern for the integrity of grand jury proceedings without substantially affecting the grand jury's historic function as an investigative and accusatory body, or its procedures." *Commonwealth* v. *O'Dell*, 392 Mass. 445, 450 (1984).

A. Committing or Permitting "Serious Bodily Injury"

General Laws c. 265, § 13K (e), makes it unlawful for the "caretaker of an elder" to "wantonly or recklessly permit[] serious bodily injury to such elder . . . ." The statute defines "serious bodily injury" as "bodily injury which results in a permanent disfigurement, protracted loss or impairment of a bodily function, limb or organ, or substantial risk of death." G.L. c. 265, § 13K (a). In this case, it is alleged that by deciding to merge Unit 1-North and Unit 2-North, Mr. Walsh and Dr. Clinton permitted serious bodily injury to the five named veterans, in two forms: (1) an increased "risk" of contracting Covid-19, and (2) dehydration and malnutrition.

As to the increased risk of contracting Covid-19, the Commonwealth conceded at oral argument that it is presenting a "novel" theory of liability under § 13K (e). It argues, however, that because contracting Covid-19 presents a "substantial risk of death," particularly for individuals of advanced age or with certain medical conditions, the mere risk of contracting the virus is sufficient to constitute a bodily injury. This is not at all what the statute says. There must be a discernible "bodily injury" in the first instance, before it can be determined whether that injury has "result[ed] in a . . . substantial risk of death." See *Commonwealth* v. *Roderiques*, 462 Mass. 415, 423 (2012) ("substantial bodily injury" under parallel language in G.L. c. 265, § 13J (b), requires risk of injury to "come to fruition in the form of an actual injury").

A mere risk of injury is not itself an injury. The Commonwealth's position—that it is unlawful for a caretaker to permit a *substantial risk of death* to an elder—would effectively remove the words "bodily injury" from § 13K (e). *Commonwealth* v. *LaBrie*, 473 Mass. 754 (2016), is instructive. In that case, the court explained, "we read [G.L. c. 265, §§ 13K (a) and

13J (a)] to define 'substantial bodily injury' as a 'bodily injury' that *results in* (1) a permanent disfigurement, *or* (2) protracted loss or impairment of a bodily function . . . , *or* (3) substantial risk of death" (emphasis added). *Id.* at 766 n.28. Therefore, under G.L. c. 265, § 13K (e), the evidence was insufficient because defendant's failure to give her child medication proved no "substantial bodily injury," as the resulting increased death risk was not "bodily injury" or "serious bodily injury," and an opinion that it "likely" caused treatment-resistant cancer did not prove she caused it. *Id.* at 768 The Commonwealth's reading is not a tenable interpretation of the statute, because it fails to "give meaning to each word in the legislation" and would render the bodily injury language "superfluous." *Int'l Org. of Masters, etc.* v. *Woods Hole, Martha's Vineyard & Nantucket S.S. Auth.*, 392 Mass. 811, 813 (1984).

Nor does the Commonwealth argue that the defendants' decision to merge the units caused any of the five named veterans to contract Covid-19.[9] As Dr. Asif testified, the three named veterans who tested positive for Covid-19 as of March 31 may have contracted it in the merged unit or, given the days-long incubation period for Covid-19, they may have *already* had it prior to the merger as a result of exposure from their roommates. For this reason, the Commonwealth cannot take the position that the decision to merge the units caused the five named veterans to actually contract Covid-19, and that such illness was the "bodily injury" that resulted in a substantial risk of death to the five named veterans; rather, the Commonwealth must rely on its "novel" risk-exposure theory which, as discussed *supra*, is unavailing.

With respect to dehydration and malnutrition, the grand jury heard no evidence from which it could reasonably infer that any of the five named veterans suffered a "serious bodily injury" as defined in § 13K (a). Several witnesses testified that the general conditions in the

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[9] All the five named veterans were tested for Covid-19 on March 31, 2020. The return of those results on April 2 showed that A.P., G.E., and R.T. had Covid-19, while G.T. and R.C. did not. Ex. 14.

merged unit led them to believe that additional steps needed to be taken to ensure the veterans were adequately fed and hydrated. One, Mr. Miller, testified that staff were not adequately hydrating his father and that he had to do so himself. But Mr. Miller's father is *not* one of the five veterans named in the indictments. The only evidence pertaining to the five named veterans during the relevant period is in the form of their medical records from March 29, two days after the merger and one day before Mr. Walsh's removal as superintendent. None of their record entries reveal any issues with the five named veterans' hydration or nutrition. The available evidence is to the contrary. A.P. was noted to have a "good appetite" and to be "taking fluids." Ex. 2B-A. G.T. and G.E.'s nurse notes contain temperatures and pulse oximeter readings, but no information about their hydration and nutrition. *Id.* R.C. was noted to have "no issues." *Id.* R.T. was "refusing regular meds," but there was no entry that he was refusing or unable to take food or fluids. *Id.*

The grand jury could not fairly infer that the five named veterans suffered from dehydration and/or malnourishment simply because staff raised *concerns* that *other* veterans in the merged unit, not named in the indictment, were the subject of steps to ensure they were adequately fed and hydrated. The evidence presented as to the five named veterans' conditions does not support—and in the cases of A.P and R.C. directly contradicts—such an inference. In sum, the evidence before the grand jury supported, at most, a "mere suspicion," of such conditions, which is insufficient to sustain the indictments. *Hason,* 387 Mass. at 174.

In addition, there was no evidence that any of the veterans in the merged unit suffered even symptoms related to dehydration or malnutrition to such an extent that it constituted serious bodily injury. While conditions such as "[a]sphyxiation . . . malnutrition and dehydration . . . *may* cause substantial impairment of the physical condition" (emphasis added), no Massachusetts court has held that they are a *per se* substantial bodily injury in every instance; rather, it is only where such conditions "create[] a protracted impairment of heart, lung, or brain function or a substantial risk of death" that they rise to the level of a "substantial bodily injury." *Commonwealth* v. *Chapman*, 433 Mass. 481, 484 (2001) (addressing parallel language in G.L. c. 265, § 13J). While Ms. Liptak and others testified about the general state of the merged unit, nothing they said suggested that any veterans—much less any one of the five named veterans—were dehydrated or malnourished to the point they suffered the kind of injury contemplated by § 13K (e). There was no evidence put before the grand jury that a single veteran in the merged unit was diagnosed with dehydration or malnutrition, or with any related illnesses of organ failure or other impairments of bodily function arising from dehydration or malnutrition, nor that any veteran was at substantial risk of death from those conditions such that additional or emergency measures needed to be taken.

For all the foregoing reasons, the Commonwealth failed to present the grand jury with sufficient trustworthy evidence on the element of substantial bodily injury to support a finding of probable cause. Therefore, indictments 20-178-1, 20-178-2, 20-178-3, 20-178-4, and 20-178-5 against Mr. Walsh, alleging serious bodily injury to the five named veterans in violation of G.L. c. 265, § 13K (e), must be dismissed. Indictments 20-177-1, 20-177-2, 20-177-3, 20-177-4, and 20-177-5 against Dr. Clinton, alleging the same, must also be dismissed.

B. Committing or Permitting "Neglect"

General Laws c. 265, § 13K (d½), makes it unlawful for the "caretaker of an elder" to "wantonly or recklessly commit[] or permit[] another to commit abuse, neglect or mistreatment upon such elder . . . ." "Neglect" is defined as "the failure to provide treatment or services necessary to maintain health and safety and which either harms or creates a substantial likelihood of harm." In this case, as with the charges under § 13K (e), it is alleged that by deciding to merge Unit 1-North and Unit 2-North, Mr. Walsh and Dr. Clinton committed neglect of the five named veterans because the merger (1) increased their "risk" of contracting Covid-19 and (2) caused them to suffer dehydration and malnutrition.

In this respect, the Commonwealth's argument regarding the risk of the five named veterans contracting Covid-19 is, arguably, less weak than under § 13K (e), because § 13K (d½) explicitly contemplates that a "substantial likelihood of harm" by itself may (or may not) constitutes neglect. See *Commonwealth v. LaBrie*, 473 Mass. at 768.[10]

However, it is not enough to satisfy §13K (d½) that there be a substantial likelihood of harm to the alleged victim; the statute requires proof that such "likelihood of harm" have been "create[d]" by the caretaker's actions. The grand jury could not reasonably infer that it *was or was not* the defendants' merger of the two dementia units that *created* any substantial likelihood of harm. That is because the Commonwealth's expert testimony, presented to the grand jury by Dr. Asif Merchant and Dr. Ronald Rosen, confirmed that the likelihood of exposure to Covid-19 by the wandering of *all* veterans was a *preexisting* situation. Before the merger of the two dementia units on March 27th, *all* the veterans suffering from dementia—including the five named veterans—wandered freely throughout *all* the units, and necessarily, each of the five had *already* been exposed to Covid-19 positive veterans. The wandering by veterans with dementia,

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[10] In *LaBrie*, the Supreme Judicial Court cautioned: "[A]n [expert] opinion that a particular result is '*likely*' *does not appear to be sufficient to permit a finding that the defendant's actions actually caused* the more treatment-resistant form of cancer to occur. [note omitted] Given that, according to the evidence, even with full treatment ten to fifteen per cent of children still succumb to the cancer, just as the Commonwealth admittedly could not prove beyond a reasonable doubt that the defendant's actions caused Peter's death from cancer, so it appears that the Commonwealth would not be able to prove that the defendant's actions caused him to relapse and become ill with a more treatment-resistant form of cancer." (emphasis added).

to and from all units, was simply unavoidable due to the ethical rules prohibiting restraints on dementia patients' movement throughout the Soldiers Home.

Here, as Ms. Lauziere testified, it would have been a violation of medical ethics to restrain even symptomatic veterans from wandering. DPH confirmed as much on March 26, 2020, when it advised even prior to the unit merger that staff was not permitted to confine veterans with dementia to their rooms to prevent them from wandering the units in violation of social distancing protocols. In addition, Dr. Merchant testified that pre-merger all five of the five named veterans had *already* been exposed to Covid-19 through their then-roommates, and thus were already at some risk of having contracted it. Dr. Merchant and Dr. Rosen both opined that the merger merely increased the likelihood or risk of *further* Covid-19 exposure, acknowledging that the risk *already* existed prior to the merger. Tr.9-24/43, 127-28. Similarly, Ms. Liptak testified only that the merger "increas[ed] the odds" of exposure to Covid-19. Tr. 9-14/160.

It is sheer speculation that the five named veterans' risk of exposure to Covid-19 veterans happened *after* the dementia unit merger, rather than *before*. *Commonwealth v. Scott*, 464 Mass. at 364. There was insufficient reasonably trustworthy evidence presented to the grand jury that, but for the merger of these two dementia units, the medical condition of any of these five veterans would have been materially different. In particular, the grand jury heard no expert evidence to support this medical conclusion.[11]

[11] "While medical testimony may not be required in every instance to establish that a victim has suffered serious injury resulting in impairment to an organ, the Commonwealth bears the burden of establishing the severity of an injury through its impact on the structure of the victim's organ and its consequent effect on the ability of the organ to perform its usual function. Medical records containing technical terminology that require jurors to speculate on the meaning of key terms will be insufficient, without more, to meet this burden." *Scott*, supra, adding at n.9: "In those rare instances where issues of injury and causation are 'within general human knowledge and experience,' an expert may not be necessary," citing *Pitts v. Wingate at Brighton, Inc.*, 82 Mass. App. Ct. 285, 290 (2012).

In sum, although the evidence presented to the grand jury was sufficient to establish that the five named veterans were at risk of contracting Covid-19 (and therefore *may* have faced a substantial likelihood of harm), the defendants are not charged generally with administering the Soldiers' Home in such a manner as to permit that risk to arise. Rather, the indictments identify a single, solitary act that comprise the entirety of the defendants' criminal conduct: their decision to merge Unit 1-North and Unit 2-North. All the evidence presented to the grand jury was that the five named veterans were *already* at risk of contracting Covid-19 before the merger. In other words, the Commonwealth presented no evidence that *the specific conduct identified in the indictments* is what created a substantial likelihood of harm to the five named veterans. See *McCarthy*, 385 Mass. at 161 (indictment deficient where "grand jury heard no evidence that [defendant] had engaged in criminal activity").

The Commonwealth's argument that the five named veterans suffered "neglect" under § 13K (d½) and resulting dehydration and malnutrition, suffers from the same defects as the Commonwealth's argument with respect to claims of dehydration and malnutrition under §13K (e). The grand jury could not reasonably infer, from the evidence presented, that the five named veterans *ever* suffered from dehydration and malnutrition, nor was there evidence that any veterans in the merged unit may have suffered from those conditions to such an extent that they created a substantial likelihood of harm.[12]

For all the foregoing reasons, indictments 20-178-6, 20-178-7, 20-178-8, 20-178-9, and 20-178-10 against Mr. Walsh, alleging neglect of the five named veterans in violation of G.L. c.

[12] To reiterate, neither Dr. Merchant nor Dr. Rosen—nor any other witness—testified to the grand jury that any of the five named veterans—or any other veterans housed in either the merged unit or any other housing area—ever became dehydrated or malnourished.

265, § 13K (d½), must be dismissed. Indictments 20-177-6, 20-177-7, 20-177-8, 20-177-9, and 20-177-10 against Dr. Clinton, alleging the same, must also be dismissed.

C. Definition of "Caretaker"

Even if the evidence were sufficient to support a finding of probable cause to believe that the five named veterans suffered bodily injury and neglect, the charges against Mr. Walsh and Dr. Clinton must still be dismissed because neither defendant is the "caretaker of an elder," as required by §§ 13K (d½) and (e). As the Commonwealth conceded at the hearing, no court has held that an administrator making facilities and staffing decisions is a "caretaker," meaning a "person with responsibility for the care of an elder . . . which responsibility may arise . . . by a voluntary or contractual duty undertaken on behalf of such elder . . . ." G.L. c. 265, § 13K (a). With respect to such a contractual duty, "it may be inferred that a person who receives monetary or personal benefit or gain as a result of a bargained-for agreement to be responsible for providing *primary and substantial assistance* for the care of an elder . . . is a caretaker" (emphasis added). G.L. c. 265, § 13K (a) (iii).

What employment duties constitute "primary and substantial assistance" is not defined anywhere in § 13K or in applicable case law. Only one unreported decision appears to have addressed the term: *Commonwealth* v. *Shartrand*, 92 Mass. App. Ct. 1103 (2017) (Rule 1:28 decision), which is instructive. There, a panel of the Appeals Court had no reservations in determining that a defendant "employed as a CNA [certified nursing assistant] on the victim's unit," *id.* at *5, was the victim's caretaker, citing the definition set forth in § 13K (a) (iii). In this respect, I note that the word "primary," when used in the context of medical or nursing care, has a specific and distinct meaning, as in the phrase "primary care"—that is, "health care provided by a medical professional (such as a general practitioner, pediatrician, or nurse) with whom a patient has initial contact and by whom the patient may be referred to a specialist." *Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/primary%20care (last visited November 10, 2021). This was the level of care provided by the defendant CNA in *Shartrand* who, although he was one of several CNAs assigned to the victim's unit and may not have been the primary (i.e., main) individual responsible for her care, provided primary (*i.e.,* direct) care or assistance for such care. By contrast, here there was no evidence before the grand jury that Mr. Walsh or Dr. Clinton's employment duties included providing either "primary" or "substantial" assistance, much less both, under G.L. c. 265, § 13K (a) (iii),[13] to any of the five named veterans, or any veteran at the Soldiers' Home.

A statute defines the duties of both defendants. G.L. c. 6, § 71, provides that Mr. Walsh, the superintendent of the Soldiers' Home in Holyoke is the "administrative head of the home," with authority (subject to approval of the trustees) to "appoint . . . a medical director, a treasurer and an assistant treasurer." Dr. Clinton, "[t]he medical director[,] shall have responsibility for the medical, surgical and outpatient *facilities* and shall make recommendations to the superintendent regarding the *appointments* of all physicians, nurses and other medical staff" (emphasis added). *Id.* Nothing in § 71 suggests that the responsibilities of the superintendent or the medical director include any patient care or assistance, much less "primary and substantial" assistance. Again, the Commonwealth concedes—as it must—that this case would be the first instance in which facility administrators, rather than actual care providers, were held criminally liable under §§ 13K (d½) or (e). See *LaBrie*, 473 Mass. at 755-56 (defendant mother was caretaker of her disabled child); *Shartrand*, 92 Mass. App. Ct. at *5 (CNA assigned to victim's unit was

[13] G.L. c. . 265, § 13K (a) (iii) "Responsibility arising from a contractual duty", it may be inferred that a person who receives monetary or personal benefit or gain as a result of a bargained–for agreement to be responsible for providing primary and substantial assistance for the care of an elder or person with a disability is a caretaker."

caretaker); *Commonwealth* v. *Cruz*, 88 Mass. App. Ct. 206, 207 (2015) (son who resided with mother and left job to provide full-time care was caretaker); *Commonwealth* v. *Boghossian*, 36 Mass. L. Rptr. 41 (2019) (Krupp, J.) (daughter who handled impaired father's finances and medical appointments was caretaker).[14]

In sum, nothing in the language of § 13K or relevant case law signals that it is intended to apply to high-level administrators who are not involved in providing patient care. The statute "fail[s] to place a person of ordinary intelligence on notice" that such administrative actions may be subject to criminal liability. *Chapman*, 433 Mass. at 487. Were it to be applied to these defendants, it would be void for vagueness. See *id.*

I am also mindful that although the Commonwealth attempts to transform both Mr. Walsh and Dr. Clinton into a statutory "caretaker" by arguing that they were responsible for *decisions* regarding the health and medical care of the veterans, the Commonwealth elsewhere argues that the unit merger was an administrative decision made for staffing reasons and was not undertaken as a patient care measure. On this point, the Commonwealth is correct. The only evidence presented to the grand jury was that in deciding to merge Unit 1-North and Unit 2-North, Mr. Walsh and Dr. Clinton were acting as administrators responsible for managing the overall operations of the Soldiers' Home amidst simultaneous staffing and infectious disease

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[14] A July 20, 1970 opinion of the Attorney General provides further support for the notion that the superintendent and medical director of the Soldiers' Home are not responsible for providing the kind of "primary and substantial assistance" for veterans' care contemplated by § 13K (a) (iii). See *Mahajan* v. *Dep't of Env. Protection*, 464 Mass. 604, 613 (2013) (opinion of Attorney General "is entitled to careful judicial consideration"). The Attorney General interpreted the division of responsibilities between the superintendent and medical director of the Holyoke Soldiers' Home to mean that "while the superintendent is responsible for the administration of the home, he cannot, in the performance of his duties, interfere in the control and supervision of the hospital or other medical facilities." Report of the Attorney General for the Year Ending June 30, 1971, p. 35. The Attorney General further opined that "disputes as to the control or supervision of personnel who are in the hospital relating to matters other than the professional care of patients would have to be resolved on a case by case basis" (emphasis added), again suggesting that the superintendent and medical director's responsibilities are to manage the Soldiers' Home's facilities and personnel, not to provide direct care to patients. *Id.*

crises. Neither was a "caretaker" providing "primary and substantial assistance," G.L. c. 265, § 13K (a) (iii), for the care of the veterans. Therefore, apart from the lack of evidence that the five named veterans suffered "serious bodily injury" pursuant to § 13K (e) or "neglect" pursuant to § 13K (d½), all ten indictments against both Mr. Walsh and Dr. Clinton must also be dismissed because the evidence presented was insufficient to establish probable cause to believe that either was a "caretaker" as defined in § 13K (a) (iii), and because the statute would be void for vagueness if applied in such a manner.

ORDER

For the foregoing reasons, David Clinton's Motion to Dismiss is **ALLOWED**. Bennett Walsh's Motions to Dismiss are **ALLOWED**.

Edward J. McDonough Jr.
Justice of the Superior Court
Date: 11-22-21