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RECENT DEVELOPMENTS IN SOCIAL CARE CHARGING

Arianna Kelly

- As local authorities continue to cope with resource constraints, there has been a spate of recent cases considering a variety of issues around social care charging and recovery
  - Charging and damages awards
  - Limitation periods for recovery of pre-Care Act debts
  - Care home rates and the market-shaping duty

Charging and damages awards

- *Tinsley v Manchester City Council, South*

- *Manchester CCG and LGA* [2017] EWCA Civ 1704
- Mr Tinsley had been in an RTA which led to his developing an organic personality disorder and being detained under s.3 MHA
- Had a long-term entitlement to assistance which was free at the point of access under s.117 MHA from MCC and MCCG

Charging and damages awards

- *Tinsley v MCC and MCCG*

- Received a damages award in 2005 of just under £2.9m for the purposes of paying for future care
- In awarding damages, court rejected a submission that because authorities were obliged to provide s.117 aftercare for free, no damages award should be made

Charging and damages awards

- *Tinsley v MCC and MCCG*

- Mr Tinsley left residential placements in which had been living, and through his deputy, purchased his own house and his own package of care to allow him to live in the community
- Change of deputy in 2009 following concerns about mismanagement

Charging and damages awards

- New deputy took the view that current arrangements were financially unsustainable and sought to require statutory bodies to fund arrangements in the home
- MCC and MCCG took the position that there was 'no reason to believe that' Mr Tinsley could not continue to fund his own care, there was no duty to provide aftercare and to permit s.117 funding would effectively be double recovery, contrary to principles of *Peters* and *Crofton*

Charging and damages awards

- The Court of Appeal affirmed the clear findings of *R v Manchester CC ex parte Stennett* that statutory bodies are not allowed to charge for services provided under s.117 aftercare
- It found MCC's reliance on the fact that the funds had come from a tortfeasor for the purposes of funding care 'an impossible argument' as there was no statutory provision to support this contention

Charging and damages awards

- The Court of Appeal also rejected the argument that funding could be rejected due to concerns over ‘double recovery’
- PI awards administered by the Court of Protection are specifically excluded from calculations of capital – if an application is made for care services generally, the local authority is not entitled to take such damages into account

Charging and damages awards

- The Court of Appeal rejected the argument that the local authority could look to the person's assets in determining whether the person has 'needs' which 'call for' aftercare services
- Also decisively rejected an argument that the claimant's argument was 'adverse to the public interest' due to unnecessary depletion of public funds

Charging and damages awards

I do not consider it to be immoral or low principled to claim a benefit to which Parliament had made clear Mr Tinsley is entitled. This is especially the case if Parliament has already made clear that funds administered by the Court of Protection are to be specifically disregarded in respect of claimants who are entitled to make claims pursuant to Acts other than the 1983 Act…There is, moreover, no suggestion that Mr Tinsley did not genuinely believe, at the time his case was before Leveson J, that he would access private care rather than state care.

Charging and damages awards

Unless therefore there is some specific inhibition on deputies appointed by the Court of Protection arising from the risk of double recovery, there is no reason why Mr Tinsley should not now claim the benefit to which he may be entitled under s.117 of the 1983 Act.

Charging and damages awards

- *Peters* undertakings are made for the purpose of defending a tortfeasor's interests
- *I doubt if it can be right, by requiring the deputy to give undertakings…to transfer the burden of deciding whether a claimant is entitled to claim local authority provision to the Court of Protection. That court looks after the interests of its patients and is not (usually) required to decide substantive rights against third parties…it could be said that to decide that a local authority is not obliged to provide after-care services would not be to promote the interests of the patient.*

Tinsley

- What if LA had offered the need by making arrangements for Tinsley in care?
  - Package of care being provided far more costly than LA would have funded
- Public law duties – LAs are obliged to considered equitable use of resources
- Direct payments

Tinsley

- Strong rejection of ‘double recovery’ arguments
- Entitlement to direct payments for the purposes of meeting care needs
- General right to top-up s.117 aftercare packages

Richards v Worcestershire [2017] EWCA 1998

- The case considered issues around a claim for restitution where a person had paid for his own mental health aftercare services for a significant period of time
- Court of Appeal affirmed that a person in that circumstance is entitled to bring a Part 7 claim for restitution of the money expended

Richards v Worcestershire [2017] EWCA 1998

- Court of Appeal specifically considered a strikeout application by the local authority on the bases that:
  - Breaches of statutory duty do not normally give rise to a private law cause of action, but must be pursued by means of judicial review alone rather than as a private law claim; and
  - No private law restitution claim arose as a result of the purported breach of public law duty

Richards v Worcestershire [2017] EWCA 1998

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Procedural exclusivity

- The court drew two general propositions:
  - *i) The exclusivity principle applies where the claimant is challenging a public law decision or action and (a) his claim affects the public generally or (b) justice requires for some other reason that the claimant should proceed by way of judicial review.*
  - *ii) The exclusivity principle should be kept in its proper box. It should not become a general barrier to citizens bringing private law claims, in which the breach of a public law duty is one ingredient.*

Richards v Worcestershire [2017] EWCA 1998

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The claimant's claim is based upon the allegation that the defendants delivered to him after-care services pursuant to section 117 of the 1983 Act, but failed to make payment for those services as was their duty. The defendants raise some formidable defences to that claim, but they can have no legitimate objection to the claimant proceeding under Part 7 of the CPR. This is a private law claim, even though based upon section 117 of the 1983 Act. It has no wider public impact. Justice does not require for any other reason that the claimant should proceed by way of judicial review. If the exclusivity principle is allowed to block this claim, it will become an instrument of injustice.

Richards v Worcestershire [2017] EWCA 1998

- Did a private claim arise?
  - Defendants looked to *X(Minors) v Bedfordshire, O'Rourke v Camden,* and *Clunis v Camden* in support of application to strike out – in general, a private law claim does not arise from a breach of statutory duty, unless it can be shown that the duty was imposed for the protection of a limited class and Parliament intended to confer a private law right of action

Richards v Worcestershire [2017] EWCA 1998

- Did a private claim arise?
  - Court found that this case was materially different from those relied on, insofar as the claim was not that the statutory bodies failed to deliver services or delivered them badly, but that the defendant failed to pay for them, leaving the deputy to pay

Richards v Worcestershire [2017] EWCA 1998

- Did a private claim arise?
  - The court acknowledged that the defendants may be able to defend this claim but it is not barred as a claim as a matter of law
  - Arguments that the defendants were not enriched, as the funds were spent on other patients; alternatively, that the defendants would not have agreed to package purchased by deputy (cost or necessity) could be run at trial

Richards v Worcestershire [2017] EWCA 1998

- Opens up recovery for historic claims for failure to fund, as well as prospective funding applications
- Case was considered only on the basis of strikeout applications – a number of arguments offered as possible defences
- Benefit of second procedural method of recovery

Limitation periods

- Care Act sets a 6-year limitation period for debts which accrued after its effective date
- Common practice and understanding in relation to NAA debts had also been that the limitation period was 6 years, unless summary recovery was sought
- However, s.69 Care Act, the Transitional Order and guidance cast doubt as to change

Limitation periods

- Any claims commenced post-Care Act must be brought under s.69 Care Act rather the HASSASSA – pre-Care Act debts may be recovered under s.69
- However, s.69(3) states:

  (3) A sum is recoverable under this section -
  (a) in a case in which the sum becomes due to the local authority on or after the commencement of this section, within six years of the date the sum becomes due;
  (b) in any other case, within three years of the date on which it became due.

Limitation periods

- Definitive statement on limitation periods in *Nottinghamshire County Council v Belton* [2017] EW Misc 26 (CC)
- Court considered the language of the Care Act 2014 (Transitional Provision) Order 2015, Article 3(4) of which stated:

  (4) A sum or charge is recoverable…within the period within which it would, but for this article, have been recoverable under section 56 of the 1948 Act (legal proceedings) or, as the case may be, section 17 of the 1983 Act.

Limitation periods

- Looking to HASSASSA and the NAA, the court noted that the provisions for 3-year recovery were permissive provisions without prejudice to other methods of recovery, such as via ordinary civil recovery
- Article 3 *'preserve[d] the time limits which applied to such NAA charges before the Care Act 2014. Thus the effect of Article 3 of the Transitional Provision is to make NAA charges (like those in this case) recoverable under s.69 Care Act 2014 but subject to the s.56 NAA time limits.'*

Limitation periods

The court found the following limitation periods currently apply to recovery of social care debts:

a) County Court recovery of residential care home costs - six years;

b) County Court recovery of (s.17) costs of care at home - six years;

c) Summary recovery of residential care home costs - three years;

d) Summary recovery of (s.17) costs of care at home - six months.

Care home fees: public funding and top-ups

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Two interesting cases on the setting of care home fees – long, complex judgments, but a few interesting notes, particularly on the issue of the relationship between public funding and private funding

Care home fees: public funding and top-ups

Torbay Council v Torbay Quality Care Forum Ltd [2017] EWCA Civ 1605

- NAA case
- Considered model used to set LA care home rates, which had regard to the fees received by care homes from third-party top-ups, privately-paying residents, and those with enhanced payments and/or CHC funding
- Providers argued that LA was obliged to look at the cost of care being provided to LA-funded individuals, not other sources of revenue

Care home fees: public funding and top-ups

Torbay Council v Torbay Quality Care Forum Ltd [2017] EWCA Civ 1605

- LA argued that its approach was based on market rates and historical differences in public and privately-funded individuals
- In a majority opinion, the Court of Appeal found the LA was entitled to deference in setting rates
- Specifically found that a strong supply of privately-paying residents might entitle a council to reduce its own rates without worsening care provided

Care home fees: public funding and top-ups

Torbay Council v Torbay Quality Care Forum Ltd [2017] EWCA Civ 1605

- Court accepted that each purchase of a care package is based on marginal cost, and LA would expect to pay *'the lowest figure at which he could purchase it without jeopardising the viability of his supplier'* even where this was less than the per capita cost of care

Care home fees: public funding and top-ups

R (Care England) v Essex County Council[2017] EWHC 3035 (Admin).

- First robust case on the s.5 Care Act 'market-shaping duty'
- Essex had not increased fees for 7 years; approved a small increase in 2016
- Challenged raised by provider association on the basis that it was *inter alia* a breach of the local authority's s.5 duties

Care home fees: public funding and top-ups

R (Care England) v Essex County Council[2017] EWHC 3035 (Admin).

- Clear loss for the care providers, who were rebuffed on all fronts
- Court emphasised that the LA's obligation was to have regard to the relevant factors, but did not compel an outcome
- The duty also did not confer specific rights on individuals or care homes, but was instead a duty to promote the efficient operation of a market alongside other duties

Care home fees: public funding and top-ups

R (Care England) v Essex County Council[2017] EWHC 3035 (Admin).

- Where the care market was a viable and stable one and people had a choice of quality providers, challenge was very difficulty to sustain
- Even though evidence was submitted that the rates were 'significantly below the actual costs of providing care,' court did not accept that a breach of statute or guidance had occurred

Care home fees: public funding and top-ups

- Counterpoint to some of the care home fee cases from the early 2010s
- Merely showing that rates are below the cost of care is insufficient
- Market-shaping duties are placed in context among a host of others and likely would not have teeth unless LA had misdirected itself or failed to have regard to evidence before it

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Any questions?

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