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# **BRIEFING**

### S117 MENTAL HEALTH ACT 1983 HOUSE OF LORDS DECISION

#### **A. INTRODUCTION**

- On 25/7/2002 the House of Lords finally brought the saga of charging under section 117 of the Mental Health Act 1983 to a conclusion. This Briefing should be read in conjunction with our original Briefing Note of 6/2/2002.
- 2. The case commenced by way of judicial review applications in the High Court on behalf of a number of individuals who had been charged for residential accommodation provided by local authorities, despite the fact that they were in categories of persons who fell under the provisions of section 117
- That is, they argued that local authorities had a duty to provide them with aftercare services, and that there was no power to charge for any after care services provided under that section.
- 4. On 28/7/1999 the High Court agreed with their challenge. The local authorities involved appealed to the Court of Appeal and on 27/7/2000 the Court of Appeal also found in favour of the applicants. The local authorities finally took their appeal to the House of Lords and the long awaited, if perhaps inevitable judgement, was delivered by Lord Steyn on 25/7/2002 (2002 UKHL 34).

#### **B. THE ISSUES**

- 5. The central question in this case, as summarised by the Law Lords, was whether section 117 authorised and required the provision of aftercare services or alternatively, whether it was merely a gateway section that triggered the use of other statutory provisions.
- 6. If section 117 authorised and required the provision of aftercare services, local authorities clearly had no right to charge for those services since the section, and indeed the Mental Health Act 1983, contained no charging power.
- If however the section was merely a gateway section, it was clear that local authorities may charge for those services under the provisions of other acts of parliament.
- 8. On the facts of these particular cases, the three applicants alive at the time of the House of Lords decision were all in residential accommodation provided by local authorities. Therefore, the local authorities argued that their charging power came from section 21 of the National Assistance Act 1948. However, the general charging arguments were far wider than this.

#### C. THE DECISION

- 9. The House of Lords stated, perhaps somewhat obviously, that any person to whom section 117 applied was "exceptionally vulnerable". It then went on to define aftercare services by quoting from the 1998 case of Clunis and Camden and Islington Health Authority, as "normally including social work, support in helping the ex-patient with problems of employment, accommodation or family relationships. the provision of domiciliary services and the use of day centre and residential facilities".
- 10. This is a wide definition. In terms of the specific arguments put forward by the local authorities, the House of Lords firstly rejected the argument that section 117 imposed a *duty* to provide aftercare services upon local authorities, but gave them no *power* to do so.
- 11. The authorities had argued that the powers had to be identified in other pieces of legislation. The court rejected this and stated that there were clear examples of other gateway provisions in other pieces of legislation, such as section 2 of the CSDPA 1970. The Lords were clear that section 117 was a freestanding provision.
- 12. Secondly, the House of Lords rejected the argument that section 117 was just a general duty upon local authorities to co-operate with regard to discharged patients. Again, the House of Lords identified powers in other pieces of legislation, which dealt with this.
- 13. Thirdly, the House of Lords dismissed the argument that the lack of a power to charge for after care services led to anomalies. The local authority cited an example (for those interested, at page 400 of Jones Mental Health Act Manual 7 Edition 2001) but the House of Lords dealt with this rather dismissivly, simply stating the Parliament had to legislate for a generality of cases, and by implication, could not avoid some anomalies.

## D. CLAIMS FOR REPAYMENT OF CHARGES

- 14. The judgement did not address the issue of claims for the recovery of unlawful charges. Across the course of the three Court Hearings, various global figures were put forward as to the impact upon local authorities nationally if they had to repay charges levied. Indeed, the House of Lords judgement specifically refers to the local authorities submissions as to the effect on repayment of charges levied since 1993.
- 15. This would indicate that the local authorities before the House of Lords were acting upon the assumption that this type of unlawful charge would fall under the contract category as defined by the Limitation Act 1980, with a six year limitation period applying from the date of the first instance judgement (28/7/1999).
- 16. This does not mean of course that there is an automatic right for any individual to recover any unlawful charges back to 1993. The Limitation Act states rather that this is the maximum period for which a claimant can claim, reaching back from the point when the claimant first became aware of their right to make the claim, and notified the local authority of their intention to seek recovery.
- 17. However, the issue is not clear cut, particularly since the persons involved in recovery claims are people who are, or who have suffered from mental illness, and, as per the House of Lords, are a class of exceptionally vulnerable persons.
- 18. There are, therefore, technical arguments about whether some of these people would ever actually be able to become aware of their right to claim and therefore, their six-year limitation period may never actually start to run.
- 19. However, we do believe that these technical arguments can be avoided simply because of the nineteen claimants so far referred through to the

Legal Services Office, only one claim goes back as far as 14/2/1995, one other reaches back as far as 2/9/1996 and the remainder reach back only as far as 1997 or later.

- 20. On the basis that only the last five were referred through to Legal Services later than 2001, the six-year limitation period should not give the local authority any financial concerns.
- 21. The following issues do remain to be resolved though: -
  - (i) Is the Local Authority liable to pay interest on the sums outstanding?

If a claimant brought debt recovery proceedings in the County Court, he would be entitled to claim interest at the rate of 8% (Judgement Debts (Rate of Interest) Order 1983).

(ii) Is the Local Authority liable to pay the claimants reasonable legal costs?

Strictly speaking, costs are not recoverable unless or until proceedings (for debt recovery) are commenced. If proceedings are commenced, although not automatic, costs are likely to be awarded to the successful party.

- (iii) What service, if any, will the Local Authority provide to the recipients of the payments in terms of:
  - (a) Money advice.
  - (b) Impact on benefits.

These issues require resolution as a matter of urgency.

Dated: October 2002

#### Implications for BCC:

- 1. The Local Authority currently has compensation claims totalling £211,721.95 against it. This sum excludes interest and any legal costs.
- 2. One outstanding claim has yet to be quantified.
- 3. There remains the possibility of new claims being brought against the authority for at least the next 4 years.

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