



Steve Hynes, LAG's director, gives a flavour of the main themes and discussions at the group's community care conference, held in London in November last year.

What price dignity? LAG conference report

Dignity and autonomy

At LAG's latest community care conference, the audience of lawyers, policymakers and others with an interest in community care law heard contributions from the leading practitioners in the field. In the plenary sessions especially, the speakers moved beyond consideration of the current state of the law, delving into the meaning of dignity within the context of community care law and the political question of how much the state should be responsible for guaranteeing a person's dignity.

In his opening remarks, the chairperson of the first session, Stephen Knafler QC, a barrister at Garden Court Chambers and general editor of LAG's *Community Care Law Reports (CCLR)*, discussed the reduction in government funding for adult social care services. He said that it had been reduced by 11.8 per cent in the year ending April 2011 and that a further 26 per cent was due to be cut by 2014. He predicted difficulties for councils in meeting these cuts as 'the scope for efficiency savings is less than it was ten years ago'.

Lord Justice Munby gave the keynote speech for the second year running.¹ His excellent speech discussed the theme of dignity and the current state of the law. He explored the adequacy of autonomy and best interests as legal concepts, gave an analysis of European jurisprudence and argued for dignity to be at the centre of judicial and state decisions on personal welfare: 'Dignity surely has a crucial role to play in the context of community care and adult social care, contexts in which, too often it might be thought, proper

regard for the dignity of the vulnerable and disabled is sacrificed to economics. And most scandalously of all, as continuing exposés of conditions in too many hospitals, care homes and other institutional settings disgracefully reveal, dignity at even the most elementary level is too often lacking.'

In response to questions from the audience, Munby LJ discussed American law and the treatment of individuals by the state: 'In this country if a prisoner wants to starve himself to death he is able to do so, because of autonomy the state cannot intervene', but in America, he argued, a prisoner 'is not allowed to cheat the state'. Expanding on a point in his speech in which he argued that in Europe, in contrast to the US, the Kantian philosophical view prevails of 'treating people as subjects not objects, as ends not means,' he said that autonomy in the interests of dignity can be overridden 'but

only if you are doing so in the interests of the individual ... not if you are pursuing a separate interest of the state'.

Setting minimum standards

Much of the discussion at the conference centred on the case of *R (McDonald) v Kensington and Chelsea RLBC* [2011] UKSC 33, 6 July 2011; (2011) 14 CCLR 341. Munby LJ sidestepped any direct comment on the case, but other speakers gave their candid views on what they saw as the failings in the Supreme Court's judgment. This case received much media attention last year and concerned a woman who needed assistance to use the toilet at night because of a bladder condition and the effects of a stroke. Her local council was no longer willing to pay for the cost of a carer and gave her the options of either moving to sheltered accommodation, in which she would receive the care she required, or being



Alison Pickup and Paul Bowen of Doughty Street Chambers, speaking to Lord Justice Munby

provided with incontinence pads for use at night.

Paul Bowen, a barrister at Doughty Street Chambers, discussed the *McDonald* case and was critical of the Supreme Court's decision, which ruled that Ms McDonald's care needs package was adequate. Much of the case hinged on whether or not it was reasonable for the council to expect Ms McDonald to use incontinence pads at night, as it was not prepared to cover the cost of a carer to assist her with using the toilet at night. He argued that it '... should have quashed the council's decision on the basis that it had failed to give any, or sufficient, weight to Ms McDonald's critical interests of autonomy and dignity when carrying out its own assessment as it was required to do under article 8 [of the European Convention on Human Rights]'. Paul Bowen also contended that Lord Brown's reasoning (Lord Brown gave the majority verdict in the case) was flawed as he relied in part on the concept of the 'margin of appreciation' to justify his decision. Paul Bowen argued that this cannot be relied on in a domestic court as it is only applicable in the Strasbourg court in order to balance the different powers and resources available in member states.

The conference delegates also heard from Catherine Casserley, a barrister at Cloisters, who provided a useful guide to using the reasonable adjustments duty under the Disability Discrimination Act 1995 and related case-law. Her presentation ended the first morning plenary session.

Public sector equality duty: challenging the cuts

The second morning plenary session was entitled 'Public sector equality duty: challenging the cuts' and was chaired by Jean Gould, a specialist legal trainer at Carers UK. The session's two speakers were Karen Ashton, a partner at Public Law Solicitors, who co-authors *Legal Action's* 'Community care law update' articles (see page 27 of this issue), and Helen Mountfield QC, a barrister at Matrix Chambers.

In her presentation, Helen Mountfield QC discussed the public sector equality duty. She said that it should be explained to judges that '[the duty] is a fundamentally new approach to equality law, a move away from the restitutive model' to a model in which 'any rational decision-maker has to take the duties into account and give due regard to them' in



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Luke Clements and Pauline Thompson pictured at the reception to mark the launch of the fifth edition of their book *Community Care and the Law*. The event, which took place after the conference, was also held to mark Pauline's retirement as co-author. Everyone at LAG would like to thank Pauline for her marvellous contribution to LAG's work.

the performance of its functions. Helen Mountfield QC believes that the duty 'is one of the most powerful tools we have for challenging the very serious cuts our clients face'.

What is the future for adult social care?

The first speaker in the afternoon plenary session was Dame Jo Williams, chairperson of the Care Quality Commission. She said that a recent BUPA report had found that in the next ten years there would be a shortfall of 100,000 places in care homes for elderly people and the need for community-based rather than hospital services for people at the end of their lives. In her view the 'quality of individual leaders on the ground is essential for the quality of caring services'. Baroness Sally Greengross OBE, chief executive of the International Longevity Centre – UK and a commissioner at the Equality and Human Rights Commission (EHRC), spoke about the EHRC's inquiry into older people's rights in home care.² The report found that half of the people surveyed were happy with the care they received while the other half were not. She also stressed the importance of good quality care as an elderly person may see only a care worker each day and said that one unhappy elderly person had told the inquiry: 'I'm not really treated as a person, but as a commodity.'

Dignity as a core value

The conference closed with a speech from Richard Gordon QC, a barrister at Brick Court Chambers and *CCLR's* editor-in-chief. In keeping with the conference theme, he explored the everyday meaning of the term 'dignity'; he argued that in

human rights and community care law, 'dignity is the ultimate core value'. He noted that the EHRC's home care review contained 'no less than 58 references to the word dignity'.

In the context of *McDonald*, Richard Gordon QC said that the court had concentrated on defining need, 'leading to the barren conclusion that Ms McDonald only needed incontinence pads because the local authority said they were the only option'. In his view, 'the courts have not got round to focusing on dignity'. He reflected the majority of opinion at the conference when he said: 'We cannot, I suggest, without protest watch dignity being stripped from others whose humanity is no different from ours without the duty to do something if we wish to preserve our own dignity, our own democracy.'

For many elderly and other vulnerable people, there is a significant gap between their expectations of what the state should provide in services to maintain their dignity and the reality of the cash-strapped public sector. The conclusion from LAG's conference would seem to be that politicians and society need to find the money to meet the price of maintaining dignity, as the law cannot be relied on to do so.

- 1 A full copy of Munby LJ's speech will be published in *CCLR* later in the year.
- 2 *Close to home: an inquiry into older people and human rights in home care*, available at: www.equalityhumanrights.com/uploaded_files/homecareF1/home_care_report.pdf.

LAG would like to thank Simmons & Simmons for hosting the event and the conference sponsors: 1 Pump Court, Doughty Street Chambers, Matrix Chambers and Tooks.