Care Workers in the Covid-19 Pandemic: Questions of Injury Compensation from a Gender Perspective

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The outcomes of the Covid-19 pandemic have gendered aspects while illuminating pre-existing inequalities.[1] In line with this,[2] the European Commission has called for a gender-specific analysis of the consequences of Covid-19.[3] This chapter takes the position that although care workers were subjected to new challenges and risks during the Covid-19 pandemic, their gendered socio-economic positions preceded and also characterized this 'emergency'. Both paid and unpaid care work is dominated by women, with accompanying negative socio-economic consequences. The exhaustion of care workers was one of several problems during the pandemic. Changing tasks and the reorganization of crisis management were claimed as factors contributing to tackling the virus and limiting transmission.[4] However, in themselves they also created more stressful situations for workers. Before the pandemic, mental health issues were one of the main problems in the labour market, often relating to stress.[5] These pre-existing problems were exacerbated during the pandemic, in addition to the more pandemic-specific challenges.

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[1] This chapter is a deliverable of the research project, Legislating Corona: Proportionality, Non-Discrimination and Transparency (PRONTO), funded by Independent Research Fund Denmark (Grant number: 0213-00025B) at Centre for Legal Studies Legal Studies in Welfare and Market, the Faculty of Law, University of Copenhagen. I am grateful to the experts who provided inspiration, comments and feedback on different portions of this chapter: Associate Professor Katharina Ó Cathaoir, Professor Laura Carlson, Senior Lecturer Lydia Lundstedt Ph.D, Amalie Giødesen Thystrup Ph.D., Associate Professor Lena Wahlberg, Post.Doc. Daniela Alaattinoğlu Ph.D., Attorney Søren Kjær Jensen, Professor Kirsten Ketscher, Professor Mette Hartlev, research assistant Katrine Hohwy Stokholm and project student Sara Margon Prip. Any mistakes or omissions remain attributable to the author.

[2] This raises questions on which more specific concept of equality is being used, see for instance Martha Albertson Fineman, 'Beyond Identities: The Limits of an Antidiscrimination Approach to Equality' (2012) 92 Boston University Law Review 1713 <https://heinonline.org/HOL/P?h=hein.journals/bulr92&i=1741> accessed 15 August 2021. See for instance Meghan Campbell, Sandra Fredman and Aaron Reeves, 'Palliation or Protection: How Should the Right to Equality Inform the Government's Response to Covid-19?' (2020) 20 International Journal of Discrimination and the Law 183 <http://journals.sagepub.com/doi/10.1177/1358229120969611> accessed 15 August 2021; Sabrina Germain and Adrienne Yong, 'COVID-19 Highlighting Inequalities in Access to Healthcare in England: A Case Study of Ethnic Minority and Migrant Women' (2020) 28 Feminist Legal Studies 301; and Emily A Benfer and others, 'Health Justice Strategies to Combat the Pandemic: Eliminating Discrimination, Poverty, and Health Disparities During and After COVID-19' (2020) 19 Yale Journal of Health Policy, Law, and Ethics 122. As to gendered intersectional problems in the Nordics during the pandemic, see Ida Gundersby Rognlien, 'Legislating Covid-19 in the Nordic Welfare Societies: Poverty, Social Control and Discrimination.' (2021) 29-30 Nordisk socialrättslig tidsskrift 7.

[3] Response given on behalf of the EU Commission by Helena Dalli on 11 September 2020, Ligestillingsudvalget 2019-20 LIU Alm.del - Bilag 118 <https://www.ft.dk/samling/20191/almdel/LIU/bilag/118/2255268.pdf> accessed 15 August 2021.

[4] The Health and Care Administration (SUF) of the Municipality of Copenhagen's report in October 2020, evaluation of SUF's Covid-19 preparedness in the beginning of the pandemic and during summer 2020: Københavns Kommune, Sundheds- og Omsorgsforvaltningen (SUF), Afdelingen for Evaluering, 'Evaluering af SUF's Covid-19 beredskab', October 2020, 4, 24-25 and 40 <https://www.kk.dk/sites/default/files/edoc/Attachments/26686242-38379394-2.pdf>accessed 15 August 2021.

[5] Ekspertudvalget om udredning af arbejdsmiljøindsatsen, 'Et nyt og forbedret arbejdsmiljø - Overvejelser og anbefalinger', Beskæftigelsesudvalget 2017-18 BEU Alm.del Bilag 482.

Statistics from the Danish Body that manages the Labour Market Insurance (*Arbejdsmarkedets Ervervssikring* AES) demonstrate that as of 9 August 2021, more women (6,789) than men (2,583) had claimed AES because of Covid-19 related injuries. Most cases relating to mental health have been denied compensation, with only 5 out of the 191 such claims granted.[6] Most cases where the worker was diagnosed with a Covid-19 infection were approved (1,128 out of the 1,773 cases). Most claims came from work places in the social and health care sector (5,412), where work places such as hospitals dominate (2,381), followed by care homes (940), 'integration of older people' (404), home assistance (267) and kindergartens (202).[7] As more women than men have reported Covid-19 related work injuries to the AES, a gendered inquiry is warranted.

The argument made here is that pre-existing discriminatory structural and institutional problems, namely the subordination of care work as a gendered societal problem, were exacerbated during the Covid-19 pandemic. This entails the risk that women care workers, suffering from stress and mental illness, will not be recognised as such under the law and consequently, not properly compensated for their injuries. Problems relating to, for instance, socio-economic inequality, gender stereotyping, interpretation of individual vulnerability and causation further worsen this situation. The pandemic is still ongoing, so this chapter contains simply initial thoughts and relevant questions that will likely need to be further investigated.

1 Framing the Gendered Problems

The concept of equality is often understood as a principle of equal treatment and redress under the law regardless of structures embedding the individual and different 'levels of tolerance' to exterior sources of harm. Drawing upon critical constructive feminist theory, this chapter asks 'the woman questions' as Bartlett frames it.[8] However, the 'women's experiences' are diverse, and will in this chapter be analysed as structural and intersectional problems. As Fineman argues:

2018, <https://www.ft.dk/samling/20171/almdel/BEU/bilag/482/1944428.pdf> accessed 15 August 2021.

6 While not exhaustive, this chapter uses mostly legal material and cases from the system of the Danish Working Environment Authorities and the Danish Labour Market Insurance, to extrapolate and discuss the underlying risks of reproducing inequality in the legal structures of care work, in addition to the reports of increased stress, risk of front line workers being infected with Covid-19 and lack of personnel and protective equipment. Material after December 2020 is only exceptionally covered in this chapter.

7 Arbejdsmarkedets erhvervssikring 'Tal for anmeldte arbejdsskader relateret til Covid-19 Datatræk pr. 9. august 2021 kl. 07:00' 9 August 2021 <https://www.aes.dk/typer-af-arbejdsskader/Covid-19-og-arbejdsskader> accessed 15 August 2021.

8 Katharine Bartlett, 'Feminist Legal Methods' (1989) 103 Harvard Law Review 829 <https://scholarship.law.duke.edu/faculty_scholarship/148>.

> Social identities are manifested within institutions and do not manifestly reflect individual characteristics, such as race or sex. However, they do represent the allocation of power and privilege between occupants based on the social function of the institution and their social roles within it.[9]

The system created by the law as well as private and social insurance is first described below. The gendered problems relating to the Covid-19 pandemic can be found at several levels, that more women than men do care work, how the concepts of vulnerability and causation are defined, the underlying discriminatory mechanisms in the care work sector and the existing financial protections of the individual's vulnerability.

1.1 Compensation and the Financial Protection of the Individual's Vulnerability

When in need of protection and provision because of vulnerability (an incident such as a work injury or due to old age), a worker may be protected by sources from the private sector (family, insurance, labour market) and/or the public sector (social welfare). The sectors are embedded in different, but also overlapping, legal models and structures. When compared, women in general still tend to depend on the public or spouse for financial support, and men tend to be financially self-sufficient (labour market or insurance).[10] Therefore, it is of interest to analyse how these different systems of sources for support are structured.

A worker's injury is dealt with at the intersection between the general tort law, insurance and the AES. The worker can qualify for insurance (the employer's mandatory insurance), the Labour Market Insurance (the Workers Compensation Act) and/or general tort remedy (the Compensation Act, *erstatningsloven*, EAL), depending, for instance, on the employer's liability and fault. In addition, the worker may qualify for public social insurance and security.[11]

The legal discourses in the social/welfare system risk generating and reproducing inequality (and poverty traps), for instance, due to the national

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9 Martha Albertson Fineman, 'Vulnerability and Inevitable Inequality' (2017) 1 Oslo Law Review 133, 143 <https://www.idunn.no/oslo_law_review/2017/03/vulnerability_and_inevitable_inequality> accessed 15 August 2021.

10 Kirsten Ketscher, *Socialret: Principper, Rettigheder, Værdier* (4. udgave, Karnov Group 2014); and Martine Stagelund Hvidt, *Danske sociale pensioner i EU-retlig og ligestillingsretlig belysning* (1. udgave, 1. oplag, 2016).

11 See more about the connection between the public social security, unemployment insurance and the labour market regulations in Jens Kristiansen, *The Growing Conflict between European Uniformity and National Flexibility: The Case of Danish Flexicurity and European Harmonisation of Working Conditions* (DJØF Publishing 2015). Private financial sources, like insurance will come in addition. Therefore, this is also a question of inequality between people with and without their own financial safety net. On poverty in the Nordics: Ida Gundersby Rognlien, *Fattigdom – Diskriminering – Relasjoner. Grunnleggende forsørgelsesrettslige problemer* (Phd afhandling, Københavns Universitet, 2020).

model, the relational legal regulation and 'the social investment paradigm'.[12] This context serves as a relevant background for understanding the risks within the AES. Historically, as the focus on risks were gradually attached to different kinds of injuries and damages that workers systematically experienced in the labour market, various forms of insurance-based systems were established. Gradually, alongside the development of the welfare state as we know it today (with different kinds of social security benefits, health care, education), the state's responsibility was made an important fulcrum, and the state intervened and monitored the parties at the labour market to protect workers, as with the Labour Market Insurance (AES).[13]

The Worker's Compensation Act (*Arbejdsskadesikringsloven*, ASL) regulates the Labour Market Insurance (*Arbejdsmarkedets Erhvervssikring*, AES).[14] AES is a 'self-governing' institution, managed by parties from the labour market, and administrated by ATP.[15] Every Danish employer has to pay a fee to the AES (which it does automatically when paying ATP as part of the salary), and every employee is automatically covered when employed by a Danish based employer.[16] AES is made up of representatives of Danish Unions and capacities with interdisciplinary backgrounds, and it is considered a public authority according to the Danish Administrative Act (*Forvaltningsloven*). Its decisions are regulated by the Administrative Act, which means that the ordinary principles in the Administrative Law are applicable (e.g., the rule imposing an obligation to gather and include all relevant information in a particular case). When a report on a work-related injury is rejected, the worker can complain to the National Social Appeals Board (*Ankestyrelsen*), a public administrative authority.

Work-related injuries (*ervervssygdomme* ASL § 7) and work-related accidents (*arbejdsulykke* ASL § 6) can be compensated by the Labour Market Insurance (AES),[17] and both mental illness and somatic illness are covered. The loss must be a consequence (meet the requirements of causality) of the relevant work-related incident/ the specific risk. Whether an injury is considered an accident or work-related injuries depends on for how long the worker was under a risk of being injured. A distinction is made between how to assess reports on industrial injuries based on whether the relevant incident(s) or the specific higher risk happened for five days or more, where less than five days is categorized as

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12 Rognlien (n 11).

13 See more about the role of the Danish state in the labour market Kristiansen (n 11). See also, Nicole Christiansen, *Fra arbejderbeskyttelse til sundhedsfremme på arbejdspladsen* (Jurist- og Økonomforbundet 2018); and Marlene Louise Buch Andersen, *Psykiske arbejdsskader: juridiske virkemidler i et forebyggelsesperspektiv med fokus på virksomhedens adfærd* (Jurist- og Økonomforbundet 2018) 255.

14 Arbejdsmarkedets Erhvervssikring (AES), 'About Labour Market Insurance', <https://www.aes.dk/english/about-labour-market-insurance> accessed 31 October 2021.

15 Arbejdsmarkedets TillægsPension (ATP), English Webpage, <https://www.atp.dk/en> accessed 31 October 2021.

16 ASL § 48.

17 ASL §§ 5, 6, 7 and 8.

an accident, and more than five days is seen as a work-related injury. Covid-19 is a recognised work-related injury.[18]

To be qualified as a work-related injury, there has to be a 'disease' and the requirements of causality between the work-related incident/the specific higher risk/ and the injury have to be met. Relevant factors in the assessment may in practice be e.g., the character of the work, explanations from the injured party and others about the working conditions, human contact, measures adopted at the workplace, the possibility for Personal Protective Equipment and the employer's statements about the impact.[19] The legal effects and relevant remedies are economic compensation, but they are subject to a fixed limit and only specific categories of losses are regulated in the ASL chapters 4 and 5.

The question of which more precise aims the AES system is supposed to achieve must be explored.[20] The Worker's Compensation Act is designed as social insurance, and therefore not intended to compensate the entire loss. While considered a tort system regulated by specialised legislation, the Labour Market Insurance is not designed as an instrument to correct the behaviour of the employer. It is based on objective liability for work-related injuries and not on negligence (culpa), which means it has more in common with the insurance systems.[21] When it comes to the measurement of the compensation, only specified categories of loss are compensated, and with an upper limit on the loss. Hence, the questions of adequacy are predetermined, instead of a system based on an assessment of the entire loss (the insurance/compensation principle).

In contrast, the main underlying aim of Nordic tort law may be claimed to create safety,[22] hereby to compensate loss.[23] Other stated aims which the Nordic tort law pursues include prevention, justice and reasonable division of risks.[24] Questions of justice entail reflections on what more precisely the principle of equality entails, hereby questions of whom and what is being compared.

The aim of insurance is determined by the insurance contract, and may be claimed in general to create even more security for the parties involved than the general tort system, since it is mutually onerous.[25] Employer insurance is mandatory with the aim of, inter alia, protecting the workers and regulating the risks of accidents at the workplace. Both the aims and principles of tort law and insurance law underpin the AES, but it is a question whether the 'social

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18 Marlene Louise Buch Andersen, 'Et arbejdsskadesikringsretligt perspektiv på Covid-19', (2020) 3 Juristen 91. On the distinctions between the listed work-related injuries (ervervsygdomme) and those which are construed by the Ervervssygdomsudvalget: Buch Andersen (n 13) 179-180.

19 The AES Covid-19 Guidelines 21 April 2020: Covid-19.

20 Bo von Eyben and Helle Isager, *Lærebog i erstatningsret* (Jurist- og Økonomforbundets Forlag 2015) 52.

21 However, the financial aspects of the system may have various effects on the employer's behaviour, see e.g., on objective liability and the employer's behaviour Buch Andersen (n 13) 189.

22 Eyben and Isager (n 20) 33.

23 Buch Andersen (n 13) 119.

24 Buch Andersen (n 13) 119.

25 Eyben and Isager (n 20) 33.

character' of the AES makes it less attractive as a financial safety net for the care workers.

1.2 More Women than Men do Care Work

More women than men do care work,[26] and the care work sector is especially vulnerable to Covid-19 related problems because of the close human contact and the pressure in the front line of the societal combat of the pandemic.[27] This chapter focuses on 'care workers', who for the purposes here include frontline care workers dealing directly or indirectly with Covid-19 infected patients, for instance health care assistants, nurses and rehabilitation personnel, and cleaners at hospitals, in home care, care institutions for elderly, assistants and teachers in kindergartens etc.

Covid-19 related injuries include complications and even death because of infection with Covid-19, Covid-19 vaccines,[28] and/or other interlinked problems like mental illness because of stress and pressure at the workplace during the pandemic. As seen above, more women than men reported on Covid-19 related injuries at work to the AES, making it a gendered inquiry.

1.3 The Concepts of Vulnerability and Causation

Understandings of personhood, ideological, epistemological/ontological positions, vulnerability and causation influence both the assessment of the law and the facts as well as, compensation and remedies. In order to qualify for AES, the relevant injury has to be work-related in according to the Worker's Compensation Act (*Arbejdsskadesikringsloven)*. Scholarship has argued, for example, that administrative decisions were based on the assumption that a work-related injury was only recognised where the relevant incident harmed 'a healthy body.'[29] The questions of what is perceived as a healthy, normal body have gendered implications. Evidence from the US shows that women are often

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[26] European Institute for Gender Equality, Gender Equality Index indicators for Denmark for the 2021 edition, <https://eige.europa.eu/gender-equality-index/2021/country/DK> accessed 1 November 2021. Mona Larsen, Helle Holt and Malene Rode Larsen, 'Et kønsopdelt arbejdsmarked. Udviklingstræk, konsekvenser og forklaringer.' (København: SFI – Det Nationale Forskningscenter for Velfærd, 16:15, 2016) <https://pure.vive.dk/ws/files/466934/1615_Et_k_nsopdelt_arbejdsmarked.pdf> accessed 1 November 2021.

[27] Ashley Elizabeth Muller et al. 'The Mental Health Impact of the Covid-19 Pandemic on Healthcare Workers, and Interventions to Help Them: A Rapid Systematic Review' (2020) 293 Psychiatry Research 113441. European Institute for Gender Equality, 'Gender Equality Index 2021: Health', 28 October 2021, <https://eige.europa.eu/publications/gender-equality-index-2021-health>, accessed 1 November 2021.

[28] The Danish Patient Compensation Association, 'Efterladte får erstatning for dødsfald efter AstraZeneca-vaccine', Press Release, 6 August 2021, <https://pebl.dk/da/nyheder/nyhedsarkiv/efterladte-faar-erstatning-for-doedsfald-efter-astrazeneca-vaccine> accessed 15 August 2021.

[29] Søren Kjær Jensen, Kira Kolby Christensen and Laura Tholstrup, 'Særlig sårbarhed og anerkendelse af arbejdsulykker' (2016) 5 Juristen 187.

misdiagnosed, or their symptoms downplayed and measured against a male paradigm of 'normality'.[30] This bias is often elevated for racialised women and the diagnostic odysseys are well documented.[31]

The *conditio sine qua non* (but-for causation) principle requires that the alleged cause triggered and thereby was a necessary condition for the effect, i.e., that the effect would not have occurred without it. In tort/liability law, one distinguishes between the questions of whether an injury is an effect of x and whether the injury should be compensated by the agent responsible for x. In legal discourses, one has discussed whether but-for-causation can be accepted when assessing the latter question, but when assessing the first question one should use the 'NESS-test' (*Necessary Element of a Sufficient Set*), which allows for causation to be established even if the but-for-condition is not met.[32] Concepts of causality and adequacy are built upon epistemological and ontological understandings that are not necessarily discussed transparently in law, and tend to be built upon positivism and logic-oriented approaches interacting with scientific discourses.[33]

Intersecting and competing causes of injuries have to be tackled in law, and entail self-reflective, critical assessment of what is seen as fulfilling the requirements of causation.[34] The dominant understanding in Danish law is that vulnerability, which leads to an injury, would not qualify for compensation. When women care workers claim compensation for work-related injuries, a central issue becomes how 'vulnerability' indirectly or directly is understood in law. Overlapping, and sometimes conflicting, understandings of vulnerability in law[35] risk affecting both the requirements for compensation for work-related injuries, and questions related to the extent of the financial remedies.

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30 Katarina Hamberg, 'Gender Bias in Medicine' (2008) 4 Women's Health 237 <http://journals.sagepub.com/doi/10.2217/17455057.4.3.237> accessed 15 August 2021. In Norway: Anne Winsnes Rødland, 'Hva vet vi om kvinners helse? Rapport fra forprosjektet til kvinnehelseportalen.no,' 2018 <https://kjonnsforskning.no/sites/default/files/hva_vet_vi_om_kvinners_helse_rapport_kilden_kjonnsforskning.no_nks.pdf> accessed 15 August 2021.

31 William J Hall and others, 'Implicit Racial/Ethnic Bias Among Health Care Professionals and Its Influence on Health Care Outcomes: A Systematic Review' (2015) 105 American Journal of Public Health e60 <http://ajph.aphapublications.org/doi/10.2105/AJPH.2015.302903> accessed 15 August 2021.

32 Andreas Bloch Ehlers, *Kausalitet i personskadeerstatningsretten* (1. udgave, 1. oplag, Karnov Group 2017) 186.

33 On legal and scientific ontology: Lena Wahlberg, 'Legal Ontology, Scientific Expertise and The Factual World' (2017) 3 Journal of Social Ontology 49 <https://www.degruyter.com/document/doi/10.1515/jso-2015-0022/html> accessed 15 August 2021.

34 Andreas Bloch Ehlers argues that, for instance, common sense and normative evaluations affect the assessment of requirements of causality, Bloch Ehlers (n 32) 106–109.

35 Martha Albertson Fineman, 'The Limits of Equality: Vulnerability and Inevitable Inequality' in Robin West and Cynthia Bowman, *Research Handbook on Feminist Jurisprudence* (Edward Elgar Publishing 2019) <https://www.elgaronline.com/view/edcoll/9781786439680/9781786439680.00012.xml> accessed 15 August 2021.

For instance, if a care worker had a post-traumatic stress syndrome (PTSD) diagnosis before the Covid-19 outbreak at work, the PTSD diagnosis is not to be compensated by the Labour Work Insurance. Vulnerabilities that *could* have resulted in the injury, will lead to a reduction in the compensation. For instance, if the PTSD diagnosis intersects with an accident at work, the loss related to the PTSD diagnosis is to be reduced in the measuring of the loss because of the work-related accident. Potential vulnerability intersecting with damage, will however, lead to compensation due to the vulnerability/frailty principle (take the injured party as they are).[36]

What is considered 'normal', 'logical' and 'mainstream' usually lacks transparent considerations in administrative decisions, case law and jurisprudence, which risks stereotyping, stigma and discrimination, and should be reflected more transparently. Another such situation is where the legal interpreter assumes that there is not a problem. This chapter argues that understandings of vulnerability and causation must include a sex/gender sensitive approach with an awareness of the structures and allocation of power and privilege embedding the individual.

1.4 Underlying Discriminatory Mechanisms in the Care Work Sector

As seen, more women than men work in the care sector. Care worker roles[37] usually intersect with the role as unpaid care worker in the private sphere, as a daughter, wife or other female relative, which can lead to different kinds of socio-economic consequences.[38] The division of care and labour work between men and women in the 'private sphere' remains gendered[39] with women taking more responsibility for unpaid care work.[40] More women than men have the sole responsibility for their children,[41] and are at risk of poverty traps.[42] Further, the gendered wage gap[43] remains a problem in the Nordics; men earn more than women do, meaning that in a family structure it often appears more financially prudent for women to exit the labour market to fulfil care obligations. These factors risk negative social, emotional (stress and pressure) and economic consequences, like isolation and absence from the labour market, resulting in

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36 Jensen et al. (n 29) 187-188; and Bloch Ehlers (n 32) 259–260.

37 On embodied and embedded differences, and analysis of roles over time, see Fineman (n 9).

38 On analysing the individual's intersecting roles over time and questions of 'different vulnerabilities', see Fineman (n 9).

39 On the development of the gendered labour market and social welfare system in Denmark, see Ketscher (n 10).

40 Ida Gundersby Rognlien, 'Hjemmehjelp i et likestilling- og diskrimineringsperspektiv' (2018) 17-18 Nordisk socialrättslig tidskrift 9.

41 Danmarks Statistik, *Børn og deres familier* (2018) 32-33.

42 Rognlien (n 11).

43 European Commission, 'The Gender Pay Gap Situation in the EU' <https://ec.europa.eu/info/policies/justice-and-fundamental-rights/gender-equality/equal-pay/gender-pay-gap-situation-eu_en> accessed 15 August 2021.

low pension contributions and wage stagnation. Care work is generally low or unpaid.[44]

This complex can be compared to male dominated workplaces and seen in relation to 'the male breadwinner' model that still exists, even though European states – supported and driven by the ECtHR and ECJ – have tried to change this traditional gender stereotypical arrangement of relations.[45] Furthermore, similar to some male dominated fields, like construction workers, care work is physically demanding, yet at the same time emotionally and relationally exigent, which may lead to other kinds of burdens, such as stress and mental illness. Since care work often is invisible and fluid/floating, compared to physical work, practical tasks or financial care, the qualifications of these social phenomena into law risks not being captured properly. The gendered structures surrounding care work also calls for other questions when compared with male dominated work places, such as unpaid care work in the private sphere.

These structures can impact how financial compensation for work-related injury is measured, since previous connections to the labour market are relevant. If a woman works part-time because of stress or care work for family or others, she may receive lower compensation. Hence, the woman's previous subordinated socio-economic position risks being reproduced by legal structures. In the context of the central issue examined in this chapter, it means that when assessing the measurements of the compensation, the woman's paid and unpaid care work are relevant, and may be underqualified compared to what it should be considering the value of the work.

2 Covid-19 Entering the Care Work Sector

While more research on the effects of Covid-19 in the care sector is needed, the increased risks for mental and physical injuries during the pandemic are apparent.[46] This serves as a starting point to address relevant legal questions and highlight risks in legal interpretation and structures.

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[44] See Karsten Albæk, Freya Casier and Mona Larsen, 'Er kvindefag stadig lavtlønsfag? En analyse af sammenhængen mellem løn og andelen af kvinder i forskellige arbejdsfunktioner' (VIVE, Viden til Velfærd Det Nationale Forsknings- og Analysecenter for Velfærd, 2019); Mona Larsen, Mette Verner and Christian Højgaard Mikkelsen, 'Den 'uforklarede' del af forskellen mellem kvinders og mænds timeløn' (VIVE, Viden til Velfærd Det Nationale Forsknings- og Analysecenter for Velfærd, 2020); Helga Aune, *Deltidsarbeid: Vern Mot Diskriminering På Strukturelt Og Individuelt Grunnlag* (1. utgave, Cappelen Damm Akademisk 2013); Hvidt (n 10); and CEDAW Committee Concluding Observations on Denmark 11 March 2015 CEDAW/C/DNK/CO/8.

[45] On the Norwegian 'widow pension': Ida Gundersby Rognlien, 'Skyggedom av enkepensjonsdommen: En feministisk gjenskrivning av dommen inntatt i Rettstidende 2006 side 262' (2017) 101 The Woman Law Publication Series, University of Oslo.

[46] Muller et al (n 27); Eldbjørg Nåheim Eien and Petter Andreas Ringen, 'Litteraturgjennomgang ved covid-19: psykiske helseplager og psykologisk-psykiatriske tiltak ved alvorlige epidemier', Forsknings- og innovasjonsavdelingen, klinikk psykisk helse og avhengighet, Oslo universitetssykehus, 3 April 2020 <https://www.helse-sorost.no/seksjon/nyheter/Documents/LITTERATURGJENNOMGANG%20%20COVID-19%20endelig.pdf> accessed 1 November 2021.

The Patient Safety Authority reported (September 2020) that a higher work intensity and changing work conditions contributed, for instance, to medication mistakes. For the care workers specifically, the report stated that they were instructed to do new, different kinds of tasks, outside of their primary field, in line with what were considered the relevant needs during the pandemic. The lack and absence of precautions made to avoid situations lacking sufficient protective equipment (PPE), have been reported as worrisome to care workers. The rotations, changes of roles and the uncertainty were reported as difficult. Societal stigma has also been reported because of care workers being viewed as likely transmitters of the disease.

Further, workers highlighted that the psychosocial environment needs improvement over the long-term, not only the short-term during a pandemic. Even at medical units where they are used to high pressure and intensity, there were experiences of fear and pressure. Additionally, it was reported that PPE, such as visors to protect against transmissions, could give physical pressure damage and other annoyances.

Rapid communications, team spirit, friendly colleagues and the feeling of community, visible leaders and the care workers' influence on their own situation (for instance, focus on prevention, certainty around when being on stand by for emergency preparedness), were however, reported as some of the important factors contributing to success.[47]

The report of the Health and Care Administration (SUF), Municipality of Copenhagen (October 2020) highlighted several problems that needed to be resolved: lack of preparedness plans for pandemics, implementation of guidelines, individualisation of responsibility, doubt and insecurity among citizens, and exhaustion of care workers.[48] SUF claimed that this level of work effort was not sustainable in a long-term perspective, and may contribute to exhaustion and risks for mistakes.[49]

Lack of and prioritisation of tests and PPE were also reported as problems that may have exacerbated the situation.[50] The Danish Working Environment Authority (*Arbejdstilsynet)* found in October 2020 that a care home breached the Health Authority's guidelines and The Work Environment Act (*Arbejdsmiljøloven*) by not planning and having efficient measures, such as PPE

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47 The Covid-19 report from the Patient Safety Authority (Styrelsen for Patientsikkerhed) is based on interviews with health care workers on their experiences during the pandemic. It is not evidence-based research, and only based on the descriptions made by the care workers (given in that specific context) and reports of so-called 'adverse events' to the Patient Safety Board: Styrelsen for Patientsikkerhed, 'Sikkerhed for sundhedspersoner er sikkerhed for patienter. En vidensopsamling om erfaringer fra Covid-19', 17 September 2020, <https://stps.dk/da/udgivelser/2020/sikkerhed-for-sundhedspersoner-er-sikkerhed-for-patienter/~/media/79D08AC0BC224882BF461734D8032D04.ashx> accessed 15 August 2021.

48 Københavns Kommune, Sundheds- og Omsorgsforvaltningen (SUF), Afdelingen for Evaluering, 'Evaluering af SUF's Covid-19 beredskab', October 2020, 8-10 and 46-47.

49 Københavns Kommune, Sundheds- og Omsorgsforvaltningen (SUF), Afdelingen for Evaluering, 'Evaluering af SUF's Covid-19 beredskab', October 2020, 24-25.

50 Tine Rostgaard, Country Reports: Covid-19 and Long-Term Care on Denmark Report, 27 May 2020, <https://ltcCovid.org/country-reports-on-Covid-19-and-long-term-care/> accessed 15 August 2021.

and individual-oriented guidance during the pandemic to protect the personnel and the persons being cared for (*the care home case*). A care worker died of Covid-19 and the Danish Working Environment Authority determined that the care home breached The Work Environment Act.[51]

Among the factors which SUF stated affected its abilities to act during the pandemic were lack of protective equipment, test capacity and insufficient hygiene focus. In March and April 2020, protective equipment was a challenge, both quantitatively and qualitatively. The demand was greater than the supply, and the hospitals were prioritized above the municipalities.[52] SUF considered the situation improved, but that it still demanded attention.

In addition, the care workers are subjected to challenging physical work, for instance the lifting of patients.[53] During the pandemic, the workplace was obliged to secure both the normal physical tasks and security, and at the same time ensure protection against Covid-19.[54] The risk of violence when doing care work is a gendered societal problem, since more women than men are care workers.[55] The level of stress and pressure may be exacerbated in connection with the risk of violence.[56] The lack of personnel in the care work sector may be challenging both physically and mentally; entailing manually lifting, cleaning, risk of violence and Covid-19 infections with stress related to bearing the responsibilities alone.

A case before the Danish Council of Appeal on Health and Safety at Work (*Arbejdsmiljøklagenævn*) illustrates the room for interpretation on what is perceived as necessary measures to combat transmissions at a work place. Also seen are the underlying mental health issues at stake when balancing the precautionary principle (choosing the measures which risks less transmissions) and the efficiency at the health care institutions. The majority (6-5)[57] in the appeal body, the Council, stated that the Working Environment Authority had not proven the necessity of an order to implement sufficient protection against transmission in a pulmonary disease unit (*The pulmonary disease unit case*).

The minority in *The pulmonary disease unit case* on the other hand found it sufficiently proven, since the workers could not keep necessary distances in the hallways and due to the lack of anteroom to isolation sections (‘*sluser til*

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51 On file: Arbejdstilsynet case number 20200034924/23, 17 August 2020.

52 Københavns Kommune, Sundheds- og Omsorgsforvaltningen (SUF), Afdelingen for Evaluering, ‘Evaluering af SUF’s Covid-19 beredskab’, October 2020, 43.

53 Arbejdstilsynet, ‘Manuel håndtering af personer’ <https://at.dk/arbejdsmiljoeproblemer/ergonomi/manuel-haandtering-af-personer/> accessed 15 August 2021.

54 The Work Environment Act (*Arbejdsmiljøloven*).

55 Lars Højsgaard Andersen and Therese Bay-Smidt Christensen, ‘Prevalence and Consequences of Violence on the Job Hit Females in Healthcare Provision Hard’ (2020) The ROCKWOOL Foundation Research Unit.

56 See for instance The Council of Appeal on Health and Safety at Work (*Arbejdsmiljøklagenævn*) Case Number: 9028 of 23 January 2020 and Case Number 9029 of 23 January 2020.

57 The members of Council of Appeal on Health and Safety at Work (*Arbejdsmiljøklagenævn*): <https://ast.dk/naevn/arbejdsmiljoklagenaevnet/om-naevnet/medlemmer-og-moder> accessed 15 August 2021.

isolationsstuerne'). They argued that the high numbers of incidents also supported this. The majority also saw this challenge, but attached more weight to the fact that the workers were required to not walk together two and two in the hall ways, not speak in the same direction and to turn their heads away from each other.[58] It is worth paying attention to this individualising of the responsibilities for preventing transmission in a mental health perspective.

On the other hand, in a different case the Council's majority emphasised the management's responsibility to control whether instructions to prevent transmissions actually were possible to follow, where 60 % of the workers at a pulmonary disease unit had been infected by Covid-19 (*The 60 % infected care workers case*).[59] In that case, the pulmonary disease unit stated that they had ensured that the instructions were followed because 'we are each other's helpers', that everyone had an interest to take care of themselves and a good culture of asking for help at the unit existed. In this author's opinion, this way of arguing gives rise to questions of stereotypes about care workers as 'good-hearted', when the underlying problems seem to be structural and not individual. The Council's minority argued that the Work Environment Authorities' order to control the transmission routines and measures lacked sufficient legal basis in the Work Environment Act, since they saw it more as prevention of general risks of transmission in the society and not as a work-related risk of transmission.[60] The majority, on the other hand, emphasised the worker's close connection to Covid-19 patients. The difference between the minority's and majority's (6-5) arguments were quite similar in another case where workers were feeding, brushing teeth and had face-to-face care of patients without PPE, and where the majority decided the care institution had not sufficiently protected the workers against transmission (*The face-to-face case)*.[61]

These cases illustrate both the risks taken by the care workers during the pandemic, and the ambiguity by the administrative authorities when responsibilities for safety were to be placed. While more research on the effects of Covid-19 is needed, these socio-economic and legal structures surrounding care workers when Covid-19 entered the field are necessary to identify and address in law when taking both an individual and a structural approach to handling the aftermath of the pandemic.

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58 The Council of Appeal on Health and Safety at Work Case Number 9487 of 25 June 2021 <https://www.retsinformation.dk/eli/retsinfo/2021/9487> accessed 15 August 2021.

59 The Council of Appeal on Health and Safety at Work Case Number 9488 of 25 June 2021 <https://www.retsinformation.dk/eli/retsinfo/2021/9488> accessed 15 August 2021.

60 The same kind of arguments were put forward by the employer and the Board's minority in another case regarding a store and the bus transport sector, The Council of Appeal on Health and Safety at Work Case Number 9490 of 25 June 2021: <https://www.retsinformation.dk/eli/retsinfo/2021/9490> accessed 15 August 2021 and Case Number 9496 of 25 June 2021 <https://www.retsinformation.dk/eli/retsinfo/2021/9496> accessed 15 August 2021.

61 The Council of Appeal on Health and Safety at Work Case Number 9493 of 25 June 2021 <https://www.retsinformation.dk/eli/retsinfo/2021/9493> accessed 15 August 2021.

3 Legal Protection of Vulnerability

As noted above, AES rejected most of the claims for compensation based on Covid-19 relating to mental illness. The legal interpretation of mental illness in connection with Covid-19 risks lacking transparency. Fitting mental illness within the stringent frames of worker insurance can be difficult. There is a risk of not identifying the gendered systemic underlying problems at a workplace, and that the women are being compared to each other instead of lifting the problems beyond the AES system and as individual stories.

Which elements of a 'fluid' phenomenon, such as mental illness, can be related to specific work situations and which are related to the individual's private life/ general health? Covid-19 related pressure may, for instance, lead to different kinds of mental illness, but some people may be diagnosed long after the 'injury'. Further, the diagnosis risks being perceived as individual vulnerability, and not related to the workplace and therefore not meeting the requirements for causality. The more invisible a sickness is to others; the more difficult proving causation becomes. One should ask, what is considered normal and visible, and from which (or whose) perspective?

3.1 The Interaction between Legal and other 'Expert' Discourses

The conception of what is considered 'normal' is construed in the interaction between legal and other expert discourses. When there is a consensus of changing the conception of 'normal', the question arises of how such systemic mistakes are redirected. This is illustrated in *The PTSD-case* (26 June 2020), where the Western High Court (*Vestre Landsret*), set aside AES practice in PSTD-cases.[62] The Western High Court ruled in favour of a veteran suffering from PTSD due to serving in the Bosnian war in the 1990s. His claim had been rejected by AES and the National Social Appeals Board. The injury was not considered work-related. The reasoning was that the symptoms of the trauma were diagnosed too long after he had served in the military, which was why there was not sufficient connection in time between the incident and the diagnosis of PTSD.[63] The High Court held that AES and the National Social Appeals Board's interpretation was not in accordance with the Workers Compensation Act.

Tort lawyers had long criticised how AES and the National Social Appeals Board were interpreting the Worker's Compensation Act when it came to recognition of mental illness related to the workplace. First, the PTSD-case illustrates how care workers suffering from Covid-19 related mental illness risk bearing the burden for what is seen as uncertainty and/or disagreements between experts in the medical field. Second, the case illustrates how systemic mistakes risk not being properly compensated. This chapter subsequently argues that this must be made visible and critically assessed on all levels of law in order to secure care workers' right to financial protection if injured during Covid-19.

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62 The Western High Court (*Vestre Landsret*) 26 June 2020 Sag BS-10106/2019-VLR. See also The Western High Court 3 November 2020 i anke 11. afd. BS-59154/2019 VLR, BS-55032/2019-VLR. Has been appealed.

63 The Western High Court (*Vestre Landsret*) 26 June 2020 Sag BS-10106/2019-VLR, 4.

The main question before the Court in *The PTSD-case* was whether the requirements of causality between the incident (work situation in Bosnia) and the PTSD diagnosis were met.[64] The Court attached weight to the fact that the veteran had been subjected to incidents as a soldier, and that he had not been subjected to burdens of the same character after his homecoming. Further, the Court attached weight to The Legal Medical Council's opinion that the PTSD symptoms probably had been present at an earlier stage, but that previous medical assessors had not been aware of the connection between the incidents during the mission and the symptoms. Since the difference between the National Social Appeals Board's and The Legal Medical Council's [65] assessment of the requirements of causality predominantly relates to questions of medical character, the latter was followed.[66]

The PTSD-case is an example of how discussions in one field of experts, here the medical field, can include disagreements on how to define (diagnose) phenomena (diseases and health situations). The WHO has changed their view on PTSD as of 1 January 2022 (PTSD ICD-11), to not focus on the six-month visibility of PTSD symptoms. The Legal Medical Council and the affiliated doctor at the National Social Appeals Board seems to have a different understanding of how to diagnose PTSD. The workers who have reported on work-related PTSD injury have wrongly carried the burden of this dispute/perceived uncertainty. The question here is how to avoid this or similar situations when care workers report on Covid-19 related mental injuries.

When it comes to the recognition of PTSD as a more complex phenomenon than what WHO ICD-10 standard and the six-month requirements seemed to frame it, The Legal Medical Council's assessment seems more in line with the WHO ICD-11 standards. What remains as a question is how the lack of gendered research on diagnosis and mental health will be perceived in the future. The WHO is not necessarily up-to-date when it comes to gender sensitive research. Further, the national context may require other gender sensitive research within the health field. The question is how these expert disagreements and lack of knowledge will be interpreted in law by the administrative bodies, the courts and other relevant actors, and who is carrying the burden in the end. Despite the extensive research on gendered differences on the labour market and its various consequences,[67] it is still a risk that it is not properly reflected in the legal discourses, such as in the AES system.

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64 ASL § 7,1.2. 2. The Court concluded that it was not sufficiently documented that he had symptoms of PTSD the first six months after his return, and subsequently did not qualify for compensation under ASL § 7, 1,1 (listed work injuries). Neither did he qualify because of new medical documentation in 2015 under ASL § 7 no. 2, 1.

65 The Legal Medical Council submits medical and pharmaceutical expert evaluations of individuals to public authorities.

66 The Western High Court (*Vestre Landsret*) 26 June 2020 Sag BS-10106/2019-VLR, 26.

67 See i.e: Hvidt (n 10); Aune (n 44); Jinjoo Chung, Donald C. Cole and Judy Clarke, 'Women, Work and Compensation: A Different and Changing Experience, the Institute for Work and Health' (The Royal Commission on Workers' Compensation in British Columbia, June 1998) <http://www.qp.gov.bc.ca/rcwc/research/chung-women-compensation.pdf> accessed 1 November 2021.

When the experts disagree, the question is where to place the burden of doubt about the character of the diagnosis when addressed in law. The medical requirements of causality are different and might be argued more restrictive than the legal assessment of the requirements for causality.[68] One question is how to formulate the questions being asked to the experts in order to clarify uncertainty of the facts and further, to improve communication between expert (scientific) discourses and legal discourses, taking for instance different legal and scientific notions and concepts in to account.[69]

The PTSD-case subsequently illustrates risks in legal interpretation when expert disagreements/perceived uncertainty in the medical field are understood in law by administrative bodies and the courts. Further, how the law and the medical assessments risk interacting when the actors are assessing diagnosis and the legal qualifications for compensation. The High Court in *the PTSD-case* selected between the medical expert's opinions, but the legal reasoning of the value of these opinions (whether being founded on formalistic, consensualistic and/or essentialist arguments) were not transparently discussed in the High Court's judgment. The lack of transparency is a problem, and represents a risk in itself. Coming back to the underlying epistemological and ontological questions as addressed above, both the legal and scientific discourses must be critically assessed in a gender sensitive approach when care workers' Covid-19 related injuries are to be assessed.

3.2 Redirections of Systemic Failures

The Work Illness Committee (*Erhvervssygdomsudvalget*)[70] decided in September 2020 that the High Court's judgment in *the PTSD case* sat aside AES practice as unlawful, and that more research on PTSD's development was required. Until then, the Committee recommended a concrete assessment of the new PTSD cases and the PTSD cases put on hold.[71] Further, previous PTSD cases where compensation was refused were to be reassessed provided that (a) the cause of rejection is related to the duration/lack of sufficient connection in time between the diagnosis and the incident (b) and that a psychiatrist diagnoses the person with PTSD. In addition, it would be the applicant's responsibility to make such a claim, since the Committee stated AES did not have an automated system for identifying the relevant old cases and did not think that manually identifying 20,000 cases was a suitable prioritisation of resources.[72]

In non-discrimination law discourse, for instance in the field of CEDAW, it has been argued that the state and public bodies have a responsibility both for

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68 In this direction, see Buch Andersen (n 13) 169-170.

69 Wahlberg (n 33).

70 *Erhvervssygdomsudvalget* makes individual and general recommendations to AES on interpretations of 'erhvervssygdomme'.

71 Arbejdsmarkedets Erhvervssikring (AES) 'Ny forskning og behandling af visse konkrete PTSD-sager efter landsretsdom' Press Release, 18 September 2020 <https://www.aes.dk/presse-og-nyheder/ny-forskning-og-behandling-af-visse-konkrete-ptsd-sager-efter-landsretsdom> accessed 15 August 2021.

72 On file: e-mail correspondence with AES, the senior press advisor, 23 November 2020.

unintentional and intentional mistakes and discriminatory mechanisms, and must break discriminatory cycles.[73] When AES incorrectly decides the law, one can ask, who should carry the burden for such mistakes? Erik Boe claims in a Norwegian context, that it is a general administrative principle of 'due diligence', not only in the individual cases, but also at the structural level, in the administrative system as such.[74] At first glance, AES' handling of the systemic breach raises concern from this perspective. When public authorities are held to have incorrectly determined cases requiring the victim to realise this and reapply can be seen as part of the discriminatory mechanisms.[75]

The PTSD-case may have implications for care workers seeking compensation for Covid-related cases many years after the origin of the trauma. However, at present uncertainty remains regarding the concrete implications of the case on AES practice. It illustrates that the AES has long misunderstood mental trauma and should rethink this approach.

3.3 Gender Perspective in the Legislative Process

As illustrated above, the lack of personnel, personal protective equipment and exhaustion of staff have been reported problems in the care work sector during the pandemic, resulting in reports on mistakes and stress/pressure and even death. Further, the need for a long-term focus on the work environment was also reported, i.e., beyond the pandemic. The concepts of vulnerability and causation examined above raise specific issues when it comes to mental illness, since mental health for a long time has been seen as 'the other' in legal discourses.[76] The stigmatisation and sometimes mistrust of mental illness has meant that work-related mental health problems have had a lower status in terms of protection in law.[77] Improving the psychological work environment is now a priority for the government, in order to ensure a well-functioning labour market.

A new executive order on the psychological work environment[78] came into force in Denmark as of 1 November 2020. It encompasses, for instance, regulations on workload and work time (§§13-15), inconsistent and conflicting requirements (§§ 16-18), 'high emotional requirements' in the labour market (§§ 19-21) and harassment, and violence (§§ 22-34). The regulation is framed as the

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73 Sandra Fredman, 'Women and Poverty – A Human Rights Approach' (2016) 24 African Journal of International and Comparative Law 494 <https://www.euppublishing.com/doi/10.3366/ajicl.2016.0170> accessed 15 August 2021.

74 Erik Magnus Boe, 'Forsvarlig Systeminnretning i Forvaltningen' (2020) 80 Lov og Rett 129 <https://www.idunn.no/lor/2020/03/forsvarlig_systeminnretning_i_forvaltningen> accessed 15 August 2021.

75 Fredman (n 73).

76 Annika Frida Petersen, *Stigmatisering af psykisk sygdom i sundhedssystemet : Et menneskeretligt perspektiv*. (Phd afhandling, Det Juridiske Fakultet, Københavns Universitet 2020).

77 Christiansen (n 13); and Buch Andersen (n 13).

78 Bekendtgørelse om psykisk arbejdsmiljø BEK nr 1406 af 26/09/2020 <https://www.retsinformation.dk/eli/lta/2020/1406> accessed 15 August 2021.

employer's responsibility and The Danish Working Environment Authority (*Arbejdstilsynet)* can sanction breaches of the law.

Nonetheless, the work environment legislation is relevant in the assessments of AES, for instance, the interpretation of the individual's vulnerability. Buch Andersen argued in 2018 that when it comes to the principle of vulnerability/frailty in case law, it has been interpreted restrictively when it comes to mental health cases.[79] This represents a risk of not recognising care worker's mental health illness related to Covid-19, and should be examined in a care worker perspective.

The government describes the aim of the legislation on the Labour Market Insurance 2020 (ASL) as to achieving an up-to-date worker compensation system that recognises work-related injuries. The overall purpose of the Government's policies in this field is to pursue the goal of keeping as many as possible in the labour market.[80] The 2020 legislation (ASL) was adopted as the government considered that too many 'injuries' had been left out of the scope of the concept of 'accident' in case law and administrative practice due to restrictive interpretations in conflict with the intentions of the AES. The proposal to the legislation on the Labour Market Insurance 2020 (ASL) argues, *inter alia*, that the new legislation should emphasise a less restrictive interpretation of the qualification of 'accident' compared to the interpretations of the Supreme Court in 2013 and 2016 and followed by the National Social Appeals Board.[81]

From a gender perspective, it is interesting that it is being explicitly mentioned that a needle prick (typically in care work situations) automatically will qualify for AES even without consequences for the injured party's health.[82] In contrast, nothing is mentioned regarding the specific emotional and stress-related issues in the care work field, for instance the risk of violence or pressure working with people facing death or serious sickness, mental health problems, which can be argued to represent similar present risks, but may be perceived as more vague.[83]

The revisions/precisions in the law were not supposed to change the burden of proof, which means the worker still has to prove the causality between the incident and the damage.[84] This means that 'vague injuries', like mental illness, and complex intersecting gendered problems/incidents may still be difficult to prove for the care worker. *The kindergarten case* below illustrates relevant risk factors in this aspect, especially in the lower courts and administrative bodies. Without access to legal aid, *The kindergarten case* would not have been resolved

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79 Buch Andersen (n 13) 88.

80 2018/1 LSF 211 Fremsat den 27. marts 2019, 7. Bemærkningene sections 3.1 and 3.4. 2002/1 LSF 216 Fremsat den 9. april 2003 See also 2002/1 BTL 216 og L 217, 14. maj 2003.

81 The Supreme Court 8 November 2013 (Ugeskrift for Retsvæsen 2014, side 452 H). The Supreme Court 9 November 2016 (Ugeskrift for Retsvæsen 2017, side 531 H). 2018/1 LSF 211 Fremsat den 27. marts 2019, 8-9 <https://www.retsinformation.dk/eli/ft/201812L00211> accessed 15 August 2021.

82 2018/1 LSF 211 Fremsat den 27. marts 2019, 10.

83 When it comes to the gendered differences, see 2002/1 LSF 216 Fremsat den 9. april 2003, Bemærkninger, sections 2 and 3.4.

84 2018/1 LSF 211 Fremsat den 27. marts 2019, 29-30.

in the woman's favour and a long time would have passed before the correct conclusion was reached. Equal access to justice may be part of the discriminatory mechanisms.[85]

In what seems to be a coincidence, the Ministry uses two male-dominated work places when exemplifying the types of injuries that may be recognised in the law: craftsmen and warehouse workers.[86] Even though the Ministry emphasises the AES duty to provide information and enlighten the case, the obligation to recognise gender inequality risk factors should explicitly have been brought to attention as well.

The Ministry uses the notions 'natural biologically' and 'logical explanation' when describing the connection between the incident and the damage.[87] As examined above, that which is perceived as natural biologically may both be a problem that relates to the biological/social divide and what is perceived as normal biologically (male or female 'normal' as the comparator). The lack of transparency as to assumptions risks both recognition gaps, stereotyping and stigmatisation.

In conclusion, it may be argued that the clarifications in the law 2020 (ASL) were necessary, but not sufficient to redirect the risk of discriminatory mechanisms and securing/redirect socio-economic consequences of care work. Further, there may be a question as to whether the new legislation rather obscures some of the underlying problems; it seems something has been done about the problems of recognition gaps in the field, but the effects may be arguably superficial. While the new legislation may mean that care workers with Covid-19 related mental health injuries will gain more just access to compensation, a lack of awareness of the gendered elements remain.

3.4 Gender Perspective and Individual Cases

A 2017 case before the National Social Appeals Board (*The shoulder case*) illustrates both the above-mentioned restrictive interpretation in the previous practise of ASL and gender issues in care work. The woman was a social assistant who helped a boy using a wheelchair with his shoes and got kicked in her shoulder. This resulted in shoulder and back pains and headache, and a blockage in the shoulder for five months.[88] The Board decided that the woman did not qualify for AES because the pains were transient and treatment was not required.

Covid-19 is an example of a situation where it is seen as natural to include also transient injuries, since Covid-19 infections does not always need treatment, but may have long-term unknown consequences.[89] The Ministry suggested clarifying the text of the ASL 2020 Act to include transient injuries, regardless

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85 Fredman (n 73).

86 2018/1 LSF 211 Fremsat den 27. marts 2019, 29-30.

87 2018/1 LSF 211 Fremsat den 27. marts 2019, 30.

88 The National Appeals Board Case Number 9475 (Case 4) of 30 May 2017 <https://www.retsinformation.dk/eli/accn/W20170947525> accessed 15 August 2021. Referred to in the Proposal: 2018/1 LSF 211 Fremsat den 27. marts 2019, 9.

89 Buch Andersen (n 18), 97.

of whether they require treatment. Yet, none of these mentioned gendered issues were addressed in the legislative process.[90]

Both men and women, male and female-dominated sector work-related injuries could be affected by this restrictive interpretation of the law. However, the specific gendered questions in *The shoulder case* were not explicitly recognised. What consequences did the blockage in the shoulder for five months have for the woman in her private and work life? Did she have other care responsibilities? What were the routines at the workplace before and after the accident, i.e., was the risk known? Many of these questions are not seen as relevant in the context of the Workers' Compensation Act (ASL). That is partly because they are seen as relevant for family law (the division of care work and the financial income between the man and the woman), work environment law, ordinary liability law (if the employer was to blame), social law (if she had irregular connection to the labour market), etc. In one way, this sectoral division can be seen as part of the discriminatory problem, where the woman's situation risks being interlocked in different legal rationales, and the cross-sectorial and intersectional problems are at risk of not being addressed properly.

4 A Structural Approach to Vulnerability

The lack of personnel and resources were claimed to be an issue in the care work sector during the pandemic as noted above. A case from the Danish Supreme Court (*The kindergarten case*) illustrates the structural problems at stake when a care worker develops mental illness/injury due to work-related problems.[91]

The woman in the case was more sick than 'normal' due to a back injury. During her absences, the supervisor did not engage substitutes, and she felt guilty. There had been different kinds of problems at the institution for a while, and during a staff weekend organised to improve the working conditions in the kindergarten, she addressed the lack of substitutes in her absence. The superior had engaged a (private) supervisor to help with the issues. An escalation of conflicts arose during the weekend, later described as harassment towards the woman, and she ended up with the impression she had been fired. She developed mental illness; PTSD, anxiety and depression.

The question before the Supreme Court was whether the woman's mental illness could be considered as an injury to the person in the Compensation Act EAL § 1, and whether the Employer (the Municipality) was responsible for the injury. The Court concluded that the mental illness was a personal injury in accordance with EAL § 1. Further, the Municipality as an employer had handled the staff weekend in an irresponsible manner, and was responsible for the injury according to the Compensation Act. In order to qualify for general compensation, the employer has to be at fault (*culpa*). The Court found that the supervisors must have understood that the woman was in a psychologically tense

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[90] 2018/1 BTL 211 Betænkning afgivet af Beskæftigelsesudvalget den 23. april 2019 <https://www.retsinformation.dk/eli/ft/201814L01013> accessed 15 August 2021.

[91] The Supreme Court 15 November 2011 (Ugeskrift for Retsvæsen 2012, side 524 H). Buch Andersen argues that the judgment represents an expansion of the scope of mental illness as a relevant ground for compensation, but the burden of proof still might be heavy. Buch Andersen (n 13)163 ff.

situation and that the mental injury was a foreseeable cause of how the employer irresponsibly treated her at the staff weekend.

When it comes to the treatment at the staff weekend, the Court referred to the descriptions made by a psychologist and a specialist psychiatrist. In short, they described the situation as harassment. The applicant explained that she had long-term emotional strain before the staff weekend. This had caused her PTSD, anxiety and depression, and she was not able to return to the labour market on normal terms. The Supreme Court did not explicitly address the structural problems as a cause, factor or element, in the regime the woman was affected by - like the lack of staff and how it influenced her and the workplace in general. Yet, it serves as a background to understand the problems at stake.

In a later Supreme Court case (2017), the employer was not held responsible for mental injuries caused by too much overtime work,[92] illustrating the risk when legal discourses individualises vulnerability and makes it a question of perceived individual robustness and inter-personal relations instead of looking at the structures embedding the situation.[93] Buch Andersen has argued that unless there is an 'especially violent experience', like the harassment in *The kindergarten case,* it can be difficult for the worker to lift the burden of proof for work-related mental illness because of the requirements of causality and adequacy.[94]

Depending on what future Covid-19 gender studies reveals; the systemic failures and structures that produce vulnerabilities in the care work sector should serve as a starting point when a care worker reports on the development of a mental health disease because of stress at the work place, similarly as it has been argued for a shift of the burden of proof when infected by Covid-19.[95] Nonetheless, whether the individualised tort system reproduces rather than redirects inequalities should be examined, and whether other structural approaches to protection of the care workers should be explored.

5 Causation and Individual Vulnerability/Frailty

The question of how 'particular/individual vulnerability' should come into play when assessing causation is a well-discussed field in the legal jurisprudence as explored above.[96] The classical question of requirements of causality between the injury and the damage is a legal question, and not for instance, a medical

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92 The Supreme Court 13 June 2017 (Ugeskrift for Retsvæsen 2017, side 2904 H).

93 On the structural and institutional elements of stigmatisation: Iyiola Solanke, *Discrimination as Stigma: A Theory of Anti-Discrimination Law* (Hart Publishing 2017).

94 Buch Andersen (n 13) 160-177 and 244.

95 Birgitte Filtenborg, Karsten Høj and Søren Kjær Jensen 'Covid-19 som arbejdsskade: Der kan være behov for en særordning', 21 April 2020 <https://elmer-adv.dk/nyheder/Covid-19-som-arbejdsskade/> accessed 15 August 2021. The AES guidelines on Covid-19 <https://at.dk/regler/at-vejledninger/vurdering-arbejdsskadesager-covid-19/#7-anke-af-afgoerelse> accessed 15 August 2021.

96 Vulnerability may play a role on both qualifications for compensation and the legal effects. On the distinction between adequacy and causality: Bloch Ehlers (n 32).

question of causality, nor a question only particularly fit for the administrative level (meaning therefore less intense judicial review).

Jensen et al. argue that individual vulnerability only should be relevant for the assessments of the financial remedies.[97] The burden of proof is closely connected to the question of attaching weight to individual vulnerability. When it comes to the burden of proof, Jensen argues that according to the Supreme Court case law, *potential* vulnerability, only gives reason to reduction in the compensation if the injury with overwhelming certainty and independent of the work-related injury would reduce the ability to work/the health situation – in accordance with the vulnerability/frailty principle.[98]

The Danish Supreme Court ruled in 2020 in favour of a man who had been in a moped accident on his way to work (*The moped case*).[99] He had both back injuries and undiagnosed ADHD before the accident. The question before the Court was whether and how these vulnerabilities should come into play in the assessment of causality. AES concluded that the accident led to a 50 % loss of earning capacity. The Legal Medical Council concluded that his pre-existing lower back injuries were not exacerbated by the motor accident. The man also had ADHD before the accident, and had been working full-time. According to the Supreme Court, this meant that neither ADHD nor lower back problems could give reason to the reduction of the estimation of his loss of work capacity. Further, the mental illness he had developed was because of the accident and the work-related training he had to undergo with pains. The Court concluded he had experienced 75 % loss of earning capacity.

The High Court argued and ruled opposite to the Supreme Court, finding in favour of the insurance company. The Court mostly relied implicitly on the argument that AES had special competence/practical knowledge to evaluate the questions at stake, and this required a less intensive judicial review.[100] The High Court found that the decision before AES was sufficiently justified, and that the applicant had not proved otherwise.[101] The Supreme Court has clarified this classical legal question about judicial review of causality. However, the arguments by the insurance company and the High Court illustrate the risks at stake in the field.[102] It is a question of how the Supreme Court judgment will be followed on the administrative level when it comes to applying the principle of vulnerability/frailty.

Covid-19 infections or 'derivatives' may intersect with 'individual vulnerability.' The risks in legal interpretation pointed out here will be of

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97 Jensen et al. (n 29) 191-192.

98 Jensen et al. (n 29) 191.

99 The Supreme Court, 19 August 2020 Case BS-49822/2019-HJR, <https://domstol.dk/media/210lmpzi/49822-2019-anonym.pdf> accessed 15 August 2021.

100 Søren Kjær Jensen and Karsten Høj 'Befriende Højesteretsdom om årsagssammenhæng (kausalitet)' 25 August 2020 <https://elmer-adv.dk/nyheder/befriende-hoejesteretsdom-om-aarsagssammenhaeng/> accessed 15 August 2021.

101 Eastern High Court Judgment, 5 July 2019, Case BS-41605/2018-OLR, 12 <https://domstol.dk/media/gpsaxnzz/49822-2019-oel-anonym.pdf> accessed 15 August 2021.

102 On the use of scientific information in legal proceedings: Wahlberg (n 33).

importance when inequality questions on behalf of care workers in a Covid-19 context are to be addressed.

6 Compensation for Paid and Unpaid Care Work

As elaborated above, many women work part-time partly to balance their unpaid care work at home. This balancing has different socio-economic consequences, which is a classical topic in the feminist jurisprudential discourses. It is also relevant when women are to be compensated because of Covid-19 related injuries, as previous income structures will be reproduced in the measurement of the compensation. The Supreme Court judgment (26 November 2019) in *The part-time-case*, illustrates the discriminatory issues at stake related to the qualification of part-time work and unpaid care work at home.

A woman filed for compensation after being involved in a car accident. She was working as a part-time night shift nurse at the time, and the question before the Court was related to the measurement of the economic damage. Was she supposed to be considered as working part-time or full-time when measuring her loss? She had been taking care of her oldest child, who was in need of extra support.[103] The former annual income formed a base for measuring of the loss.[104] The Supreme Court concluded that the main rule is that the claimant is considered as having a full-time income, because she could have worked full-time, even though she did not use this potential. The counterarguments by the lower courts and the insurance company illustrate the risk in the practices of the National Social Appeals Board and the AES.

However, this full-time principle does not apply when assessing the 'incapacity loss percentage'.[105] In a neo-liberal economic perspective, this makes sense and may seem coherent as individuals who in fact have worked full-time will receive more financial compensation than those who have worked part-time. This is in alignment with the 'workfare' principles underpinning the Danish welfare system and the focus on investing in people at the labour market in the 'social investment paradigm'.[106] Hence, it is a prerequisite for this paradigm that the policies make people participate in the labour market. This illustrates how the full-time principle at first glance may look like an equality measure, but in reality it is a 'good will' approach. The underlying structural issues at stake are arguably being reproduced in this system.

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[103] The Supreme Court 26 November 2019 (Ugeskrift for Retsvæsen.2020 side 356 H), 361.

[104] EAL § 5, (1) and (2) and ASL § 17.

[105] EAL §7 and ASL § 24.

[106] A Hemerijck, 'The Quiet Paradigm Revolution of Social Investment' (2015) 22 Social Politics: International Studies in Gender, State & Society 242 <https://academic.oup.com/sp/article-lookup/doi/10.1093/sp/jxv009> accessed 15 August 2021.

7 Gender, Power and Privilege - Conclusions and Perspectives

Using pandemic-related examples from primarily Danish law, this chapter explores the underlying care structures facing care workers from a feminist jurisprudential perspective. A particular focus is placed on the difficulty of being compensated for mental health-related Covid-19 workplace injuries and its potential implications. These difficulties have a connection with pre-existing gendered inequalities related to women's shares of paid and unpaid care work, both in the labour market and in the private sphere, the status of mental health injuries in law and the construction of the insurance system, here the Danish Labour Market Insurance (AES). Pre-existing discriminatory structural and institutional problems - namely the subordination of care work as a gendered societal problem - are exacerbated during the Covid-19 pandemic.

Most of the cases filed with the AES on Covid-19 related mental illness have been rejected as of 15 August 2021, and this raises the question of why. More women than men have reported work-related Covid-19 injuries to the AES. Most of the cases come from the care work sector, which is dominated by women. The question therefore is gendered. This chapter has used examples from Danish case law and administrative practices to illustrate the risks with legal interpretations and structures. More in-depth, interdisciplinary research must be conducted in the future, in order to understand and solve the gendered problems at stake in the care work sector in the Covid-19 context. The lack of preparedness plans, equipment and personnel and other socio-economic and legal structures surrounding care workers when Covid-19 entered the field are necessary to identify and address in law when taking both individual and structural approaches to handling the aftermath of the pandemic.

Women's pre-existing subordinated socio-economic positions risk being reproduced by legal structures, for example when measuring the compensation when injured in the pandemic. Women's paid and unpaid care work may be undervalued compared to what it should be considered with respect to the value of the work. When dealing with Covid-19 related injuries in the care work sector, understandings of vulnerability and causation must include sex/gender sensitive approaches with awareness of the structures and allocation of power and privilege embedding the individual. Mental illness and stress-related problems risk being seen as individual weaknesses, rather than work-related or societal problems. This also relates to the issue of who should carry the burden of the Covid-19 care work. It can be questioned whether stress-related issues have been properly documented by the government and the employers of care workers during the pandemic. Gender sensitive research should be conducted on how care workers might, for instance, develop long-term socio-psychological and economic effects after the Covid-19 pandemic.

Lessons from vulnerability research remind us that what is considered as a 'normal' development of, for instance PTSD, or other diagnoses, is not only a medical question, but also a question to be critically evaluated in law. The premises for vulnerability and causation must be transparently discussed to avoid stereotypes, stigmatisation and discrimination. The systemic failures and structures that produce vulnerabilities in the care work sector should serve as a starting point when a care worker reports on the development of a mental health disease because of stress in the work place.

The PTSD case illustrates the lack of proper systems to redress AES mistakes. As a minimum, systems should be established that make it possible to contact claimants who were wrongfully assessed and rejected by AES. Further, there must be a question of efficient compensation for the mistakes made by AES. The structuring of AES and the compensatory systems as individualised institutions may be at risk of not (fully financially) recognising women who had to face the Covid-19 front line. They must be seen in light of the broader socio-economic situation for women in both the public or private sphere; for example, in the family, taxes, social security, insurance, tort law and labour systems. The gender perspective, with an awareness of the structures and allocation of power and privilege embedding the individual, should be included in both structural and individual-oriented responses to Covid-19 and its aftermath.