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Contents

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HOME CARE SERVICES

CHARGING

R (C) v North Tyneside Council – in assessing income, councils are not obliged to make a deduction for housing costs equivalent to the housing benefit non-dependant deduction

This case saw the intersection of two complex statutory schemes - the system of charging for non-residential community care services and the welfare benefits system. It was about money, in particular how to quantify income. This is always a contentious topic when the provision of some state benefit or service is dependent upon income levels. The way in which income is identified determines how much money is left in the pocket of the person receiving the benefit or service. So, from that person's perspective, the more income that is ignored the better.

KEY POINTS

As a general rule, councils are not obliged, when assessing income for charging purposes, to allow a disregard in a sum equivalent to the housing benefit non-dependant deduction

But if they allow a disregard in some cases, councils need to be able to justify not allowing it in other cases: charging policies should be equitable

The Court seemed to approve of the policy of constructing the income 'buffer' by reference to Employment & Support Allowance rates, rather than income support rates

The service user in this case was living with her parents. She was entitled to a community care service but the council concerned wanted her to pay a charge for it. In calculating her ability to pay, the service user argued that a deduction should be made from her income to take account of housing costs. She said that her income should be reduced by the amount which the housing benefit system assumes a person will contribute towards running costs. In principle, that argument was rejected by the High Court. However, in the particular circumstances of this case the service user was not treated fairly and the council's charging decision was quashed. Ultimately, though, this may prove a hollow victory as is explained below.

The background

The background to this decision was as follows:

(i) Ms C was a disabled adult who lived at home with her parents. She had Down's Syndrome and a moderate learning difficulty.

(ii) North Tyneside Council assessed Ms C's needs for community care services. The council decided that Ms C was entitled to a community care service in the form of sessions with an outreach worker.

(iii) The Council turned to consider whether to charge Ms C for her service. Ms C had an income from disability benefits of £183 per week. The council disregarded £163 of that income (ignored it for charging purposes). However, the council decided to impose a charge equivalent to all of Ms C's remaining income, £20 per week.

(iv) Ms C's parents became aware of the charging position for another young adult with disabilities. That service user was charged accommodation costs by her parents and those sums were subtracted from the available income for charging. Ms C's parents thought their daughter should be treated in the same way and started to charge her £65 per week to live with them.

(v) The council refused to deduct any of the housing charge from Ms C's income. They maintained that she remained liable to pay £20 per week and there were no housing costs to be deducted from her income.

(vi) Ms C brought a claim for judicial review of the council's charging decision.

Charging for non-residential care services: the legal framework

In England, local authorities' power to charge for non-residential community care services is found in S.17 of the Health & Social Services and Social Security Adjudications Act 1983(a). Statutory guidance was issued to local authorities in 2003 about how to exercise the power to charge: "Fairer Charging Policies for Home Care and Other Non-Residential Social Services: Guidance for Councils with Social Services Responsibilities" ("the Fairer Charging guidance").

The statutory basis for the guidance is s.7 of the Local Authority Social Services Act 1970. This means the guidance is close to being mandatory in effect. This is because in *R v LB Islington ex p Rixon* (1997) 1 CCLR 119, the High Court held:

> "Parliament in enacting section 7(1) did not intend local authorities to whom ministerial guidance was given to be free, having considered it, to take it or leave it. Such a construction would put this kind of statutory guidance on a par with the many forms of non-statutory guidance issued by departments of state. ...Parliament by section 7(1) has required local authorities to follow the path charted by the secretary of state's guidance, with liberty to deviate from it where the local authority judges on admissible grounds that there is good reason to do so, but without freedom to take a substantially different course."

Of particular relevance to the present case was one short passage in the Fairer Charging Guidance which states that "income should be assessed net of housing costs" and council tax. In other words, housing costs and council tax liability should be deducted from income although account should be taken first of any housing benefit or council tax benefit to which the disabled person is entitled (i.e. housing costs cannot include those costs already met by housing and council tax benefit). The guidance provides no further details of how housing costs are to be quantified. That may not be particularly problematic where a person has a tenancy and there is clear evidence of what it costs him/her to live in rented property, for example. But in this case, the disabled person was living at home with her parents and there was no tenancy agreement (nor was the disabled person in receipt of housing benefit).

Should an amount equivalent to the housing benefit non-dependant deduction be allowed?

Ms C's lawyers argued that the council ought to disregard from her income an amount for housing costs equivalent to at least the amount of the housing benefit non-dependant deduction. This is the amount by which a person's housing benefit award is reduced where a non-dependant is living with them ("the occupant"). The underlying assumption is that the occupant will contribute towards housing costs and therefore housing benefit should be reduced to take account of that.

At the time of the relevant events in this case, the amount of the non-dependant deduction was about £13 per week. While Ms C's parents were not actually in receipt of housing benefit, her lawyers argued that it was an appropriate yardstick to use to identify the amount an occupant should pay towards household running costs. Ms C's lawyers therefore argued that this sum at least should be deducted from her assessed income.

The High Court disagreed. The Court pointed out that, under the housing benefit system, it is assumed that an occupant on an income-maintenance benefit will pay the non-dependant deduction from those benefits. Ms C was on an income-maintenance benefit, Employment & Support Allowance (ESA). In accordance with the Fairer Charging guidance, the whole of Ms C's ESA was disregarded. That element of the ESA which the 'system' assumed would be used to contribute towards housing costs was therefore already ignored for care charging purposes. An additional deduction was therefore unwarranted. This is how the High Court put it:

> "35. Where the non-dependant is on basic level ESA, effectively his only income, then the deductions...are made on the basis that it reasonable to expect the non-dependant to contribute to those housing costs *from his ESA*. Given that that scheme has Parliamentary approval...an authority cannot be unreasonable in expecting such a person, when in the situation of C, to make an exactly similar contribution to his or her housing costs from his or her ESA income. Consequently, the non-dependant reductions in housing benefit and council tax benefit by analogy here support the Council's case, not that of the Claimant."

The Court went on to hold that, generally, councils are entitled to make no deduction for housing costs where the service user is in receipt of Employment & Support Allowance (the benefit which is in the process of replacing incapacity benefit and income support awarded on the basis of incapacity):

> "46...a social services authority is entitled to assume that, in the ordinary case, no specific allowance or disregard need be made in relation to housing costs for community care service users who live with parents, other close relatives or other informal carers, where the user has no legal obligation to a third party to pay mortgage, rent or council tax. An element of basic rate ESA covers household expenditure, and there is a sufficient element within that rate for relevant "housing costs". The same will be true ... if the service user in fact has income over basic rate ESA, e.g. earned income."

The reason why the claim succeeded: the council's inconsistent housing costs policy

The evidence showed that in some cases the council would consider allowing as housing costs an amount equivalent to the housing benefit non-dependant deduction. However, this was only in cases where the person with whom the disabled person was living was in receipt of housing benefit. In other words, only in those cases where the person suffered a non-dependant deduction from their housing benefit.

The High Court held that it was irrational (and thus unlawful) for the council to distinguish between those households in receipt of housing benefit and those household not in receipt of that benefit. The Court said:

> "43. The rationale for not considering such an allowance when the parents or other informal carers are not on housing benefit is that the service user's basic level ESA (for which allowance is already made) includes a sufficient element for board and lodging, such that it is reasonable to expect them to make any contribution to their relatives out of that income. However, that reasoning equally applies to circumstances in which the user's relatives are on benefit. Indeed, the non-dependant reduction is of course based upon those very circumstances.
>
> 44. The Council has not suggested any reason for such a distinction in treatment; the only rationale appears to be that the parents in the former case (not on housing benefit) are, probably, better off financially as those in the latter case (on housing benefit) – but that may not be so in every case, and, vitally, the charges calculation is required to focus exclusively on the financial circumstances of the user, not her family or household [under the Fairer Charging 2003 Guidance]. A distinction based on such a criterion would therefore be directly contrary to the terms of the 2003 guidance themselves."

A hollow victory?

The council's approach to charging in the present case was considered irrational. It made a concession for one group of disabled persons but not for another group, despite their being no material difference between the two groups. However, the council was not obliged to make the concession to the first group. It simply chose to do so. It would have acted lawfully if it had made no concession at all. It is possible, therefore, that the council's response to this decision will be to stop making housing costs deductions for disabled persons living with someone who is in receipt of reduced housing benefit as a result of the disabled person's presence. The High Court seemed to have this in mind when, having ordered the council to reconsider its charging decision, the Court went on to say:

> "51...Whilst that new decision will of course be a matter entirely for the Council, it will be only too apparent to the Claimant from this judgment that she should not be unduly optimistic that she will, as a result of that new decision, obtain a higher level of disregards from her income in relation to her housing costs than were allowed in the decision which I have quashed."

That is a general point. In individual cases, particular disabled people may have additional housing costs and councils should not close their minds to that possibility. This was acknowledged by the High Court as follows:

> "47. Of course, there may be exceptional circumstances in relation to a specific user, which may require the authority to consider an additional allowance or disregard, e.g. if the user, by virtue of his or her disability, has additional housing needs."

The 'buffer' within the income assessment: how is it calculated now that income support has largely disappeared?

The Fairer Charging guidance was constructed so that disabled people on benefits did not have all of their benefits income taken away by charges. This was achieved by the creation of what was termed a 'buffer'. Originally, the buffer was set by reference to income support rates.

Now, income support on the basis of incapacity has been largely replaced by Employment & Support Allowance (ESA). The council in the present case had sensibly applied an updating interpretation to the Fairer Charging guidance. Instead of setting the buffer by reference to income support, it was set by reference to what the High Court called 'basic rate' Employment & Support Allowance. The Court did not expressly approve the approach taken by the council but it did not cast any doubt on its correctness. It must be the right way to proceed in order to give effect to the spirit of the Fairer Charging guidance which is that a disabled person's income maintenance benefits should be used in fixing the 'buffer'.

The High Court referred to what it said was the 'basic rate' of ESA. Under the Welfare Reform Act 2007, ESA is actually comprised of three different rates: (i) a reduced or assessment phase rate, payable while a claim is awaiting assessment; and (ii) the main phase rate, whose technical name is 'ESA with the work-related activity component', and (iii) the rate for particularly disabled individuals, known as 'ESA with the support component'.

The rate which has effectively replaced income support awarded on the ground of incapacity is the second rate of ESA. Typically, this pays about £30 more per week than the assessment phase rate and is the amount which councils ought, in principle, to be using to identify the 'buffer' amount of protected income.

(a) Note that in Wales there is now very different charging legislation to that applying in England. It is contained in the Social Care Charges (Wales) Measure 2010 and regulation s and guidance made under that Measure.

The High Court (Hickinbottom J) gave its decision in R (C) v North Tyneside Council on 1 August 2012: [2012] EWHC 2222 (Admin).

DISABILITY DISCRIMINATION

TRANSPORT

Ali v Newham LBC – council unlawfully departed from national non-statutory guidance on tactile paving

Most councils would probably strive to reflect generally-accepted best practice in the provision of services for disabled people. Traditionally, however, best practice is legally weak when compared to statutory guidance. So it has been less incentivised. But in this case the High Court held that non-statutory guidance had a similar legal effect to statutory guidance.

The background

The relevant events in this case were as follows:

(i) Mr A was visually impaired. He relied on tactile paving to get around safely, in particular to locate road crossings. The value of tactile paving for visually impaired persons is that it compensates for the absence of a kerb, which is normally used to identify the edge of the pavement (or footway).

(ii) Mr A's local authority decided that it would not lay paving at uncontrolled road crossings, only at controlled ones like pelican or zebra crossings. It set out its policy on paving in 'local guidance'.

(iii) The local guidance conflicted with national guidance issued by the Department of Transport. The national guidance stated that, in cases where a kerb is absent, some device such as tactile paving should be used to alter visually impaired persons to the absence. The national guidance also set a specification for the bumps used to make paving tactile.

(iv) Mr A brought a claim for judicial review of the local policy.

What was the legal status of the guidance?

The Department for Transport's guidance was 'non-statutory', in the sense that it was not issued under an express legislative power to issue guidance. According to the High Court, that did not necessarily mean it could be ignored. This is what the High Court said:

> "39...the weight that should be given to particular guidance depends upon the specific context in which the guidance has been produced. In particular (without intending to create an exhaustive list) I believe that it is necessary to give due regard to the authorship of the guidance, the quality and intensity of the work done in the production of the guidance, the extent to which the (possibly competing) interests of those who are likely to be affected by the guidance have been recognised and weighed, the importance of any more general public policy that the guidance has sought to promote, and the express terms of the guidance itself."

Having taken into account the fact that the Department for Transport guidance was the product of extensive consultation with expert external organisations (i.e. organisations who really understood the street architecture needs of visually impaired people) and the considerable importance of standard street architecture for the assistance of visually impaired persons, the High Court concluded that the guidance had a legal status indistinguishable from many types of statutory guidance. The council was "required to follow the national guidance unless it had good reasons to depart from it". This, for example, is the materially the same legal status as is accorded to the statutory Code of Practice issued under the Housing Act 1996 to councils about the exercise of their functions under the homelessness legislation.

The council had not shown a good reason for departing from the national guidance by failing to embed tactile paving at non-controlled crossing points. Further, the council had decided to install grey tactile paving at controlled crossings, rather than the standard red colour specified by the guidance. Again, it had not shown a good reason for that departure from the guidance. The council's local guidance was therefore unlawful and would be quashed.

The High Court (Kenneth Parker J) gave its decision in Ali v Newham LBC on 30 October 2012: [2012] EWHC 2970 (Admin).

COMMUNITY CARE – GENERAL ISSUES

ASSESSMENTS

R (Hayle) v Camden LBC – London council not required to provide accommodation under community care legislation for an elderly person living in asylum accommodation in Leeds

Council's have the power to provide community care services in advance of a community care assessment in urgent cases. In this case, a council decided that an older person did not have an urgent need for community care services. The older person challenged that decision and argued that she should be accommodated pending a full hearing of her challenge. Given that her underlying case against the council was not a strong one, the High Court refused to order the council to provide accommodation.

The background

The relevant events in this case were as follows:

(i) Ms H was an aged Eritrean national who arrived in the UK in January 2012. Initially, she was put up with a friend but she could not cope.

(ii) In October 2012, Ms H went to live in Leeds, her accommodation being provided under the asylum support legislation. Ms H also had community connections in Camden.

(iii) Shortly after moving to Leeds, in November 2012, Ms H returned to London for an asylum hearing and stayed with a friend.

(iv) While in London, Ms H approached Camden council seeking assistance, including accommodation in London. She was interviewed in her friend's flat by a social worker and a housing officer. The officials told Ms H that she was not eligible for housing, which was not surprising given the social housing entitlement exclusions for persons seeking asylum, but that arrangements would be made for her to have a full community care assessment. The council refused to provide any services in the interim.

The issue under s.47(5) of the NHS & Community Care Act 1990

S.47(1) of the NHS & Community Care Act 1990 provides for councils to carry out an assessment of community care needs and then go on to make a decision as to whether to provide services for a particular individual. S.47(5) of the Act recognises that this two-stage approach should not prejudice those who need services urgently. They should not have to wait for help until the formal completion of a community care services. And so s.47(5) declares that there is nothing to prevent a council from temporarily providing services for a person in advance of a community care assessment where the council is of the opinion that "the condition of that person is such that s/he requires those services as a matter of urgency".

As noted above, pending assessment, Camden Council refused to provide any community care services for Ms H. After being informed that Ms H had returned to Leeds, the council said that they would make arrangements for the full community care assessment to be carried out there. The council decided that s.47(5) did not apply because, in their opinion, Ms H did not require community care services as a matter of urgency.

Ms H claimed judicial review of the council's decision and also sought interim relief, which she argued should take the form of accommodation in London. Ms H said that her Leeds accommodation was unsuitable for someone with her health conditions and that London accommodation would better suit her because of her community links there.

Why did the Court refuse to order the council to provide accommodation?

The High Court refused to order the council to provide interim accommodation. Ms H had failed to show a strong *prima facie* (on the face of it) case that the council were acting unlawfully in deciding that she did not have an urgent need for services.

The council's social worker, while not having undertaken a full community care assessment, had met Ms H and been able provisionally to assess her needs. In deciding that Ms H did not have an urgent need for services, the social worker had relied on the fact that Ms H did have accommodation available to her (in Leeds) in which she had lived for a period of time without complaint. Ms H's case for saying that the social worker's decision was unlawful, on the basis that it was irrational, was weak. That was why the High Court refused the application for interim relief.

The High Court (Sales J) gave its decision in R (Hayle) v Camden LBC on 26 November 2011.

MENTAL CAPACITY

MEDICAL TREATMENT

A Local Authority v E – Court of Protection authorises force-feeding of patient with anorexia

Understandably, the finality of death seemed to affect the approach taken by the Court of Protection in this case. It was unwilling to allow implementation of an anorexia sufferer's expressed wish to be allowed to die in the absence of 'clear evidence' that she had the mental capacity to make that decision. Instead, the Court authorised what appears to be one final attempt to establish a health body weight.

The background

The relevant events in this case were as follows:

(i) Ms E was a young woman with severe anorexia nervosa. She had other mental health problems too, probably stemming from persistent, hidden childhood sexual abuse, including an unstable personality disorder, alcohol and opiate dependence. This co-morbidity (combination of mental health conditions) made Ms E a particularly challenging patient. She had a history of being

KEY POINTS

Public bodies waited too long before asking the Court of Protection to rule on whether they were obliged to follow the wishes of a patient who resisted force-feeding

A patient's obsessive fear of weight gain meant that she could not use or retain the information relevant to her decision on accepting life-sustaining nutrition. As a result, she lacked mental capacity to take that decision

In the case of advance decisions to refuse life-sustaining treatment, the Court of Protection requires 'clear evidence' that the decision-maker had capacity when the decision was taken

The Court of Protection expects the public bodies involved in the patient's care to secure the resources to deliver a protracted treatment programme

forcibly admitted to hospital for treatment under s.3 of the Mental Health Act 1983 ("MHA 1983").

(ii) In October 2011, Ms E made an advance treatment decision, the aim of which was to prevent her from being force fed.

(iii) In March 2012, Ms E was detained under s.3 of the MHA 1983. Initially, she was given nutrition via a feeding tube but she then opposed it and feeding was stopped. Then she was taken off section.

(iv) Medical staff were uncertain whether they had the power forcibly to feed Ms E and she was managed under an 'end of life pathway'. In the meantime, the young woman's local authority applied to the Court of Protection for a declaration that it was lawful, despite the advance direction, for medical staff forcibly to feed Ms E.

Should Ms E's case have been considered by the Court of Protection before now?

The Court of Protection was critical of the fact that it was not until Ms E's death was imminent that it was asked to rule on her capacity to make decisions about her treatment:

> "40. E's case should have been brought before the court long before it was. Her condition has been seen by those treating her as raising an ethical predicament since at least 2009, if not before. As long ago as July 2011, the health authority considered referring the matter to the court in the context of doubts over the validity of E's advance decision. Apart from anything else, an earlier application might have allowed E herself to participate directly in the proceedings if she chose; as it was, her condition at the time of this hearing meant that this was not possible. It has also meant that the question of treatment has only been brought forward several weeks after E embarked down the palliative care pathway."

Did Ms E have mental capacity to refuse treatment in the form of force feeding?

The Court first considered whether Ms E currently had the mental capacity to make a valid decision not to accept life-saving nutrition. If she did have capacity, her advance decision became immaterial as her current mental capacity would allow her to make whatever decision she wished about receiving nutrition.

The Court held that Ms E did not currently have the mental capacity to decide to refuse treatment in the form of life-saving artificial nutrition. The mental capacity test set out in the MCA 05 asks whether a person is unable to make a decision due to an impairment of, or a disturbance in the functioning of, the mind or brain (s.2(1) MCA 05).

S.3 of the MCA sets out a number of cases in which a person is deemed unable to make a decision. If any of these are satisfied, the person lacks capacity to make the particular decision.

A person does not have capacity if they are unable to understand or retain the information relevant to a decision. The Court held that neither of these cases applied to Ms E, as she could understand and retain information relevant to deciding whether to accept life-saving artificial nutrition. However, another case is where a person cannot "use or weigh" the relevant information "as part of the process of making the decision". This condition must not met and therefore Ms E lacked the mental capacity to make a valid decision. The Court gave the following explanation for this conclusion:

> "49...there is strong evidence that E's obsessive fear of weight gain makes her incapable of weighing the advantages and disadvantages of eating in any meaningful way. For E, the compulsion to prevent calories entering her system has become the card that trumps all others. The need not to gain weight overpowers all other thoughts...
>
> 50. A secondary reason for the conclusion that E lacks capacity is that she is now subject to strong sedative medication and is in a severely weakened condition. She is, as her parents described it, in a "drug haze".

Advance decisions – legal framework

Advance treatment decisions were placed on a statutory footing by s.24 of the Mental Capacity Act 2005. They are decisions made by adults about the future treatment which they do not (or do) wish to have. A decision cannot amount to an advance treatment decision under the MCA 05 unless, at the time it was taken, the person in question had the mental capacity to take it.

Additional conditions must be met in the case of an advance decision about life-sustaining treatment. The decision must be verified by a statement that it is to apply even if life is at risk. It must also be in writing, signed and witnessed. There was no dispute that these conditions were met in Ms E's case. The issue was whether she had capacity when she made the advance decision. In fact, the Court of Protection in the present case seemed to hold that, where an advance decision related to life-sustaining treatment, the Court would be especially anxious to ensure that the person had capacity at the time the decision was taken:

> "55...for an advance decision relating to life-sustaining treatment to be valid and applicable, there should be clear evidence establishing on the balance of probability that the maker had capacity at the relevant time. Where the evidence of capacity is doubtful or equivocal it is not appropriate to uphold the decision."

Was Ms E's advance decision valid?

The Court of Protection held that E's advance treatment decision was not valid. She lacked mental capacity when she made the decision, in October 2011. In so finding, the Court relied on the absence of an assessment of mental capacity to make the advance decision in October 2011. This seemed to link in with its earlier finding that 'clear evidence' establishing capacity is necessary in order for a life-sustaining treatment advance decision to be held valid. This is what the Court said:

> "65...Against such an alerting background, a full, reasoned and contemporaneous assessment evidencing mental capacity to make such a momentous decision would in my view be necessary. No such assessment occurred in E's case and I think it at best doubtful that a thorough investigation at the time would have reached the conclusion that she had capacity."

The best interests analysis

As Ms E lacked capacity to decide whether or not to accept life-sustaining treatment and her advance decision was not valid, the Court of Protection had to decide whether it was in her best interests to receive that treatment.

It was hardly surprising that the Court found it incredibly difficult to decide which course of action was in Ms E's best interests. On the one hand, Ms E's clearly expressed wish was to be allowed to die. Her parents supported her wishes for a combination of reasons: they had seen her struggle for so many years; the process of re-feeding would be traumatic and expert psychiatrists had likened it to a repeat of her childhood sexual abuse. On the other hand, sustained re-feeding had not been attempted since Ms E was 15, following which she excelled academically and secured a place at medical school. Ultimately, the Court decided that it was in Ms E's best interests to be forcibly re-fed for a sustained period in order to increase her Body Mass Index to a level at which it had not stood since she was still in her teens. The Court of Protection judge expressed his conclusion as follows:

> "137...We only live once – we are born once and we die once – and the difference between life and death is the biggest difference we know. E is a special person, whose life is of value. She does not see it that way now, but she may in future.
>
> 138. I would not overrule her wishes if further treatment was futile, but it is not. Although extremely burdensome to E, there is a possibility that it will succeed. Services and funding will now be provided that were not available before, and it would not be right to turn down the final chance of helping this very vulnerable young woman...
>
> 139. I am also influenced by the fact that those who know E best are not in outright opposition to treatment taking place, however sceptical they justifiably feel.
>
> 140. The competing factors are, in my judgment, almost exactly in equilibrium, but having considered them as carefully as I am able, I find that the balance tips slowly but unmistakably in the direction of life-preserving treatment. In the end, the presumption in favour of the preservation of life is not displaced."

What happens next?

The precise nature of the treatment to be provided to Ms E will be decided by the clinicians in charge of her care, but its likely nature was described as follows by the High Court:

> "44...E's immediate transfer, via an intermediate hospital with an intensive care facility under the care of Dr C, to what may be the country's leading facility for the treatment of advanced eating disorders ('the specialist hospital') under the care of Dr M. She would be stabilised and fed with calorific material via a nasogastric tube or a PEG tube inserted through her stomach wall. Any resistance would be overcome by physical restraint or by chemical sedation. The process would continue for a year or more. Once her weight had been restored, she would be offered therapies for her eating disorder and for her other physical and psychological problems. By these means, she might overcome her feeling that life is not worth living."

The Court also stated that the public authorities responsible for Ms E's care are obliged to provide the resources necessary for her to be therapeutically force fed:

> "143. I record that the state, having instigated this plan of action for E in the way that it has, is now honour-bound to see it through by the provision of resources in the short, medium and long term. Had the authorities not made that commitment, I would not have reached the conclusion that I have."

The Court of Protection (Peter Jackson J) gave its decision in A Local Authority v E (by her litigation friend, the Official Solicitor), a Health Authority and E's parents on 15 June 2012: [2012] EWHC 1639 (Fam).

OLDER PEOPLE

HEALTH SERVICES

AV v N W London Hospitals NHS Trust – £11,000 compensation agreed following allegation of negligent failure to protect older person from risk of falls

87 year old Mr V had dementia. Following a fall, he was admitted to hospital. In hospital, Mr V had a number of further falls. After the eighth fall, Mr V developed an intra-cranial haemorrhage which led to his death.

The circumstances of the last fall need to be identified. It took place when Mr V was in a day room without supervision. He stepped backwards, fell and struck the back of his head which triggered a fit.

Mr V died three days after the fall. His causes of death were identified as bruising on the brain and heart disease.

The resulting compensation claim

Mr V's son brought legal action against the NHS Trust responsible for the hospital to which his father was admitted. The son alleged that the hospital were negligent in their care of his father. In particular, by: failing to supervise Mr X more closely given his risk of falls; leaving Mr V unsupervised in the day room; failing to provide adequate training to staff to ensure that the hospital complied with the National Institute for Clinical Excellence's Guidelines on the Assessment and Prevention of Falls.

The son also brought a claim under the Human Rights Act 1998 which asserted that the NHS Trust had failed to discharge their positive obligation under Article 2 of the European Convention on Human Rights to establish systems and working procedures that would have protected his father's right to life.

The NHS Trust, without making a formal admission of liability, agreed an out-of-court settlement with the son of £11,000.

AV (as personal representative of the Estate of CV, deceased) v North West London Hospitals NHS Trust (settlement date: 13 November 2012), reported in the Lawtel Quantum Reporting Service.

DISABILITY BENEFITS

DISABILITY LIVING ALLOWANCE

MMF v Secretary of State – chronic diarrhoea is capable of generating entitlement to higher rate mobility component entitlement

Walking and bowel operation are not usually thought of as linked processes. However, it is possible for bowel difficulties to affect walking and render a person virtually unable to walk. If so, the person meets the criteria for an award of the higher rate of the mobility component of DLA (currently paying £54.05 per week).

In order for a person to be entitled to the mobility component on the basis of virtual inability to walk, their inability must be as a result of their 'physical condition as a whole' (reg. 12(1)(a) Social Security (Disability Living Allowance) Regulations 1991). The Upper Tribunal recently considered whether this condition was capable of being satisfied by an individual with ulcerative colitis which resulted in chronic diarrhoea.

When the case was before the First-tier Tribunal (FtT), it appeared to rule out an award as a matter of principle on the basis that 'though very restricted by chronic diarrhoea, [the claimant] does not have a physical disability which renders her virtually unable to walk'. The Upper Tribunal held that this approach was wrong. Chronic diarrhoea, if it is disabling enough, is capable of founding an award of the higher rate of the mobility component on the basis that it renders a person virtually unable to walk. The issue is whether it impedes the act of putting one foot in front of the other. It is possible that the claimant's condition so impeded her walking that she would be virtually unable to walk. In the Upper Tribunal's words:

> "19...diarrhoea is capable of affecting the physical act of walking and *might* therefore make a person virtually unable to walk. The physical pain of preventing herself from soiling herself might stop her from walking, as might the added pain and soreness associated with faeces running down her legs."

The case was sent back to the FtT for re-hearing.

The Upper Tribunal (Judge Lane) gave its decision in MMF v Secretary of State for Work & Pensions on 7 September 2012: [2012] UKUT 312 (AAC).

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