

# Social Care Law

T O D A Y



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# CHILD PROTECTION / CHILDREN'S SERVICES

## NEGLIGENCE CLAIMS

### The Court of Appeal, in *Lawrence v Pembrokeshire CC*, confirms that local authorities may not be sued by parents/carers for negligent discharge of their child protection functions

In this decision the Court of Appeal revisited the topic of civil liability for negligent discharge of child protection functions, in particular whether a parent could sue for damages in respect of child protection interventions which turned out to be unfounded. In fact, the Law Lords addressed this very point two years ago in *JD v East Berkshire Community Health NHS Trust & Ors* [2005] 2 AC 373 and held that such a claim could not be brought for fear that it would discourage timely and robust child protection by officials.

Why, then, in the light of the Law Lords' decision, was the issue back before the Court of Appeal? This was due to the Human Rights Act 1998. The *East Berkshire* case concerned events that occurred before the Human Rights Act 1998 came into force. The claimant in this case pointed out that under the Human Rights Act it is now possible for a parent to make a claim for damages where a child protection intervention amounts to an unjustified breach of the right to respect for private and family life contained in Article 8 of the European Convention on Human Rights. The fact that another type of damages claim is now possible called for, argued the claimant, reconsideration of the immunity from suit laid down by the Law Lords in *East Berkshire*.

#### How did the case arise?

Ms L told social workers that occasionally she disciplined her children by threatening them with a wooden spoon. Then, her partner told social workers that she had hit him with a wooden spoon, which was, in fact, a lie. The children were interviewed by police and, in April 2002, a Child Protection Conference (CPC) was held. Ms L was unhappy about the conduct of the CPC because she was not permitted to give her side of events. The CPC concluded that her children were at no risk of physical harm but that they should be entered on the Child Protection Register under the "emotional harm" category. This was despite the fact that there appeared to have been no evidence before the CPC which suggested that the children were at risk of emotional harm.

Subsequently, an independent report concluded that "the evidence did not justify placing the children's names on the register and social workers had misused the initial CPC and misled the chair". Shortly after this report, in June 2003, the children's names were removed from the register. Ms L made a complaint to the Ombudsman who found maladministration, issued a highly critical report, and recommended £5,000 compensation.

Ms L then brought a claim for damages in negligence. The High Court struck out her claim on the basis that it is impossible for parents to sue a local authority for negligent discharge of its child protection functions. Ms L appealed to the Court of Appeal.

## THE DECISION

### The immunity from suit remains

The Court of Appeal was asked to decide whether a local authority owes parents what is known as a "common law duty of care" to exercise reasonable care when carrying out child protection functions. Where such a duty exists, a well-intentioned but negligent mistake gives rise to potential legal liability. In other words, if there is no such duty, no claim in negligence can be brought.

In the *East Berkshire* case, the Law Lords decided that a common law duty of care should not be imposed for fear that this might make child protection professionals too cautious and prevent them from taking timely and robust action to protect children who could be at risk.

The Court of Appeal saw no good reason to depart from *East Berkshire*. Whilst human rights legislation might now give a separate legal right to aggrieved parents, that did not justify exposing local authorities to negligence claims. The immunity from negligence claims, therefore, remains in place.

### The *East Berkshire* immunity was always intended to extend to social workers

A subsidiary argument was also raised in this case. It was that the *East Berkshire* immunity was only ever intended to extend to medical professionals, and not to social workers. This was rejected by the Court of Appeal as follows:

"one of the cases in *East Berkshire* did concern a social worker as well as a doctor, and none of their Lordships distinguished between them, the ratio of the majority being clearly directed to all such persons engaged in child protection.", and

"It is immaterial that social workers, not doctors, place children on the Child Protection Register or take them into care, since child protection work requires social service departments to work closely with the police, doctors, community health workers, the education service and others."

The Court of Appeal went on to reject the argument that social workers should be distinguished on the basis that supposedly they have less intimate contact with children than medical professionals:

"Actions taken by social workers may not always have the direct quality, in the sense of face to face contact with the parent and/or the child in the family context; it may involve enquiries or decisions made in municipal offices or in committee rooms by a number of persons, some with no personal contact with the family. But more importantly, given the factual matrix in which the issue for the Court arises...It does not seem to me to matter as a matter of common law whether the conduct said to have caused harm to the parent was direct, in the sense of face to face, or otherwise."





## Claims by children

This decision does not mean that claims by a child whom a local authority negligently failed to protect are barred. The law treats children differently from their parents in this respect. Consistently with the principle that the law's purpose here is to promote the protection of children, the courts have held that child protection teams do owe a common law duty of care to children. Therefore, a negligent failure to protect a child could leave a local authority open to claims for damages in negligence.

## COMMENT

It is a feature of our legal system that a single event can have more than one legal consequence. Therefore, this decision does not rule out claims other than negligence claims by parents. A claim under Article 8 of the European Convention on Human Rights, the right to respect for family life, for example, is possible. The European Court has allowed Article 8 claims by parents on the basis that public authorities acted without 'relevant and sufficient' reasons, although it should be noted that that Court has also stressed the importance of the law not inhibiting social workers from taking action to protect children from harm.

The Court of Appeal gave its unanimous decision in *Lawrence v Pembrokeshire County Council* on 7 June 2007: [2007] EWCA Civ 446. The Court was comprised of Auld, Scott Baker and Richards LJ.

# COMMUNITY CARE

## FUNDING CARE FOR CATASTROPHIC ACCIDENT VICTIMS

**The Court of Appeal, in *Crofton v NHS Litigation Authority*, holds that it is possible for an insurer to avoid paying compensation for future domiciliary care because a local authority can be expected to fund that care**

Recently, we have reported a spate of cases concerning the links between awards of damages for the future costs of care in negligence claims (e.g. RTAs) and local authorities' duties to provide residential care under s.21 of the National Assistance Act 1948(a). Those cases show that sometimes the negligent party's insurers will not be required to make an award for the future costs of residential care because the courts have concluded that such care would be provided free of charge by a local authority in any event. The upshot is a transfer of the (often massive) financial burden from the negligent party to the state, in the form of a local authority. This offends many people's notions of justice, but, on the current case law, it is possible.

The residential care decisions have begged the question of whether a similar result is expected in cases where an accident victim requires care at home, rather than residential care. This was addressed by the High Court in *Freeman v Lockett* [2006] EWHC 102 (QB) which we considered in issue 39. The Court in that case held that it could not be safely assumed that a local authority would provide the necessary long-term care services free of charge and, accordingly, the negligent party's insurers had to pay an additional £1 million compensation in respect of future home care. So, that was a good decision for local authorities – it illustrated that the statutory framework for domiciliary care is such that, where an accident victim requires that sort of care, insurers would often have to foot the bill. The decision of the Court of Appeal considered here will not be as welcomed by local authorities. The Court accepted that it was possible for an insurer successfully to argue that it should not pay compensation in respect of the future costs of an accident victim's domiciliary care. However, the Court did not say that such a result was likely and, in fact, it is suggested that such a result is actually unlikely provided that courts hearing compensation claims are made fully aware of the legal nature of the statutory domiciliary care regime. This is addressed in more detail in the 'discussion' section at the end of this article.

These are not insignificant issues for local authorities. If responsibility for the long-term care of a catastrophic accident victim can be avoided, the savings for a local authority can make a real difference to its finances. In addition, the injured party obtains far greater control over, and security in relation to, the provision of future care. It is therefore important for local authorities to engage with those acting for victims in order that they might show how local authority care cannot (through no fault of the authority) be relied on to provide the same benefits as a cash sum which the victim (or his/her trustees) can use to purchase care services on the open market.

Now, a health warning! This aspect of the law is fiendishly complex which is illustrated by the fact that the Court of Appeal itself said here that "we cannot conclude this judgment without expressing our dismay at the complexity and labyrinthine nature of the relevant legislation and guidance, as well as (in some respects) its obscurity." In other words, it is tough going. However, it is worth persevering with because the fate of millions of pounds worth of public monies often turns on the application of this branch of the law.

## THE FACTS

This case was slightly different in factual terms to the other recent cases on the topic because it concerned not a road traffic accident, but NHS medical negligence. However, that is immaterial so far as the law is concerned: the principles are the same regardless of the party being sued.

C was born in 1979. A few days after his birth, a vascular disorder was diagnosed. This was negligently treated by the NHS and, as a result, C was left with catastrophic injuries. In the words of the Court of Appeal: "he suffered diffuse brain damage with the result that he now has the mental age of a young child. He has very limited mobility and speech, and his vision is poor. He can do very little for himself and requires the attendance of a carer throughout the day and a second carer for certain purposes. Attendance by carers is required throughout the night". The NHS admitted liability for C's injuries. They could not, however, reach agreement with C's lawyers as to the amount required to compensate C for his injuries.





The sticking point was quantifying the costs of C's care for the rest of his life. This turned upon the treatment of any compensation award for the purposes of the charging scheme for local authority domiciliary care services. The NHS argued that any award would be ignored by a local authority whom C approached for the provision of domiciliary care and, as a result, the authority would be bound to provide such care free of charge. Accordingly, argued that NHS, an award of compensation to cover the costs of future care would be an unjustified windfall. In order to avoid this result, they claimed, the court should not award any compensation for the costs of C's future care.

The parties could not resolve their differences and so the matter came before the High Court for determination. That Court held as follows:

- (i) the High Court accepted that it was reasonable for C's compensation to include a sum designed to allow him to purchase his own accommodation. Accordingly, that meant that this was not a 'residential care' case (because the parties agreed that, as a result of the accommodation ruling, C's needs for residential accommodation were met). The issue therefore became whether, in the accommodation that would be purchased for C, local authority domiciliary care would be provided free of charge;
- (ii) the High Court quantified the annual costs of C's domiciliary care at £122,000. The Court also concluded that his local authority would decide that he was entitled to £70,000 worth of domiciliary care per year and that the authority would make direct payments to him in that sum (instead of directly providing the service). The Court went on to decide that C's local authority would provide this care free of charge because they would ignore any compensation paid in respect of C's injuries. Accordingly, no compensation was payable to C in respect of the future costs of local authority-provided care. The NHS were only ordered to fund the remainder of C's care costs, approximately £50,000 per year. Overall, this reduced the NHS's compensation bill by about £1.5 million.

C appealed to the Court of Appeal. He argued that the High Court had made an error by concluding that, for domiciliary care purposes, his local authority would ignore any compensation.

## LEGAL BACKGROUND

### A summary of the position in relation to residential care

It is convenient at this point to summarise the case law concerning compensation for future costs of *residential* care and local authority duties to provide that care (for a fuller account, see issue 26). This is because the charging rules for residential care provide a rough template for charging for domiciliary care services and it was because of this that the NHS in this case argued that the compensation cases involving victims who require residential care were applicable when the courts were considering future funding arrangements for domiciliary care.

#### *The historic position and the 1998 legislative changes*

Local authorities must charge for the residential care that they are obliged to provide under Part III of the National Assistance Act 1948 (NAA). This, however, is subject to a service user's ability to pay: persons with insufficient income or capital pay nothing. Prior to 1998, the way in which local authorities were required (under the National Assistance (Assessment of Resources) Regulations 1992) to assess a service user's ability to pay meant that accident victims who required long term care would invariably receive an award of damages in respect of the cost of that care even if it were likely to be provided by a local authority. This was because personal injury damages awards would be taken into account by a local authority when assessing a person's ability to pay for residential care, and awards tended to be of sufficient value so that recipients became too wealthy to qualify for free residential care – the present capital limit is £21,500 in England and £22,000 in Wales. Consequently, awards of damages would include an element to cover the future cost of local authority care in order to ensure that a claimant would be fully compensated for the financial costs flowing from his/her injuries. As the High Court put it in *Crookdake v Drury* [2003] EWHC 1938 (QB):

"Prior to the amendment damages recovered in a personal injury claim were taken into account in assessing an individual's resources when considering the charges to be made for accommodation and ancillary services under...the [NAA]. Accordingly until the amendment came into effect it was not open to a [negligent party in an action for negligence] to argue that a claimant had not suffered any loss in relation to accommodation and ancillary services by virtue of the statutory duty to which s.21 [NAA] Act gives rise".

In 1998, the Regulations were amended to provide that certain categories of damages awarded in personal injury claims (and held on trust) were to be disregarded in assessing an individual's ability to pay for residential care under s.21 of the 1948 Act – in other words, the cost of providing s.21 accommodation could no longer be met from a claimant's damages. One consequence of this amendment has been to stop, in some cases, awards of damages for the cost of long-term care and accommodation where a social services authority would be likely to provide that care/accommodation free of charge in any event as a result of its duty under s.21 of the 1948 Act. This is because in such cases a compensation award to fund future residential care would be unlikely to be used for that purpose (given that the compensation would have to be ignored by a local authority) and to pay such compensation would therefore be an unjust enrichment. For further details of this complex area of law, see the High Court's decision in *Bell v Todd* [2002] Lloyd's Rep. Med. 12. QB. In that case, the High Court concluded (not without some difficulty) that both the capital represented by a relevant personal injury award and the income from that capital were to be ignored by a local authority assessing a person's ability to pay for residential care under the 1948 Act. The question of whether the same dual disregard (capital and income) applies in the case of domiciliary care charging was at the heart of the present case.

#### *Cases in which insurers, rather than local authorities, will have to pay for long term residential care*

It is not, however, a foregone conclusion that the courts will assume that a local authority will provide satisfactorily for an accident victim's future residential care. A court that is considering how an accident victim's long-term care needs should be met, and a local social services authority considering how to discharge its s.21 duty to provide residential care, approach their task according to different legal rules. The effect of these differing rules means that in some cases local authorities will not be required to shoulder the financial burden of the long term residential care of catastrophic accident victims.

In its decision in *Sowden v Lodge; Drury v Crookdake* [2004] EWCA Civ 1370 (see issue 26) the Court of Appeal held that a court deciding a personal injury claim must, in constructing a compensation award, give effect to a claimant's reasonable requirements for future residential care.





This will not necessarily match the type of provision that a local authority would be likely to provide for the person in the exercise of its duty to provide residential care under the NAA. A local authority has a degree of discretion as to the form taken by accommodation provided by it under the NAA. The general position is that so long as the local authority provides accommodation (with care) that it reasonably considers to be "suitable" to meet the needs of the service user, it has discharged its duty under s.21(a).

Where there is a material difference between the type of accommodation and care reasonably sought by a claimant and the type of accommodation that a local authority would be likely to provide under s.21, a court should award damages to cover the cost of the long term accommodation and care – to ensure that the accommodation and care reasonably sought is, in fact, provided. Thus, in such a case, the relevant local social services authority would not expect to bear the cost of providing residential accommodation for the accident victim(b).

## The relevance of the residential care charging rules for domiciliary care charging

Why, then, are the residential care charging rules relevant in cases such as the present which concern *domiciliary care*?

In charging terms, the provision of domiciliary care differs from the provision of residential care. Local authorities must charge for residential care, but they have a discretion as to whether to charge for domiciliary care (s.17 of the Health and Social Services and Social Security Adjudications Act 1983). Central government has issued guidance (Fairer Charging Policies for Home Care and other non-residential Social Services) to those local social services authorities that do charge for domiciliary care services (which authorities are expected to follow: *R v Islington LBC ex parte Rixon* (1998) 1 CCLR 119).

The guidance sets out how those authorities that do charge for domiciliary care services should assess a service user's ability to pay. In some respects, the guidance provides for the same approach as is required by statute in relation to residential care charging. Broadly speaking, it was because of this similar charging basis that the NHS in the present case argued that C's local authority would provide the necessary domiciliary care services for the rest of the claimant's life, and provide them free of charge, if his damages were paid into a personal injuries trust (i.e. they were looking to the residential care case law that we discussed above and arguing for a similar result).

## THE COURT OF APPEAL'S DECISION

### (1) Local authority not permitted to refuse domiciliary care merely because of a compensation award

The first issue for the Court of Appeal was not in fact raised when the case was in the High Court. It was whether, in the light of an award of compensation, C's local authority would be entitled to refuse to provide any domiciliary care assistance at all (which the Court of Appeal described as the 'threshold question').

What was the purpose of this argument? C's counsel pointed out that, leaving aside for one moment the issue of long-term funding for domiciliary care, C had already been given a multi-million pound award, for example he had been awarded £600,000 to purchase a suitably adapted house and £500,000 in respect of future loss of earnings. C's counsel's argument was that a local authority would look at these sums and decide that, as a result, they did not need to provide domiciliary care services. A local authority would reasonably conclude that C would use these sums to provide for his long term care. Accordingly, C would have to cannibalise the other elements of his compensation in order to pay for the long term care that his local authority would refuse to pay. To avoid this happening, argued C's counsel, C should be awarded a sum which would permit him to purchase all the care he needed on the open market.

The Court of Appeal's decision on this point is actually of some significance more generally in the community care field. The Court of Appeal has confirmed that a local authority can refuse to provide domiciliary care services on the basis that a service user has the financial and other means to fund services him/herself (i.e. in appropriate cases, the authority can simply leave an individual to arrange his/her own care, rather than providing care and then recovering charges). However, that does not apply where the finances in question are in the form of an award of personal injury damages such as in the present case.

#### *The position in relation to residential care*

It is convenient to begin, as did the Court of Appeal, by considering the effect of a service user's resources on the 'threshold' question for a local authority in connection with residential care, that is whether a service user's finances can entitle a local authority to refuse to provide any residential care at all. The position, as described by the Court of Appeal is as follows:

- (i) under s.21 of the National Assistance Act 1948 (NAA), residential accommodation is to be provided for persons who need care and attention but for whom that care and attention is not "otherwise available" (in other words, persons who will not receive the care and attention they require unless residential care is provided to them: *R (Wahid) v Tower Hamlets LBC* [2002] EWCA Civ 287);
- (ii) the key question is whether a local authority can decide that, because a person has his/her own financial resources and has the capacity to deploy them to purchase, care and attention is otherwise available (so that the duty to provide residential care does not arise)?
- (iii) the answer to the above question is a qualified 'yes'. The point was considered by the Court of Appeal in *R v Sefton Metropolitan Borough Council, ex parte Help the Aged* [1997] 4 All ER 532. That was a case in which a local authority was found to have acted unlawfully by refusing residential care to individuals despite them having capital that fell below the capital limit for residential care charging purposes. The purpose of the capital limit is to identify those service users who can afford to meet the full costs of local authority-provided residential care: a person with capital in excess of the limit is liable to meet an authority's full charges for residential care and a person with less is liable to pay reduced charges, or no charges at all once capital has been reduced to a certain level. The council in *Sefton* would only provide assistance to persons whose capital had fallen below £1,500 whereas the capital limit at the time was £16,000 (and is now £21,500 in England). The Court of Appeal held that if a local authority is to refuse to provide assistance on the basis that a person has the resources to fund his/her own residential care they must not thereby destroy the purpose of having a capital limit for residential care charging purposes. They must not refuse to provide assistance to a person on the basis that s/he has sufficient resources (and ability) to arrange his/her own residential care unless that capital





exceeds the capital limit. By implication, therefore, the Court of Appeal held that, where a person had capital above the capital limit, a local authority could refuse to provide him/her with residential care;

- (iv) the *Sefton* decision was effectively "confirmed" (to use the Court of Appeal's phrase) in statute by amendments made to section 21 NAA by the Community Care (Residential Accommodation) Act 1998. The new provision, s.21(2A), and related regulations, provide that, in determining whether care and attention are "otherwise available" to a person (i.e. deciding whether the duty to provide residential accommodation has arisen), a local authority is to ignore so much of a person's capital as does not exceed the "capital limit". In other words, where a person has capital in excess of the capital limit, a local authority may conclude that care and attention is otherwise available (i.e. it can be bought), provided, of course, that the person in question is capable of arranging the required residential care;
- (v) however, this is not the end of the story where the capital in question is a personal injury award held in trust. As noted above in the 'legal background' section, such capital is to be ignored for charging purposes which means it is also to be ignored for the purposes of the 'threshold question'. In the words of the Court of Appeal, "for the purposes of deciding the threshold question under section 21, therefore, the capital sum represented by an award of damages for personal injury is disregarded". Accordingly, a local authority cannot decide that care and attention is otherwise available (and thus deny the duty to provide residential care) on the basis that an award of damages for personal injury can be used to fund residential care.

#### *The position in relation to domiciliary care under the Chronically Sick and Disabled Persons Act 1970*

The Chronically Sick and Disabled Persons Act 1970 confers a duty upon local authorities to provide certain domiciliary care services, such as "practical assistance in the home". The duty is triggered where a local authority decides that it is "necessary" to provide a service in order to meet a person's needs: this is the domiciliary care equivalent of the threshold question considered above.

The Court of Appeal held that the position as respects service user resources and the threshold question in relation to domiciliary care mirrors that in relation to residential care:

- (i) Generally, it is permissible for a local authority to decide that it is not necessary to provide services to meet a service user's needs where s/he has adequate resources and capacity to arrange and pay for the services him/herself. In the Court of Appeal's words in the present case:

"the statutory scheme rests on the assumption that it is "necessary in order to meet the needs" to provide or pay directly for care services if the person is unable to provide them himself; and in deciding whether he is able to provide them himself, his ability to pay is to be judged by reference to the relevant means testing regime."

It is observed that this finding reflects the finding of another sitting of the Court of Appeal, in *R (Spink) v Wandsworth LBC* [2005] EWCA Civ 302, where it upheld the High Court's ruling that it was open to a local authority to decide that it was not necessary to provide services for a disabled child because his parents had sufficient resources to arrange the services themselves.

- (ii) However, as with residential care, damages awarded for personal injuries are a special case and cannot be taken into account for the purposes of the threshold question. The Court of Appeal said:

"it is difficult to see why personal injury damages should be left out of account for the purposes of deciding whether care and attention is to be regarded as "otherwise available" (the section 21 question), but that they should be taken into account when deciding whether it is necessary to provide welfare services to meet a person's care needs (the section 29/section 2 question). There are obvious policy reasons for ring-fencing a person's personal injury damages where he is under a disability (and his funds have to be administered by the Court of Protection). No policy reason has been suggested to justify ring-fencing such a person's personal injury damages in relation to the cost of care and attention in accommodation provided by a local authority, but not ring-fencing the damages in relation to the cost of meeting such a person's care needs in his own home."

- (iii) the upshot of this was that the Court of Appeal rejected the argument that the existing damages, for sums such as loss of earnings, would lead to a local authority refusing to provide for C's care.

Because C's argument on this first point was rejected, the Court of Appeal had to address the consequences of the domiciliary care means testing rules for the quantification of C's compensation award. To recap, the issue here was whether, for means testing purposes, a compensation award would be ignored. If it would, the NHS could argue that any compensation for future care would be unjustified enrichment – the award would have to be ignored by a local authority and so C could just keep the money and, at the same time, avail himself of free local authority domiciliary care (his disabilities were such that it appears to have been accepted that, under any local eligibility criteria, he would qualify for care).

## **(2) The relationship between domiciliary care means testing and personal injury damages**

At the outset of this part of the article, it is convenient to recap on the role played by capital and the role played by income in relation to residential care means testing:

- (i) capital has a dual function. First of all, as we have seen, the relevant regulations set a capital limit. If a person has capital (being capital that 'counts') above the capital limit, and s/he is provided with local authority residential care, s/he will have to pay the full charge for the residential care;
- (ii) a person's income also has a bearing upon residential care charges. For this purpose, it is weekly income that matters. This is where the second function of capital comes into play. A person is deemed to have a weekly 'tariff income' from capital and so the existence of a weekly tariff income increases the charges payable (because the higher a person's income, the greater the contribution that must be made);
- (iii) 'pure' income is, accordingly, also taken into account. A resident's actual income (i.e. non-tariff income) feeds through into higher residential care charges in accordance with the relevant regulations.





As we saw at the beginning of this article, for residential care purposes, both the capital represented by a personal injury award held in trust, and the income derived from that capital, are to be ignored. It is this which has led to claimants not receiving awards of damages for the costs of future residential care. The question for the Court of Appeal in the present case was whether the same applied for domiciliary care purposes, that is whether both capital and income were to be ignored.

#### *The treatment of capital under the domiciliary care charging regime*

Local authorities have been issued with statutory guidance about the way in which they should levy charges for domiciliary care (if they decide to levy charges). As we saw above, this is a legally 'strong' form of guidance that local authorities are expected to comply with.

The Court of Appeal found that, so far as capital is concerned, the guidance is very clear. The residential care approach must be followed. This means the capital in any personal injury award must be ignored for the purposes of domiciliary care means testing (where it is in a form that must be ignored under the residential care charging scheme). The Court of Appeal said that the guidance "provides that the capital value of personal injury damages that are administered by the Court of Protection is to be disregarded in the means testing exercise".

Accordingly, this was a good finding for the insurers because it took them a step closer to succeeding in their argument that compensation would be ignored in its entirety and therefore should not be paid. Generally, it is likely to mean that in some cases local authorities will have to provide the care that, in the absence of these very complex rules about compensation, would have been funded by insurers/the person who injured the claimant.

#### *The treatment of income*

The Court of Appeal said that the treatment of income deriving from capital was "more problematic" and "far from clear", largely because of the poor drafting of the guidance in this respect.

The Court's conclusion makes life more complex in practice. Their conclusion was that the treatment of income deriving from capital is not covered in the guidance. This means it is for each local authority to exercise its discretion and decide how, within that authority, income deriving from capital is to be treated for means testing purposes. As a result, the decision of the High Court in the present case was incorrect because it had held that income would definitely be taken into account yet there was no evidence about the relevant local authority's policy on this matter.

Obviously, it will be beneficial for this local authority to decide that it will take into account such income for means testing purposes. That ought to mean compensation being increased to take account of the fact that the income will be seized by the local authority in order to pay home care fees. By contrast, if it decides that it will not take into account such income, compensation will be reduced because there is no need to compensate C for domiciliary care that will be provided free of charge.

### **(3) The Court's disposal of the matter**

The Court of Appeal allowed the appeal. As just described, the High Court had erred by deciding that income derived from capital would be ignored for charging purposes. The Court of Appeal was also concerned more generally about the lack of evidence placed before the High Court about the likely future funding of local authority care for C. It directed that much fuller evidence on these points should be placed before the High Court judge that is to re-hear the claim.

### **(4) Evidence**

The Court of Appeal was critical of the way in which evidence as to the likely charging stance of the relevant local authority was presented during the High Court trial. Apparently, the possibility of the local authority continuing to fund, via direct payments, C's future domiciliary care emerged for the first time during the oral evidence of one of the local authority's officials. In other words, it had not been part of the NHS case as set down for trial.

The Court of Appeal said that the late introduction of the point meant that C's counsel and the High Court judge "did not have sufficient time to unravel the complexities of the legislation and guidance, or consider properly whether further evidence was needed to deal with the point" and led to an "important lacuna in the evidence necessary for the judge's decision". The Court of Appeal went on:

"The springing of surprises is anathema to modern case-management. That is what happened in this case. To raise an important and difficult issue in the way that the direct payments issue was raised was an unacceptable way to conduct litigation."

The Court of Appeal concluded that it would have been better if the proceedings before the High Court had been adjourned so that the parties could have adequately prepared their arguments in relation to likely local authority charges for domiciliary care.

The complexities involved in relating the compensatory principles of the law of tort to the law about charging for community care services may render litigation of the present category particularly difficult to prepare. Indeed, the above comments of the Court of Appeal echo those made recently by another division of that same court on exactly the same point: see *Sowden's case* which we considered in issue 18. It may therefore be wise for legal representatives instructed to act in cases of this sort to consult with lawyers experienced in the complexities of the community care charging regimes.

### **COMMENT**

The Court of Appeal recognised that the potential result in cases such as the present (*de facto* transfer of responsibility for care from the wrongdoer to the State, in the form of a local authority) appears wrong to many:





"We say only that we can see no good policy reason why the care costs in a case such as this should fall upon the public purse. We can see no good policy reason why damages which are about to be awarded specifically for the provision of care to the claimant, needed only as a result of the tort, should be reduced, thereby shifting the burden from the tortfeasor to the public purse. We recognise that the mechanism by which these ends could be achieved with justice might be complex and difficult. But, as we say these are policy issues and are a matter for Parliament."

However, such a result is not a foregone conclusion. The residential care cases and the domiciliary care case of *Freeman v Lockett* (see above) illustrate that it cannot be assumed that a claimant's reasonable requirements for lifelong future care will be met by local authority provision. If they are unlikely to be so met, compensation should be paid in order that the claimant / trustees can purchase his/her own care on the open market that will enable his/her reasonable requirements to be met. Some of the key factors that raise doubts about the sufficiency of local authority provision in this respect are as follows:

- (i) The statutory scheme for the provision of domiciliary care services is flexible and leaves significant discretion in the hands of local authorities as to the form in which services are provided, a discretion whose exercise is heavily dependent upon its available resources. In addition, whilst most authorities aspire to provide person-centred services, organisational and financial constraints means there is often a standardisation of services and not all needs and preferences can be accommodated;
- (ii) Guidance has established a national framework of sorts by requiring authorities to establish a needs banding system – "critical", "substantial", "moderate" and "low" – and to decide which bands they will fund (the Fair Access to Care Services guidance). What the guidance does not, however, do is tell authorities precisely *which* care needs should be met, nor does it prescribe *how* any eligible need should be met. The relevance of this flexibility for present purposes is that it means there is significant uncertainty as to the future provision of local authority provided care services for claimants. If an authority has, for example, a budgetary crisis it might decide to raise its thresholds and fund fewer services, as, in principle, it would be entitled to do. As the High Court said in *Freeman v Lockett*:

"It is obvious that the future availability and level of such services is dependent in part upon considerations which the court is completely unable to evaluate. The longer the timescale over which the court is required to form a view as to the level and availability of such services, the more hopeless is its task".

- (iii) To assume that a claimant's future needs will be met by a local authority (and so not award damages for future care costs) would place a fetter on a claimant's future freedom of action. What if at some point in the future a claimant wishes to move abroad? If a damages award had the effect of forcing the claimant to rely on her local authority for future care, this would effectively prevent her at some point over the rest of her life from moving abroad. This possibility was clearly a material factor in the High Court rejecting the insurer's case in *Freeman v Lockett*.
- (iv) Linked to the previous point is devolution. This builds further uncertainty into the future for social care in England and Wales. The Welsh Ministers already have the power to issue guidance about the provision of domiciliary care services, and charging for such services, that differs from that in England. In addition, the Welsh Ministers have recently announced that it is their desire to take advantage of new powers under the Government of Wales Act 2006 so that a 'Measure', similar to an Act of Parliament but applicable only in Wales, could be made about charges for domiciliary care in Wales.
- (v) The High Court in *Freeman v Lockett* appeared to find persuasive the claimant's argument that encompassed within her reasonable needs was a desire not to have to rely upon a local authority for the provision of services(c). The Court observed that "such conduct was praiseworthy and moreover calculated to contribute to the sense of wellbeing of the person concerned".
- (vi) A further significant factor relied upon by the High Court in *Freeman v Lockett* was the fact that no one can be certain as to what the future holds for the provision of publicly provided social care services. This builds further uncertainty into the analysis of likely future public provision of care. As the High Court said:

"The possibility of a reduction in the level of publicly funded services is obvious to any moderately well-informed person. It is equally obvious that the future availability and level of such services is dependent in part upon considerations which the court is completely unable to evaluate. The longer the timescale over which the court is required to form a view as to the level and availability of such services, the more hopeless is its task."

All in all, the High Court in *Freeman v Lockett* could see no justification for requiring the claimant to bear the risk of future social care service re-configuration, which she would be expected to do if damages were awarded on the assumption that she would receive a certain amount of local authority care for the rest of her life. The High Court said:

"I can see absolutely no justification whatever for additionally and quite unnecessarily imposing upon her a risk which relates not to the possible deterioration in her own condition or to other matters wholly outside any normal control but rather as to the availability or source of funds to meet her needs. Funds can be secured now to meet her reasonable needs as best they can currently be assessed. Why, having assessed those needs, and being in a position to make an award to meet them, should the court relegate the Claimant to a state of uncertainty, however small be the uncertainty, whether there will be available the funds assessed as necessary to meet her needs? The notion that the Claimant should in that respect bear any risk seems to me contrary to all principle."

(a) Although under the NAA (Choice of Accommodation) Directions 1992 (which we looked at in-depth in issue 25, an authority is required to give effect to a service user's choice of preferred accommodation (if it is suitable to meet his/her assessed needs and does not cost more than the authority would usually expect to pay) the general nature of s.21 accommodation will flow from an authority's decision as to which of a person's needs it is willing to meet. By contrast, what a court does when considering what type of accommodation and care should be provided to an accident victim is to decide whether the care and accommodation sought by a claimant/his or her advisers is something s/he can reasonably require. This is how the Court of Appeal described it in *Crookdake*:

"In general terms, the approach is to compare what a claimant can reasonably require with what a local authority, having regard to uncertainties which





almost inevitably are present, are likely to provide in the discharge of their duty under Section 21. If the second falls significantly short of the first, as Owen J found in *Crookdake* it did, the tortfeasor must pay, subject to the argument raised in both cases that Section 21 provision augmented by contribution from the tortfeasor meets the reasonable requirements. If it is the statutory provision which meets the claimant's reasonable requirements, as assessed by the judge, the tortfeasor does not have to pay for a different regime"

(b) In *Crookdake* the Court of Appeal also addressed those cases where matters are less clear cut – 'top-up' or 'augmentation' cases. These are the cases where the courts decide that the expected local authority provision *plus* an award to pay for additional care is sufficient to restore the victim as nearly as possible to the position s/he would have been in but for the accident. It should, however, be borne in mind that whilst augmentation may appear feasible on paper, in practice it may not be. For example, there have been two recent cases in which the probable practical difficulties in co-ordinating two sets of carers (the local authority-funded carers and the 'augmentation' carers) led the High Court to conclude that an augmented award taken with local authority funded care would not be sufficient to compensate claimants for the losses they had suffered: *Howarth v Whittaker* [2003] Lloyd's Rep Med 235 and *Neale v Queen Mary's Sidcup NHS Trust* [2003] EWHC 1471. In *Crookdake* the Court of Appeal said that courts should proceed carefully before ordering top-ups, as opposed to ordering full compensation for future care, especially where there has been limited time to analyse the feasibility of a proposed top-up arrangement:

"while a top-up award is not inappropriate in principle, a court of first instance should be alert to investigating the evidence adduced in favour of a top-up award in the particular case before him. The cost of a yearly holiday together with appropriate carers for such holiday might well be permissible without difficulty, but top-up arrangements in general may present problems, as Elias J said in *Howarth v Whittaker* [2003] Lloyd's Rep Med 235. Judges should normally be reluctant to let defendants raise possible candidates for top-up in the course of the hearing. This will mean that, while it is for a claimant to assert what are his or her reasonable needs, it is for a defendant who asserts that a claimant should be content with local authority residential care to set out in clear terms whether such reasonable needs can be met by such care and whether there is any respect in which they accept that such care does not meet the claimant's reasonable needs, so that top-up will be appropriate. It will then be for the claimant to assert that top-up or further top-up in addition to that proposed by the defendant will be required, if local authority residential accommodation is to be provided".

(c) In this regard it should be noted that even a direct payment does not give a service user complete freedom. The relevant local authority must be satisfied that the service to be purchased by the service user is suitable and, additionally, the service user can expect to be monitored and held to account for his/her use of the monies provided by a direct payment.

The Court of Appeal gave its decision in *Crofton (a patient suing by his father and litigation friend, John Crofton) v National Health Service Litigation Authority* on 8 February 2007: [2007] EWCA Civ 71. The Court was comprised of May, Dyson and Smith LJJ.

## CARERS / DIRECT PAYMENTS

**The Welsh Ombudsman finds Swansea CC guilty of maladministration for failing to appreciate the extent of its obligations to carry out carers assessments and to make direct payments (£3,450 compensation)**

### THE FACTS

This case revolved around the care of R, a boy with autism who is now 10 years old. R first came to the attention of Swansea social services child protection team in 2001 as a result of concerns about the quality of his mother's care. A "core assessment" of R was carried out at this point, when he was 5, but this made no mention of his father's caring capacities. In fact, the child protection file was 'closed' when R went to live with his father, who had obtained a residence order in respect of him. Throughout the period in question, R would stay with his father during the week and with his mother at weekends.

By 2002, Swansea social services recognised that R had "learning disabilities and behaviour characterised by autistic features" and that his behaviour at home was becoming increasingly challenging. He was put on the waiting list for the Family Link scheme, which provided respite care for parents. An "initial assessment" was performed in 2003, in response to R's father's concerns that he was becoming more violent but, later that year, a decision was taken to 'close the file' and re-open it when Family Link support (intended to be one overnight stay per month) was provided. R's father continued to press for respite care and his desire for such care became more urgent once he started a full-time degree course.

In February 2004, R's father informed Swansea that he had the right to a carers assessment under the Carers and Disabled Children Act 2000 and requested that they carry out such an assessment. Swansea agreed to do so, but they described this as a 'goodwill gesture'. This was followed by a meeting between R's father and social services, in March 2004, when R's father was told that he would be offered a respite service. However, nothing materialised.

Meanwhile, the carers assessment was delayed and not completed until summer 2005. It concluded that R's father did not need any carers service. In autumn 2005, R's father requested a fresh carers assessment. This was carried out in December 2005, by a different social worker, and, as a result, R's father was offered weekly evening (home-based) respite care. Swansea agreed to pay R's father a direct payment (of £35 per week) instead of the direct provision of this service.

Throughout the period, R's father had regularly raised queries with the council as to his entitlement to receive direct payments instead of the direct provision of services. He received inconsistent advice. At times, he was told direct payments were not available to a person in his position. On other occasions, he was told that it was for him to put forward a case for receiving direct payments and that he had no right to receive direct payments instead of the direct provision of services.





R's father complained to the Welsh Administration Ombudsman about his treatment by Swansea.

## THE DECISION

### Respite care

The Ombudsman noted that, in the past, joint reviews of Swansea social services had criticised its lack of available respite services, especially for the families of children with autism. Swansea did not appear to have responded with any concrete steps to increase its respite care capacity.

As regards the provision of respite care in this case, the Ombudsman criticised Swansea for having told R's father in the 2004 meeting that he would be offered respite care yet failing to do anything to secure this. It appears that Swansea had offered this service without first having considered whether it had the capacity to provide it.

The Ombudsman concluded:

"The team's principal officer has outlined certain measures carried out to improve respite provision post the joint review but this case illustrates that the council needed to do more in order to meet the previously identified significant shortage of respite facilities. Otherwise the council is failing in its duty to meet the needs of such children."

### The carers assessment

The council had been quite wrong to describe the assessment of R's father's needs as a carer as a 'goodwill gesture'. Since s.1 of the Carers and Disabled Children Act 2000 came into force in Wales on 1 July 2001, carers (within the meaning of s.1) have had an absolute right to require their local authorities to carry out an assessment of their needs as carers.

The first carers assessment of R's father was itself flawed. It concluded that R's father had no unmet needs because R's mother would be able to increase the amount of time that she cared for R, thus giving the father more time to spend on his studies. The facts of the matter, however, were that the mother was reluctant to look after R mid-week (as well as over the weekend) and that the father was also unhappy about increasing the mother's caring responsibilities. The assessing social worker apparently refused to acknowledge these obstacles. As regards this aspect of the case, the Ombudsman found as follows:

"I am not therefore satisfied that the carers assessment was carried out in the spirit promoted by the legislative framework. Mr H wanted the flexibility of arranging his own care for R during the week to suit his University timetable. He had concerns about the time taken to transport R by taxi to his mother's home or to an activity on a school night. Nevertheless, despite the reservations of the parents, the social worker concerned sought to impose an arrangement which in my view neither of the parents wanted nor was feasible long term...I do not consider that the outcome of the carers assessment, i.e. that Mr H had no assessed need was the result of a balanced view as claimed."

### Direct Payments

The Ombudsman's decision reveals wholesale confusion within the council about its powers and duties to make direct payments, (instead of the direct provision of services to a disabled child or the direct provision of a carers service).

Throughout the period in question, the council had the power to make direct payments. The Ombudsman concluded that the council was guilty of maladministration by failing to recognise that it could have made direct payments. The facts showed that the council operated a policy of "blanket refusal" rather than considering each case on its merits.

As from November 2004(a), the council had the duty to make direct payments instead of the direct provision of services for disabled children or carers services. This was not appreciated within the council. The Ombudsman noted that "senior officers were maintaining as late as October 2005 that direct payments were not available to enable Mr H to complete his studies [by enabling him to purchase respite care with the direct payment]. Their view was that direct payments were not available for such purposes. Clearly this was wrong".

### Effect of residence order on parental accommodation decisions

At one stage, it seemed that Swansea discounted the possibility of residential respite care because R's mother, who had parental responsibility for him, indicated she would object. Swansea arrived at this conclusion for the following reason. Any residential respite accommodation would have been provided under section 20 of the Children Act 1989(b). S.20(7) prevents accommodation from being provided under s.20 if a person with parental responsibility for a child objects and is able and willing to provide accommodation. Swansea concluded that s.20(7) prevented them from proceeding with residential respite whilst it appeared that R's mother objected.

The Ombudsman noted that Swansea appeared to have overlooked certain provisions in s.20 which modify its application where a person who holds a residence order in respect of a child agrees to the child being accommodated by a local authority. The bar on accommodating a child where a person with parental responsibility objects does not apply if a person with a residence order in respect of the child agrees to the child being accommodated (s.20(9) (i.e. the person with a residence order trumps a person who merely has parental responsibility). Accordingly, in this case R's father could have trumped any objection of his mother to the provision of residential respite care under s.20 of the Children Act 1989.

### Complaints Procedure

The Ombudsman made the following comments about the way in which the Council responded to R's father's formal complaints:

"The Council failed dismally to deal effectively with Mr H's complaints. His complaints were treated as resolved at stage one





proper investigation. The line manager of the Council's complaints section has acknowledged that his complaints because of their recurring nature should have been referred to the independent investigation stage. Both Government guidance and the council's own complaints procedure gives complainants the right to proceed directly to the independent investigation stage of the procedure. Despite his requests Mr H was denied this right."

## Compensation

The Ombudsman recommended that Swansea pay £3,475 compensation to Mr H and that they also arrange for training for "staff, including senior officers" in direct payments and carers assessments.

(a) In November 2004, the Community Care, Services for Carers and Children's Services (Direct Payments) (Wales) Regulations 2004 came into force. These regulations, together with sections 57 of the Health and Social Care Act 2001 and section 17A of the Children Act 1989, establish the duty to make direct payments in Wales.

(b) For example, s.20(4) provides that "a local authority may provide accommodation for any child within their area (even though a person who has parental responsibility for him is able to provide him with accommodation) if they consider that to do so would safeguard or promote the child's welfare". It should be noted, however, that many authorities provide residential respite accommodation under s.17 of the 1989 Act, and not s.20.

The Welsh Administration Ombudsman gave his decision on file no. B2004/0707/S/370 (complaint against Swansea CC) on 22 February 2007.

# PROTECTION OF VULNERABLE ADULTS

## BOURNEWOOD / HIGH COURT'S INHERENT JURISDICTION

**The High Court, in City of Sunderland v PS, holds that, despite the Bournemouth litigation, a public authority may be authorised to detain a mentally incapable adult other than under the Mental Health Act**

Generally, there has been some misunderstanding of the effect of the *Bournemouth* litigation upon the High Court's inherent jurisdiction in relation to the detention of vulnerable adults other than under the Mental Health Act 1983. In some quarters, it has been assumed that, as a result of the European Court of Human Rights' decision in *Bournemouth*, pending the enactment of new statutory procedures designed to close the *Bournemouth* gap, the High Court's inherent jurisdiction may no longer be relied upon to authorise the detention of an adult without capacity despite the fact that detention is in his/her best interests.

This decision shows that the High Court can authorise detention in such circumstances with the result that the *Bournemouth* gap can be closed. Given that the 'gap' arose because of the lack of procedural safeguards attendant upon detention under the common law doctrine of necessity, the key point is that those safeguards are supplied by the involvement of the High Court.

### THE FACTS

This case concerned the care arrangements for PS, who was aged 82 at the date of the High Court's decision. In July 2006, PS began to reside at a specialist residential unit ("the unit") for older persons suffering from mental infirmity.

In January 2007 PS was admitted to hospital. By 7 February 2007, she was fit for discharge. However, a dispute had arisen between the local social services authority, Sunderland, and PS's daughter as to her future care arrangements. The daughter wanted PS to go and live with her, whereas Sunderland were of the opinion that the daughter's proposal was unsafe and that PS should return to the unit to live. Sunderland's concerns were heightened when they learnt that the daughter had requested hospital staff not to inform them that she planned to take her mother home to live with her.

On 9 February 2007 (a Friday), Sunderland made an urgent telephone application (without giving notice to the daughter) to the High Court. The application requested that the Court, in the exercise of its inherent jurisdiction in relation to adults without capacity, make an interim order permitting Sunderland to prevent the daughter from removing her mother from the hospital.

The interim order was renewed the following Tuesday (13 February) at a contested hearing before Munby J, a High Court judge. Munby J made, and subsequently renewed, interim declarations that PS lacked the requisite mental capacity to make necessary decisions for herself(a).

Two points of particular interest were thrown up by this case and about which Munby J thought it important to provide a reasoned judgment:

- (i) whether the High Court, in the exercise of its inherent jurisdiction in relation to vulnerable adults / adults without capacity, may authorise an adult's detention where it is satisfied that it would be in the adult's best interests. Sunderland sought such a declaration because they were concerned, as a result of the Bournemouth 'gap', that if they sought to prevent PS from leaving the unit they would be liable to pay damages for unlawful detention by virtue of Article 5 of the European Convention on Human Rights;
- (ii) whether the High Court, in the exercise of its inherent jurisdiction, may authorise the appointment of a receiver. Sunderland requested that the Court appoint it as PS's receiver because they had concerns that her daughter would misappropriate monies from her bank account. Sunderland recognised that they/their social workers probably could have applied, and been appointed as receiver, under Part VII of the Mental Health Act 1983. However, they wished to avoid the (in their view) cumbersome procedure under that Act in the light of the small amount of money at stake.





## THE DECISION

### (1) detention under the inherent jurisdiction

#### *Background: Bournewood*

The decision of the European Court of Human Rights in *HL v the United Kingdom* considered the compatibility of UK law with the rights protected by the European Convention on Human Rights in the light of the decision of the Law Lords in *R v Bournewood Mental Health NHS Trust, ex parte L* [1999] AC 458. That decision authorised the detention of incapacitated compliant adult patients under the common law doctrine of necessity where it was considered necessary in an adult's best interests. It concerned a patient who could not have been detained under the Mental Health Act because he did not meet the detention criteria under that Act. The European Court held that whilst detention under the common law doctrine met the substantive requirements under Article 5 of the Convention for detention of a person on the ground of unsound mind (i.e. the three *Winterwerp* criteria were met(b)), the practical application of that doctrine did not involve sufficient guarantees against arbitrary detention because it was imposed, and maintained, without recourse to the courts. The European Court found "striking" the lack of procedural guarantees associated with the admission and detention of incapacitated compliant patients and, for that reason, found a violation of Article 5.

#### *Background: the nature of the inherent jurisdiction*

Traditionally, the inherent jurisdiction was viewed as no more than an aspect of the High Court's jurisdiction to declare the state of legal relationships between individuals. The particular legal principle in question was the common law doctrine of necessity which, as we have seen, permits something to be done in relation to a mentally incapable adult which, in the case of a capable individual, would require his/her consent, provided that the thing to be done is necessary in the incapable person's best interests. On this analysis, the High Court would merely validate a proposed course of conduct, i.e. it would declare that if such and such a thing happened, for example a family member tried to remove an incapable adult from a care home, the common law doctrine of necessity would permit the local authority to prevent removal on the basis that it was in the adult's best interests.

One High Court judge in particular, Munby J, has been instrumental in freeing the inherent jurisdiction from the above conceptual shackles. He has repeatedly asserted that the inherent jurisdiction is a free standing power of the High Court to protect the interests of adults without capacity in relation to particular matters(c). For example, in *Re SA (Vulnerable Adult with Capacity: Marriage)* [2005] EWHC 2942 (Fam), [2006] 1 FLR 867 Munby J held:

"It is now clear ... that the court exercises what is, in substance and reality, a jurisdiction in relation to incompetent adults which is for all practical purposes indistinguishable from its well-established *parens patriae* or wardship jurisdictions in relation to children. The court exercises a 'protective jurisdiction' in relation to vulnerable adults just as it does in relation to wards of court..."the court can regulate everything that conduces to the incompetent adult's welfare and happiness."

#### *The local authority's concerns in the present case*

Sunderland were concerned that PS's daughter might attempt to remove her from the Unit. In those circumstances, Munby J was persuaded that it was appropriate to grant an injunction, backed by a penal notice (i.e. the threat of imprisonment for breach), restraining the daughter from doing anything to obstruct or prevent PS from remaining at the unit. But Sunderland were also concerned that the injunction would not of itself enable them to prevent PS's removal if her daughter were to take the law into her own hands and seek to remove her mother from the T unit, albeit in defiance of the injunction. Equally, Sunderland were concerned that if they took steps to prevent PS leaving or being removed from the Unit without the protection of an appropriate order of the court it might be unlawfully 'depriving PS of her liberty' in breach of Article 5 of the Convention thereby exposing itself to a possible claim for compensation under Article 5(5).

Sunderland suggested that the High Court could remedy the procedural deficiencies identified by the European Court of Human Rights in the *Bournewood* litigation and, thereby, remove any possibility of a claim for damages for breach of PS's Article 5 rights.

#### *The High Court does have the power to authorise detention*

Munby J had no doubt that the High Court may, under its inherent jurisdiction in relation to vulnerable adults, authorise the detention of an adult without the capacity to decide where s/he should live. He said:

"It is in my judgment quite clear that a judge exercising the inherent jurisdiction of the court (whether the inherent jurisdiction of the court with respect to children or the inherent jurisdiction with respect to incapacitated or vulnerable adults) has power to direct that the child or adult in question shall be placed at and remain in a specified institution such as, for example, a hospital, residential unit, care home or secure unit. It is equally clear that the court's powers extend to authorising that person's detention in such a place and the use of reasonable force (if necessary) to detain him and ensure that he remains there: see *Norfolk and Norwich Healthcare (NHS) Trust v W* [1996] 2 FLR 613 (adult), *A Metropolitan Borough Council v DB* [1997] 1 FLR 767 (child), *Re MB (Medical Treatment)* [1997] 2 FLR 426 at page 439 (adult) and *Re C (Detention: Medical Treatment)* [1997] 2 FLR 180 (child)."

#### *The obligation of the courts in detention cases*

When a public authority seeks to invoke the High Court's inherent jurisdiction in order to 'detain' an adult, then, if that, in legal fact, amounts to detention for the purposes of Article 5 of the Convention, the Court is obliged to exercise its jurisdiction in a manner which is compatible with Article 5 of the Convention. In the words of the High Court, "in my judgment, proper compliance with section 6 of the Human Rights Act 1998 requires the judges to mould and adapt the inherent jurisdiction so that it is compatible with the requirements of Article 5". What this is likely to involve is discussed in more detail below.



### *The meaning of detention*

The requirements of Article 5 will only be overlaid upon inherent jurisdiction decision making if there is a proposal for an adult to be 'detained' within the meaning of the European Convention. This has its own meaning for the purposes of the Convention. As we looked at in issue 45, when considering Munby J's decision in *JE v Surrey CC & Others* [2006] EWHC 3459 (Fam.), in no way does a person have to be held in something that looks like a prison in order to be detained for the purposes of Article 5. Similarly, in this case the High Court operated on the assumption that "perimeter security, designed to ensure that PS cannot leave by simply walking out of the premises, and appropriate monitoring of visits to ensure that she is not taken away by [her daughter]" would amount to detention for the purposes of Article 5.

### *The requirements of Article 5*

Munby J analysed the general requirements of Article 5(1) and drew on the associated case law to provide guidance about the procedure to be adopted in inherent jurisdiction cases in order to comply with the requirements of that Article. He held as follows:

"For present purposes, and confining what follows to cases of the type with which I am here concerned, it seems to me that if the inherent jurisdiction is to be invoked to justify the detention of someone like PS in somewhere like the T unit, the following minimum requirements must be satisfied in order to comply with Article 5:

The detention must be authorised by the court on application made by the local authority and *before* the detention commences.

Subject to the exigencies of urgency or emergency the evidence must establish unsoundness of mind of a kind or degree warranting compulsory confinement. In other words, there must be evidence establishing at least a *prima facie* case that the individual lacks capacity and that confinement of the nature proposed is appropriate.

Any order authorising detention must contain provision for an adequate review at reasonable intervals, in particular with a view to ascertaining whether there still persists unsoundness of mind of a kind or degree warranting compulsory confinement."

Munby J went on to elaborate on the requirements to be met. In doing so, he drew upon the decision of Wall J in *Re C (Detention: Medical Treatment)* [1997] 2 FLR 180 which Munby J also observed "contains an important analysis of the permissible use of force in the case of children" and "curiously, and unfortunately, its significance as an indication of how the inherent jurisdiction with respect to incapacitated or vulnerable adults should properly be exercised has, so far as I am aware, never been appreciated". These further requirements were as follows:

- (i) any order should be time-limited and "have built into it stringent safeguards to protect the interests of [the patient]";
- (ii) however, the "best safeguard" is "legal representation and access to the court". Accordingly, "any order must contain liberty to apply on short notice";
- (iii) any order the court makes must be based upon and justified by convincing evidence from appropriate experts that the regime proposed:
  - (a) accords with expert medical opinion, and
  - (b) is therapeutically necessary;
- (iv) any order the court makes should direct or authorise the minimum degree of force or restraint (the wording actually used in the order made in the present case was as follows: "it is lawful being in PS's best interests for the [local authority] by its employees or agents to use reasonable and proportionate measures to prevent PS from leaving [the T unit]");
- (v) any order directing or authorising detention should:
  - (a) specify the place where the adult is to be detained,
  - (b) specify (i) the maximum period for which the detention is authorised and, if thought appropriate, (ii) a date on which the matter is to be reviewed by the court, and
  - (c) specify, so far as possible, a place whose location imposes the minimum impediments on easy and regular access between the adult and family and carers (in so far as contact with a particular individual is not prohibited by the order)
- (vi) any order directing or authorising the detention should contain an express liberty to any party to apply to the court for further directions on the shortest reasonable notice.

## **(2) The appointment of a Receiver under the inherent jurisdiction**

### *The local authority's concerns*

Sunderland were concerned that PS's daughter had access to her bank account into which were paid modest private pension payments and which also contained her savings. Sunderland recognised that an application could have been made to the Court of Protection under Part VII of the Mental Health Act for one of their social workers to be appointed PS's Receiver under that Act. However, they argued that, in the light of the fact that PS's case was before the High Court in any event, it was disproportionate to expect a Part VII application to be made and, accordingly, the High Court, in the exercise of its inherent jurisdiction, should appoint one of Sunderland's officials as PS's receiver.



### The decision

The High Court allowed Sunderland's application and appointed a Receiver in reliance on its powers under the inherent jurisdiction. Here is the Court's reasoning:

- (i) it pointed out that section 37 of the Supreme Court Act 1981 confers power on the court to appoint a receiver whenever it appears to the court to be just and convenient to do so;
- (ii) the Court said that "I can see no reason why in principle the court in the exercise of the inherent jurisdiction should not, in an appropriate case, appoint a receiver of an incapacitated or vulnerable adult's property if that is an appropriate way of protecting his interests and promoting his welfare. Welfare, after all, in this context is not confined to someone's physical or emotional welfare. It extends to embrace the material and financial: see the well-known passage in the judgment of Lindley LJ in *In re McGrath (Infants)* [1893] 1 Ch 143 at page 148";
- (iii) the existence of the Mental Health Act regime for the appointment of receivers for persons without the mental capacity to manage their own affairs did not prevent the inherent jurisdiction from being exercised to appoint a receiver;
- (iv) the Court's overall conclusion was as follows:

"It is necessary in PS's interests for her income and savings to be put under proper control, but it would be an unnecessary burden and, in my judgment, wholly disproportionate to the very modest amounts involved, to condemn the parties to the trouble and expense of separate proceedings in the Court of Protection. In the circumstances it seemed to me that the appropriate course was for me to appoint an appropriate officer of the local authority to be PS's receiver. I accordingly made an order declaring (in the form of a bare declaration of best interests as explained in *St Helens Borough Council v PE* [2006] EWHC 3460 (Fam)) that:

"it is in PS's best interests that her financial affairs are managed by [DS], Director of Adult Services, Sunderland City Council (provided that the management of such financial affairs shall be limited to the collection and application of her income and the management of her bank and building society accounts)"

and ordering that:

"[DS] is hereby appointed to be receiver of the property money and income of PS until further order and is hereby authorised to take all such steps as may be necessary to preserve the same with power to pay and apply the income to or for the benefit of PS."

I also granted an injunction to restrain [the daughter] operating PS's bank or building society accounts."

### COMMENT

This decision is to be welcomed. Provided an application to the Court is made before a person is detained (if need be, by way of an emergency telephone application to a duty High Court judge), Munby J has shown how the *Bournewood* gap can be closed through the High Court supplying the procedural safeguards and judicial oversight that were shown to be missing in the *Bournewood* litigation. As a result of Munby J's ruling, local authorities now have a clear description of the route to be taken if they wish to be able to prevent the care arrangements for an incapable adult being disrupted and, in so doing, detain the adult in question. Additionally, authorities can be confident that if they follow the procedure outlined by Munby J they will not be liable to claims under the Human Rights Act 1998 for breach of an adults' rights under Article 5 of the Human Rights Convention.

(a) It is worth pointing out that Munby J stressed the need for a separate decision as respects PS's mental capacity in relation to the range of decisions that fell to be taken in order for Sunderland's care plan to be implemented. He said:

"I made, and subsequently continued, interim declarations that PS lacks the capacity (i) to litigate, (ii) to decide where she should reside, (iii) to decide whom she has contact with, (iv) to decide on issues concerning her care and (v) to manage her financial affairs. The reason why there were no fewer than five declarations in relation to capacity is, of course, because questions of capacity are always issue specific: *Masterman-Lister v Brutton & Co (No 1)* [2002] EWCA Civ 1889, [2003] 1 WLR 1511, and *Re E (An Alleged Patient); Sheffield City Council v E and S* [2004] EWHC 2808 (Fam), [2005] 1 FLR 965. Someone may have capacity for one purpose but lack capacity for another purpose. In the present case the medical evidence indicates that PS lacks capacity in all five respects."

(b) In *Winterwerp v the Netherlands* (1979) 2 EHRR 387 the European Court set out the three minimum conditions that must be met if a person is to be detained in accordance with the Convention on the ground of "unsound mind". It said:

"In the Court's opinion, except in emergency cases, the individual concerned should not be deprived of his liberty unless he has been reliably shown to be of 'unsound mind'. The very nature of what has to be established before the competent national authority - that is, a true mental disorder - calls for objective medical expertise. Further, the mental disorder must be of a kind or degree warranting compulsory confinement. What is more, the validity of continued confinement depends upon the persistence of such a disorder."

(c) In fact, Munby J has started to go further and assert that the High Court's jurisdiction is exercisable more generally in relation to vulnerable adults (that is even where an adult does have capacity in relation to a particular matter): see a *Local Authority v MA, NA & SA* [2005] EWHC 2942 (Fam.). It is also observed that in this case Munby J pointedly referred to the High Court's inherent jurisdiction in relation to "incapacitated or vulnerable adults" (our emphasis: see para. 16 of the judgment).

The High Court (Munby J) gave its decision in *City of Sunderland v PS (by her litigation friend, the Official Solicitor) & CA* [2007] EWHC 623 (Fam) on 9 March 2007.



# HOUSING

## OVERCROWDING

The Court of Appeal, in Elrify v Westminster Council, holds that where, for homelessness purposes, a council deploys the Housing Act 1985's concept of 'overcrowding' it must apply the concept in its entirety

Many homelessness officers have to apply the statutory concepts of overcrowding in discharging their duties under the homelessness legislation. This case is a reminder that these concepts can be quite tricky to apply and, as a result, it is worth seeking advice from those housing officials who are responsible for functions in connection with statutory overcrowding and who can be expected to be familiar with the intricacies of the statutory tests.

### THE FACTS

Mr E applied to Westminster Council for assistance under the homelessness legislation. He was housed at the time, but was living with his 7 children in a 3 bedroom maisonette. He argued that this meant that it was not reasonable for him to continue to occupy the dwelling and he was, for that reason, homeless for the purposes of s.175 of the Housing Act 1996.

In coming to a conclusion as to whether it was reasonable for Mr E to continue to occupy his maisonette, Westminster applied the statutory concept of overcrowding created for the purposes of Part X of the Housing Act 1985(a).

The statutory concept of overcrowding contained in Part X is not as simple as might be assumed. It is to be judged against either a room standard (s.325 of the 1985 Act) or a space standard (s.326). In this case, the space standard was relevant. The space standard operates by reference to the "permitted number of persons in relation to a dwelling". There are two methods of calculating the permitted number. For the purposes of the statutory concept of overcrowding, the lower of the two numbers must be used. What the legislation is actually doing here is as follows:

- (i) there is a 'standard' number of persons assumed to be able to sleep in available sleeping rooms (see Table I in s.326(3) of the 1985 Act);
- (ii) this standard approach is modified in respect of smaller rooms so that a smaller number of persons are assumed to be able to sleep in smaller rooms (see Table II on s.326(3));
- (iii) the result, overall, is that, where a dwelling contains these smaller rooms, the permitted number is lower than applies under the standard approach in Table I. In other words, the smaller the rooms, the fewer are the number of persons assumed to be able to sleep in those rooms for the purposes of deciding whether a dwelling is overcrowded.

When Westminster analysed whether Mr E's home was statutorily overcrowded, they considered only the standard approach to the space standard (this led them to conclude that his home was overcrowded by only one person which then led to their overall conclusion that it was not unreasonable for him to continue to occupy his home: he was not, therefore, homeless). Westminster did not go on to consider whether Table II applied. If they had, they would have concluded that Mr E's home was more overcrowded; in fact it was overcrowded by two and a half persons.

The case eventually came before the Court of Appeal in order for it to determine whether Westminster had erred in law.

### THE DECISION

The Court of Appeal held that Westminster had erred in law. If a local housing authority is to apply the concept of statutory overcrowding, it must apply that concept in its entirety. This means it must address both Table I and Table II in s.326 of the 1985 Act, and, if Table II applies, use that as its basis for deciding whether a dwelling is overcrowded. In other words, it must recognise that where a dwelling has smaller rooms it is more liable to be statutorily overcrowded than a dwelling with larger rooms. In the Court of Appeal's words:

"The council unfortunately made an error in reaching the conclusion that the overcrowding was only by one person too many. The proper application of section 326 upon the information available to the court should have led to the conclusion that it was in fact not one, but two and a half. That difference in my judgment is material. In those circumstances, with if I may say so considerable sympathy to Westminster, in my judgment this should be regarded as a decision which was flawed because one of the main reasons was actually wrong."

The matter was remitted back to Westminster for it to reconsider whether Mr E was statutorily homeless and, in doing so, properly to apply the overcrowding provisions of the Housing Act 1985.

(a) Under s.210 of the Housing Act 1996, local authorities must have regard to the overcrowding provisions of Part X of the Housing Act 1985 when deciding whether accommodation is "suitable", for example when deciding whether accommodation order to discharge the main housing duty is "suitable" (as it must be in order to discharge that duty: see s.193 of the Housing Act 1996). The authority in this case were not deciding whether the claimant's accommodation was "suitable"; rather they were deciding whether it was "reasonable" to expect the claimant to continue to occupy his current accommodation. There is no statutory requirement that the Part X meaning of overcrowding be deployed for the purposes of deciding under the homelessness legislation whether it is reasonable for a person to continue to occupy accommodation. Nevertheless, Westminster decided to use the statutory concept of overcrowding for this purpose. In so doing they were following common practice, indeed it is recommended by the Homelessness Code of Guidance which provides:

"Overcrowding must be considered in relation to general housing circumstances in the district. Statutory overcrowding within the meaning of Part 10 of the Housing Act 1985 may not of itself be sufficient to determine reasonableness, but it can be a contributory factor if there are other factors which suggest unreasonableness."

The Court of Appeal gave its unanimous decision in Elrify v City of Westminster Council on 23 March 2007: [2007] EWCA Civ 332. The Court was comprised of May LJ (who gave the only reasoned judgment) and Smith LJ.



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