

Casenotes

Charges for Services Provided Under S.117 Mental Health Act 1983

*Nicola Mackintosh**

R v London Borough of Richmond Upon Thames ex parte Watson, R v Redcar and Cleveland Borough Council ex parte Armstrong, R v Manchester City Council ex parte Stennett, R v London Borough of Harrow ex parte Cobham

Court of Appeal (27th July 2000) 3 CCLR 276

This case has finally confirmed that charges may not be made for aftercare services (including accommodation) provided under s.117 Mental Health Act 1983, and clarifies the circumstances in which such aftercare services must still be provided to discharged patients free of charge.

The proceedings were brought by four applicants against decisions/policies of four local authorities to charge for residential accommodation which was provided to the applicants upon their discharge from liability to be detained under the compulsory treatment provisions of the 1983 Act. Two of the applicants were subject to guardianship under s.7 of the Act, having previously been detained under s.3 (admission for treatment), and were required as a condition of the guardianship provision to reside in the placement, for which they were being charged. One further applicant had previously been detained under s.3. The fourth applicant had been discharged from detention under s.3 and was subject to the 'aftercare under supervision' provisions of s.25A of the Act with a condition of residence in the care home. She had sold her property in order to pay for the residential care home fees.

In addition to the main issue of charging for services under s.117, two subsidiary issues were raised. The first was whether a person who was 'liable to be detained' under s.3 of the 1983 Act and granted leave of absence under s.17 of the Act was a person to whom the provisions of s.117 applied. The second issue was whether the effect of s.19 of the 1983 Act (which provides for the transfer of a patient under s.3 to guardianship) was to erase the existence of the original s.3 detention, and thus render that patient outside the scope of s.117 completely.

The Respondent local authorities argued that s.117 was not a free standing service provision duty. They contended that it merely converted the powers/duties to provide services (including accommodation) under other provisions in community care legislation into an individual duty to the patient concerned. Further, s.21 National Assistance Act 1948 provided a complete statutory

* Partner, Mackintosh Duncan, Solicitors, London.
Solicitor instructed by one of the four Applicants in the

case, and the solicitor instructed by the applicant in ex parte Coughlan.

regime for the provision of accommodation for those in need of care and attention, such as the Applicants, for which charges must be made under s.22 of the 1948 Act. The Respondents sought to introduce extracts from Hansard in support of their arguments. Finally, the Respondents maintained that there would be a 'perverse incentive' created if aftercare services under s.117 were free of charge, as people would take action to ensure that they were detained under the longer treatment provisions of the Mental Health Act in order to avail themselves of free services. Those already in residential accommodation by virtue of their mental disorder would take steps to ensure that they remained there.

In respect of the subsidiary issues, the Respondent local authorities argued that a patient who was on leave of absence was still 'liable to be detained' and thus was excluded from the scope of s.117, as s.117 refers to patients who 'cease to be detained'. Further, the Respondents maintained that s.19 of the Act had the effect of 'cancelling' the patient's detention under s.3 by transferring the person into guardianship, and thus the patient was treated as never having been detained under s.3 so the provisions of s.117 would not apply.

Judgment of the High Court (28 July 1999)¹

Mr Justice Sullivan accepted all of the submissions made on behalf of the Applicants, and rejected the Respondents' arguments set out above.

He held that s.117 Mental Health Act 1983 is a free-standing duty to provide aftercare services to particular patients detained under the Act. That the duty was free-standing and did not refer back to the other duties/powers under other community legislation was clear from the wording of the section itself, and from s.46(3) NHS and Community Care Act 1990, which defines community care services as those which a local authority had a power to provide under, inter alia, s.117 itself. The fact that 'aftercare services' were not defined was not an argument for reverting to the duties/powers under other legislation. It was not surprising that no restrictive definition was given since the duty was jointly placed upon both the health authority and the local authority and maximum flexibility was intended to be given to the statutory aftercare authorities in the provision of services to this group of patients.

The Court was not assisted by the reference to Hansard extracts, as not only was there no ambiguity in s.117 itself, but there was no clear statement by the Minister and promoter of the Bill of the mischief which Parliament had intended to address. Indeed, if policy was of relevance, it was notable that the Parliamentary Under-Secretary for State, Paul Boateng, had stated in an answer to a parliamentary question on this issue in July 1998 that no charges may be made for services under s.117, whether domiciliary or residential. The submission that if services were free of charge, there would be a 'perverse incentive', was far-fetched.

The duty under s.21 National Assistance Act 1948 to provide accommodation for those 'in need of care and attention' arose only where the accommodation was 'not otherwise available', and as such services were available under the provisions of s.117, the patients were outside the scope of s.21(1). If any further clarification were needed, the prohibition in s.21(8) preventing the local

¹ [1999] 2 CCLR 402. A case note by Nicola Mackintosh describing, and commenting on, this decision, was published in *Legal Action* in September 1999 (pages 19/20). We are grateful to the *Legal Action*

Group for their permission to reproduce in this article, some of the comments made within that case note by Ms Mackintosh.

authority from providing any services under s.21 which were 'authorised or required to be made by or under any other enactment' left the position in no doubt. In this regard, the Court was assisted by the judgment in *R v North and East Devon Health Authority ex parte Coughlan and Secretary of State for Health and Royal College of Nursing*² which confirmed that the words 'by or under' encompassed a wider range of services than those authorised or required to be made 'under the National Health Service Act 1977' (the second limb of s.21(8)).

There was no express or implied statutory provision authorising or requiring the making of charges for aftercare services under s.117. Indeed, it was notable that s.17 Health and Social Services and Social Security Adjudications Act 1983 (which gives local authorities a discretion to charge for some community care services) omitted any reference to s.117.

The scope of 'aftercare services' under s.117 extended to those services which a person required by virtue of their mental disorder, and the duty to make provision continued until a joint decision was made by the aftercare bodies that the patient was no longer in need of those services. The Court was of the view that in the case of a patient who had been admitted to residential care by virtue of mental disorder before detention under s.3, if the accommodation was still required upon discharge due to the mental disorder, it must be provided free of charge. If the accommodation was required as a result of a physical disability or illness, as opposed to mental disorder, then the position might be different, but this would depend on the facts of the individual case.

On the subsidiary issues, the Court held that a patient on leave of absence under s.17 of the 1983 Act was a person to whom the duty under s.117 was owed. It would be 'remarkable' if a person on leave fell outside the scope of s.117 especially as a condition of residence was likely to be imposed in such cases and non-compliance would lead to re-admission.

On the issue of transfer from liability to detention under s.3 to guardianship, it was held that s.19 MHA was intended to prevent an artificial extension of time before a review of the patient's condition took place. Thus the duty under s.117 applied to such patients.

Leave was granted to the Respondents to appeal on the basis that although the Respondents' case was not arguable, the case raised issues of national importance.

The Judgment of the Court of Appeal

The appeal was heard before Lord Justices Otton, Buxton and Mr Justice Hooper, judgment being handed down on 27th July 2000.

As in the High Court proceedings, the authorities argued that:

1. After services under s.117 Mental Health Act 1983 are not defined, thus indicating that the specific powers/duties to provide aftercare services must be found in other social welfare enactments.
2. The aim and purpose of the duty under s.117 is to create a specific individual duty to provide aftercare services, thus reflecting the particular need for persons to whom s.117 applies to be protected from 'falling through the net'.
3. Thus, s.117 MHA is a 'gateway' section, and has no content itself other than refining the powers/general or target duties under other enactments to a duty to an individual service user.

2 [1999] 2 CCLR 285

4. S.21 National Assistance Act 1948 provides a complete statutory framework for the provision of residential accommodation for those in need. S.117 places a duty on the authorities to provide accommodation under s.21 NAA where this is required.
5. There is an obligation to charge for residential accommodation under s.21 NAA (s.22 NAA)
6. To permit or indeed oblige the statutory authorities to provide accommodation free of charge would result in a 'windfall' of welfare benefits for those subject to the duty under s.117; result in inequality and absurdity; and create a 'perverse incentive' for the mentally disordered and the professionals involved in their care.
7. The fact that the practical position 'on the ground' as to which services were provided by the statutory agencies had altered since s.117 was enacted, yet the language of s.117 MHA had not been amended since that time; was indicative of an interpretation in favour of a 'gateway section'.

On behalf of the service-users, it was argued that:

1. The starting point must be the language of s.117 MHA itself.
2. There is no reference in s.117 to it being an 'gateway section', unlike other examples apparent in social welfare legislation (see for example, s.2 Chronically Sick and Disabled Persons Act 1970, which refers to services being provided under the powers in s.29 NAA but accessed via s.2 itself).
3. There is no express authority to charge for s.117 services and thus charges may not be made.
4. The duty under s.21 NAA only arises when accommodation required 'is not otherwise available' (s.21(1) NAA). As it is 'otherwise available' under s.117, there is no duty under s.21 NAA. It is not s.21 accommodation, but 's.117 accommodation'.
5. If the positions were in doubt, the inclusion of s.21(8) NAA is determinative of the fact that accommodation provided under s.117 is just that - it is not accommodation provided under s.21 NAA. S.21(18) confirms the 'last resort' nature of s.21 NAA accommodation in that it prohibits the provisions of accommodation under s.21 where there is a power (or duty) to provide accommodation 'by or under any other enactment'.
6. The fact that aftercare services under s.117 are not defined results from the wide range of needs and services that may be required for this uniquely vulnerable client group - the precise services provided to meet the identified needs are determined via a multidisciplinary assessment of the individual needs of the service user.
7. S.46(3) NHS and Community Care Act 1990 defines 'community care services' for which the local authority must assess a person's needs and reach a service provision decision. S.117 is defined as a subset, which an authority may provide. It cannot, therefore be a gateway section.
8. There is no absurdity or inequality created in the provision of services under s.117 free of charge - any 'windfall benefits' can be avoided by a simply amendment to the social security regulations. Indeed, there is a positive benefit to the provision of aftercare services being free of charge in that there are reduced barriers to persuading those in need of services to access those services, without the disincentive of a financial penalty.

The judgment of the Court of Appeal upheld the decision of Mr Justice Sullivan in the High Court and determined that:

1. The wording of S.117 MHA itself is unambiguous in imposing a free-standing duty to provide aftercare services on health and local authorities. It would be artificial and contrary to the plain meaning of the section to interpret the section as a 'gateway' provision.
2. The reference to services 'provided under s.117' to be found in s.25 A-J MHA (inserted by the Mental Health (Patients in the Community) Act 1995) would not have been phrased as such if s.117 was a 'gateway' section.
3. S.21(1) and S.21(8) NAA are supportive of the argument that s.117 is not a gateway section, as the duty under s.21 is specifically disengaged where the authority has the power/duty to provide accommodation by or under any other enactment.
4. S.46(3) NHSCCA makes it clear that s.117 is concerned with the direct provision of services and not merely a gateway section to the provision of services under other enactments.
5. The concept of 'windfall' was unconvincing in the context of the provision of services for those who have been compulsorily detained in hospital and who may be amongst the most seriously ill and needy in society.
6. The 'perverse incentive' argument was unattractive. This was a slur on the members of the medical profession who are responsible for taking a decision as to whether a person should be detained under the compulsory provisions of the Mental Health Act 1983.
7. The imposition of a joint duty under s.117 on both health and local authorities is consistent with a 'seamless provision' of services, and it would be inequitable for the local authority to charge for services where the health authority had no such power to charge.
8. There was no benefit in resorting to reference to Hansard. There was no ambiguity in s.117, and therefore the application of the principle in *Pepper v. Hart*³ was not appropriate. In any event, there was nothing in Hansard that supported the authorities' case.
9. Permission to appeal was refused.

The local authorities have now lodged a petition with the House of Lords in respect of a renewed application for permission. The outcome of the application is awaited, but may not be determined for several weeks or months.

Comment

A case involving the issue of charging under s.117 MHA has been long awaited. It is now clear (subject to the outcome of any appeal to the House of Lords) that s.117 is a free-standing duty and that no charges may be made for any aftercare services (including accommodation) which are needed by virtue of a person's mental disorder. The High Court judgment also provides a welcome insight into the circumstances in which the duty under s.117 may lawfully be terminated.

Local authorities and Health Authorities will need to consider carefully their criteria and any policies relating to service provision for this client group. In particular, those authorities who have

3 [1993] 1 All ER 42. The principle determined by the House of Lords in this case, was that where the precise meaning of legislation is uncertain or ambiguous or where the literal meaning would lead to a manifest

absurdity, the Courts can access Hansard (in particular, statements of the government minister, or other sponsor, responsible for the legislation) as an aid in construing the meaning of the legislation.

policies in place that seek to 'discharge a patient from s.117' after a particular period and elect to continue provision under other community legislation while there is still a continuing need for services will lay themselves open to challenge.

There will be a need to review joint working arrangements and any eligibility criteria agreed between the agencies, given the effect of this judgment and that given in *ex parte Coughlan* (eligibility for health services). Authorities will not only need to revisit those patients who are currently 'subject to s.117', but those who are in receipt of continuing services having 'been discharged from s.117', and there are likely to be a considerable number of claims for restitution in respect of charges already levied.

The judgments of both the High Court and the Court of Appeal confirm in the clearest possible terms that the policy underlying the absence of express authority to charge users of services under s.117 is directly related to the fact that such persons are extremely vulnerable individuals for whom there should be no barriers to access to health or community care services. Such an approach is to be welcomed in a climate where resource implications feature highly in decisions regarding service provision to those in need.