

R v Gloucestershire CC and Secretary of State for Health ex p Barry; R v Lancashire CC ex p Royal Association for Disability and Rehabilitation and Gilpin

Court of Appeal

Hirst, Swinton Thomas and Sir John Balcombe LJJ

27 June 1996

Resources are not relevant to the assessment of need under Chronically Sick and Disabled Persons Act 1970 s2 although they are relevant to determining the manner in which the assessed need should be met.

Facts

Mr Barry was a disabled 79-year-old man whom the respondent had assessed as needing home care assistance including cleaning and laundry services. The respondent then withdrew these services owing to a shortage of financial resources. Mrs Ingham was an 88-year-old chronically ill woman whom the respondent had assessed as needing 24-hour care in her home from a housekeeper. The respondent later decided that Mrs Ingham's needs could and should be met by residential care in a nursing home. The fact that such care was significantly less expensive was a factor taken into account by the respondent. The rival submissions were essentially the same as in *R v Gloucestershire CC ex p Mahfood and Others* (1997) 1 CCLR 7.

Held (Hirst LJ dissenting):

- 1 A 'need' is a basic or essential requirement which must be distinguished from objects or services which it is desirable for a disabled person to have. There is a duty to meet needs under Chronically Sick and Disabled Persons Act 1970 (CSDPA) s2 and a power to provide that which is desirable under National Assistance Act 1948 (NAA) s29. A 'need' is a matter for assessment and judgment, not discretion. Resources are not relevant to that assessment or judgment.
- 2 Resources are relevant, however, to the manner in which provision is made to meet the assessed need. A need for cleaning services might be met by cleaning once a week, even though cleaning every day was desirable. A need for 24-hour care might be met by a nursing home placement rather than a live-in carer.

Cases referred to in judgment:

No cases were referred to.

Legislation/guidance referred to in judgment:

National Assistance Act 1948 s29 – Chronically Sick and Disabled Persons Act 1970 s2 – National Health Service Act 1977 s21 and Sch 8 – Disabled Persons (Services, Consultation and Representation) Act 1986 s4 – National Health Service and Community Care Act 1990 ss46 and 47 – Local Authority Social Services Act 1970 s7 – Department of Health Circular 12/70 *The Chronically Sick and Disabled Persons Act 1970 – Caring for People: Community Care in the Next Decade and Beyond* (White Paper, Cmd 849, HMSO, 1989) – *Community Care In the Next Decade and Beyond* (LASSA Guidance, November 1990) – *The Care and Management Assessment: Practitioners' Guide* (1991) – the Laming Letter

- A (guidance in the form of a letter from Mr Herbert Laming CBE, the Chief Inspector, Social Services Inspectorate, dated 14 December 1992).

This case also reported at:

- [1996] 4 All ER 421; [1996] COD 387; (1996) 93 (33) LS Gaz 25; (1996) 140 SJLB 177;
B *Times*, 12 July; *Independent*, 10 July, CA.

Representation

- Richard Gordon QC and Alan Maclean (instructed by the Public Law Project) appeared on behalf of the appellant Barry.
- C Cherie Booth QC and Helen Mountfield (instructed by the Public Law Project) appeared on behalf of the appellant Gilpin.
- Patrick Eccles QC and Christopher Frazer (instructed by County Legal Services, Gloucestershire County Council) appeared on behalf of Gloucestershire County Council).
- D Nigel Pleming QC and Stephen Kovats (instructed by the Legal Department, Department of Health) appeared on behalf of the Secretary of State for Health.
- Genevra Caws QC and Clive Lewis (instructed by the Chief Executive's Clerk's Department, Lancashire County Council) appeared on behalf of Lancashire County Council.

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Judgment

- LORD JUSTICE HIRST:** These two appeals raise important questions concerning the scope of the duty owed by a local authority to a disabled person as contained in section 2 of the Chronically Sick and Disabled Persons Act 1970, and its place within the framework of the Community Care legislation as a whole. The particular point at issue is whether such authorities are entitled, when making an assessment of a disabled person's needs and of the arrangements required to meet them, to take into account the resources available to them in both human and financial terms.
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- G In the first case Michael Barry appeals against part of the decision of the Divisional Court (McCowan LJ and Waller J) dated 16th June 1995 whereby they allowed his motion for judicial review of decisions by the Gloucestershire County Council withdrawing services under section 2 of the 1970 Act on a ground no longer in dispute, but refused his application for further additional declaratory relief that, *inter alia*, in assessing or re-assessing the needs of a disabled person and the arrangements required to meet them, a local authority are not entitled to take account of the resources available to such local authority.
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- In the second case, in substitution for the original applicant Mrs Annie Ingham deceased, pursuant to an order of the Court of Appeal dated 12th December 1995, the Royal Association for Disability and Rehabilitation, and Beryl Gilpin (Mrs Ingham's daughter), appeal against the decision of Hidden J dated 5th July 1995 whereby he dismissed Mrs Ingham's application for judicial review to quash the decision of the Lancashire County Council dated 5th October 1994 to review Mrs Ingham's care arrangements, and the decision of the Social Services Special Cases Sub-Committee dated 9th December 1994 that Mrs Ingham's needs for 24-hour care could most appropriately be met by the provision of residential care. The appellants in this case now seek a declaration similar to Mr Barry's.
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- The facts of Mr Barry's case are very simple. He is 79 years old, and is gravely disabled. Prior to 29th September 1994 he was in receipt of home care services providing him with cleaning, laundry, shopping and community meals pursuant to section 2 of the 1970 Act. By letter dated 29th September 1994 the Gloucester-
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shire County Council withdrew his cleaning services and reduced his laundry provision on the ground that it had been necessary to re-assess the service hitherto provided due to shortage of financial resources.

Mrs Ingham, who was aged 88 at the material time, was chronically ill, suffering from poor mobility, incontinence and confusion, and in need of 24-hour care. After a spell in hospital in late 1993 she was discharged to a nursing home. On 23rd May 1994 her needs were assessed at the request of her daughter, and an agreed care plan was instituted to move her from the nursing home for 24-hour care in her home from a housekeeper. Her needs were re-assessed on 5th October 1994, and at this juncture it was decided that her needs could best be met by a residential placement back in a nursing home. Mrs Ingham's daughter then sought a Review Panel hearing, which took place, with the result that the Sub-Committee on 9th September 1994 upheld the decision of 5th October. In both decisions financial considerations were one of a number of factors taken into account.

During the course of the hearing these two decisions in Mrs Ingham's case were attacked by Miss Cherie Booth QC on the ground that they were *Wednesbury* unreasonable whatever the outcome of the appeal on the main point of principle, but in view of Mrs Ingham's death, the question is now academic, and I propose to say no more than that, having considered the documents, I am not satisfied that Miss Booth has made good her contention that there was any such impropriety in either of these decisions.

It follows that both appeals stand or fall on the same point of principle, which itself turns on the proper construction of the relevant legislation.

Section 29 of the National Assistance Act 1948 is the legislative starting point, and is within Part III of the Act, headed 'Local Authority Services'. It presently provides so far as relevant as follows, under the sub-heading 'Welfare Services': –

Welfare arrangements for blind, deaf, dumb and crippled persons, etc

(1) *A local authority [may, with the approval of the Secretary of State, and to such extent as he may direct in relation to persons ordinarily resident in the area of the local authority shall] make arrangements for promoting the welfare of persons to whom this section applies, that is to say persons [aged eighteen or over] who are blind, deaf or dumb [or who suffer from mental disorder of any description], and other persons [aged eighteen or over] who are substantially and permanently handicapped by illness, injury, or congenital deformity or such other disabilities as may be prescribed by the Minister.*

(2), (3) . . .

(4) *Without prejudice to the generality of the provisions of subsection (1) of this section, arrangements may be made thereunder –*

- (a) *for informing persons to whom arrangements under that subsection relate of the services available for them thereunder;*
- (b) *for giving such persons instruction in their own homes or elsewhere in methods of overcoming the effects of their disabilities;*
- (c) *for providing workshops where such persons may be engaged (whether under a contract of service or otherwise) in suitable work, and hostels where persons engaged in the workshops, and other persons to whom arrangements under subsection (1) of this section relate and for whom work or training is being provided in pursuance of the Disabled Persons (Employment) Act 1944 [or the Employment and Training Act 1973] may live;*
- (d) *for providing persons to whom arrangements under subsection (1) of this section relate with suitable work (whether under a contract of service or otherwise) in their own homes or elsewhere;*
- (e) *for helping such persons in disposing of the produce of their work;*

- A (f) for providing such persons with recreational facilities in their own homes or elsewhere;
(g) for compiling and maintaining classified registers of the persons to whom arrangements under subsection (1) of this section relate.

B The words in brackets have been inserted by subsequent legislation, and in its original form and as it stood in 1970, it was, subject to minor grammatical changes, in the form it presently appears without the brackets.

The description in sub-section (1) has stood ever since as the definition of disabled persons.

- C Section 2 of the Chronically Sick and Disabled Persons Act 1970 is the bedrock of the appellant's case, and is in the following terms: –

Provision of welfare services

D (1) Where a local authority having functions under section 29 of the National Assistance Act 1948 are satisfied in the case of any person to whom that section applies who is ordinarily resident in their area that it is necessary in order to meet the needs of that person for that authority to make arrangements for all or any of the following matters, namely –

- (a) the provision of practical assistance for that person in his home;
(b) the provision for that person of, or assistance to that person in obtaining, wireless, television, library or similar recreational facilities;
E (c) the provision for that person of lectures, games, outings or other recreational facilities outside his home or assistance to that person in taking advantage of educational facilities available to him;
(d) the provision for that person of facilities for, or assistance in, travelling to and from his home for the purpose of participating in any services provided under arrangements made by the authority under the said section 29 or, with the approval of the authority, in any services provided otherwise than as aforesaid which are similar to services which could be provided under such arrangements;
F (e) the provision of assistance for that person in arranging for the carrying out of any works of adaptation in his home or the provision of any additional facilities designed to secure his greater safety, comfort or convenience;
G (f) facilitating the taking of holidays by that person, whether at holiday homes or otherwise and whether provided under arrangements made by the authority or otherwise;
H (g) the provision of meals for that person whether in his home or elsewhere;
(h) the provision for that person of, or assistance to that person in obtaining, a telephone and any special equipment necessary to enable him to use a telephone,

I then . . . subject . . . [. . . to the provisions of section 7(1) of the Local Authority Social Services Act 1970 (which requires local authorities in the exercise of certain functions, including functions under the said section 29, to act under the general guidance of the Secretary of State)] [and to the provisions of section 7A of that Act (which requires local authorities to exercise their social services functions in accordance with directions given by the Secretary of State)], it shall be the duty of that authority to make those arrangements in exercise of their functions under the said section 29.

I shall in future refer to sub-paragraphs (a)–(h) inclusive as ‘the service list’.

- K Section 4 of the Disabled Persons (Services, Consultation and Representation Act) 1986 provides as follows: –

Services under s2 of the 1970 Act: duty to consider needs of disabled persons

When requested to do so by –

- (a) a disabled person,*
- (b) his authorised representative, or*
- (c) any person who provides care for him in the circumstances mentioned in section 8*

a local authority shall decide whether the needs of the disabled person call for the provision by the authority of any services in accordance with section 2(1) of the 1970 Act (provision of welfare services).

Section 47 of the National Health Service and Community Care Act 1990 provides so far as relevant as follows: –

Assessment of needs for community care services

(1) Subject to subsections (5) and (6) below, where it appears to a local authority that any person for whom they may provide or arrange for the provision of community care services may be in need of any such services, the authority –

- (a) shall carry out an assessment of his needs for those services, and*
- (b) having regard to the results of that assessment, shall then decide whether his needs call for the provision by them of any such services.*

(2) If at any time during the assessment of the needs of any person under subsection (1)(a) above it appears to a local authority that he is a disabled person, the authority –

- (a) shall proceed to make such a decision as to the services he requires as is mentioned in section 4 of the Disabled Persons (Services, Consultation and Representation) Act 1986 without his requesting them to do so under that section; and*

(b) shall inform him that they will be doing so and of his rights under that Act.

(3) If at any time during the assessment of the needs of any person under subsection (1)(a) above, it appears to a local authority –

- (a) that there may be a need for the provision to that person by such District Health Authority as may be determined in accordance with regulations of any services under the National Health Service Act 1977, or*
- (b) that there may be a need for the provision to him of any services which fall within the functions of a local housing authority (within the meaning of the Housing Act 1985) which is not the local authority carrying out the assessment,*

the local authority shall notify that District Health Authority or local housing authority and invite them to assist, to such extent as is reasonable in the circumstances, in the making of the assessment; and, in making their decision as to the provision of the services needed for the person in question, the local authority shall take into account any services which are likely to be made available for him by that District Health Authority or local housing authority.

(4) The Secretary of State may give directions as to the manner in which an assessment under this section is to be carried out or the form it is to take but, subject to any such directions and to subsection (7) below, it shall be carried out in such manner and take such form as the local authority consider appropriate.

In future I shall refer to these four key statutory provisions as section 29, section 2, section 4, and section 47 respectively.

During the course of the argument considerable reference was made on all sides to official guidance and advice, starting with the White Paper entitled 'Caring for people; Community Care in the Next Decade and Beyond' 1989 Cmd 849, which was the progenitor of the 1990 Act.

- A Before citing the relevant material, it is important to note the extent to which it is appropriate to refer to it, and the weight which it should bear.
- B It falls into two categories, namely on the one hand official guidance issued by the Secretary of State, and on the other hand official statements in, for example, ministerial circulars.
- C So far as the former is concerned, local authorities are obliged by section 7(1) of the Local Authority Social Services Act 1970 (LASSA 1970) to act under the general guidance of the Secretary of State in the exercise of their social services functions, including section 2, which specifically refers to LASSA 1970.
- D The latter, which do not come strictly within the scope of section 7 of LASSA 1970, are as stated in volume 44(1) of Halsbury's Laws (Reissue 4th edition) on the authority of the cases there cited, at paragraph 1427, persuasive authority on the proper construction of the legislation.
- E I propose to go through this material in chronological order, starting with the White Paper.
- F The White Paper, which of course preceded the 1990 Act, describes in paragraph 1.11 one of the government's six key objectives to be 'to promote the development of domiciliary, day and respite services to enable people to live in their own homes wherever feasible and sensible'.
- G Paragraph 3.3.1 provides 'once an individual assessment has been completed, and a decision has been taken that public funding care can and should be arranged, it will be the responsibility of the social services authority to design care arrangements in line with individual needs . . . '.
- H Circular No 12/70 issued on 17th August 1970 and headed 'The Chronically Sick and Disabled Persons Act 1970' provides under the heading 'General' in paragraph 3: –
- I *Purpose of the Act . . . Its underlying purposes are to draw attention to the problems, varying with age and incapacity, for people who are handicapped by chronic sickness and disablement; to express concern that these problems should be more widely known and studied and to urge that when priorities are settled, full weight is given to finding solutions. While recognising the effect of constraints on resources, the Government are confident that local authorities will have these purposes in mind in the administration of sections with which they are concerned.*
- J In relation to section 2 specifically, the circular states in paragraph 7: –
- K *The duty requires the authority to assess the requirements of individuals determined by them to be substantially and permanently handicapped as to their needs in these matters. If they are satisfied that an individual is in need of any (or all) of these matters, they are to make arrangements that are appropriate to his or her case. The task of assessment should be undertaken as a normal part of authority's social work service, ie., it should be an occasion for considering all relevant needs and not merely those to which the section refers; and a judgment whether those needs are of prior importance should be drawn from a complete and not partial picture of the situation. Criteria of need are matters for the authorities to determine in the light of resources.*
- The Policy Guidance, issued following the 1990 Act, states that the White Paper and the Act itself set out the Government's policy framework for community care in the next decade and beyond. This document of course falls into the former category. Paragraph 1.9 provides: –

The objective must be to provide a service in which the boundaries between primary health care, secondary health care, and social care do not form barriers seen from the perspective of the service user. How this is done will reflect the way local authorities and health authorities work together and organise their resources. Care must be focused on meeting the needs of individuals and their carers appropriately and sensitively . . .

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Paragraph 1.15 provides: –

A major objective of government policy is that over a period of time services should increasingly respond to the needs of individuals . . .

Paragraph 3.7 provides: –

*Care management is based on a needs-led approach which has two aspects:-
A progressive separation of the tasks of assessment from those of service provision in order to focus on needs, where possible having the task carried out by different staff;
A shift of influence from those providing to those purchasing services . . .*

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Paragraph 3.9 provides: –

*For the purpose for this guidance, care management in its most comprehensive form covers three distinct processes;
Assessment of the user's circumstances in the round including support required by carers;
Design of a 'care package' in agreement with users, carers and relevant agencies, to meet the identified needs within the care resources available, including help from willing and able carers. Any preferred solutions which prove unavailable either because of resource constraints or because the services have not been developed will be fed back into the planning process . . .*

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Paragraph 3.15 provides: –

Although assessment is a service in its own right it can be distinguished from the services which are arranged as a consequence. This needs-led approach presupposes a progressive separation of assessment from service provision. Assessment does not take place in a vacuum: account needs to be taken of the local authority's criteria for determining when services should be provided, the types of service they have decided to make available and the overall range of services provided by other agencies including health authorities.

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Paragraph 3.24 provides: –

Once needs have been assessed, the services to be provided or arranged and the objectives of any intervention should be agreed in the form of a care plan . . .

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Paragraph 3.25 provides: –

The aim should be to secure that the most cost-effective package of services that meets the user's care needs taking into account the user's and carers' own preferences. Where supporting the user in a home of their own would provide a better quality of life this is to be preferred to admission to residential or nursing home care. However, local authorities also have a responsibility to meet needs within the resources available and this will sometimes involve difficult decisions where it will be necessary to strike a balance between meeting the needs identified within available resources and meeting the care preferences of the individual.

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A Paragraph 3.30 provides: –

In accordance with Section 47(2) of the Act, if, at any time during their assessment, an individual is found to be a person to whom Section 29 of the (1948 Act) applies, the authority must so inform them, advise them of their rights and make a decision as to their need for services, as required by Section 4 of the (1986 Act).

B *Once an individual's needs for welfare services, specified in Section 2 of the (1970 Act), has been established, the authority must make necessary arrangements to meet it.*

The Practitioners' Guide 1991 provides under the heading 'Summary of Practice Guidance' as follows: –

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Care management and assessment constitute one integrated process for identifying and addressing the needs of individuals within available resources, recognising that those needs are unique to the individuals concerned . . . (para 3).

D *Need is a complex concept which has been analysed in a variety of different ways. In this guidance, the term is used as shorthand for the requirements of individuals to achieve, maintain or restore an acceptable level of social independence or quality of life, as defined by the particular care agency or authority.*

E *Need is a dynamic concept, the definition of which will vary over time and in accordance with*

- *Changes in national legislation*
- *Changes in local policy*
- *The availability of resources*
- *The pattern of local demand.*

F *Need is thus a relevant concept. In the context of community care need has to be defined at the local level. That definition sets limits for the discretion of practitioners in accessing resources . . . (paras 11–13).*

Finally, the letter from Mr Herbert Laming CBE, the Chief Inspector, Social Services Inspectorate, dated 14th December 1992, which falls into the former category, states in the following numbered paragraphs as follows:-

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H *3. The assessment process should be structured so that the needs of the individual ie. their capacities and incapacities and their circumstances are identified before any consideration is given to any requirements for service provision. Such consideration will need to take into account for example whether other organisations could more appropriately meet the needs identified. It would also take into account the resources available to the authority.*

I *13. An authority may take into account the resources available when deciding how to respond to an individual's assessment. However, once the authority has indicated that a service should be provided to meet an individual's needs and the authority is under a legal obligation to provide it or arrange for its provision then the service must be provided. It will not be possible for an authority to use budgeting difficulties as a basis for refusing to provide the service.*

J *28. Authorities will need regularly to review their criteria of eligibility for resources and services to take account of: –*

- *the new policy objectives;*
- *more efficient targeting of resources;*
- *newly available resources;*
- K – *changing volumes and types of assessed needs and user preferences;*
- *available resources.*

31. *The care plans of all users should be subject to regular review. For frail people in the community, frequent reviews and adjustments of their care plans are likely to be needed. Before any changes in services are made for existing users, they should be re-assessed. In those cases, where assessment had been undertaken, particularly under section 2(1) of the (1970 Act), authorities must satisfy themselves, before any reduction in service provision takes place that the user does not have a continuing need for it. So long as there is a continuing need, a service must be provided although, following review, it is possible that assessed need might be met in a different way.*

In the Gloucestershire case, McCowan LJ giving the leading judgment with which Waller J agreed, having stated that at first sight the arguments on behalf of Mr Barry appeared to have much force, proceeded as follows: –

A person's need is none the less a need because there is a shortage of resources to meet it and competing needs of other persons; and once a need has been established it cannot be reduced or eliminated by virtue of a reduction in the resources available to meet it. On further reflection, however, I have been driven to the view that such an interpretation would be impractical and unrealistic and hence one to be avoided if at all possible. In assessing need, those doing so will inevitably compare the extent of the disabilities of the persons concerned in order to arrive at a view as to who needs help more. That comparative exercise is obviously related to resources. Indeed, it seems to me that a local authority face an impossible task unless they can have regard to the size of the cake so that in turn they know how fairest and best to cut it.

I am strengthened in that view by the following factors:

- (1) *The broad nature of the factors under (a) to (h) seems to demonstrate the very broad spectrum covered by the word 'needs'.*
- (2) *The expression 'necessary in order to meet the needs' again suggests to my mind that resources are a relevant factor.*
- (3) *The demand for resources and the resources themselves are bound to fluctuate. Hence inevitably resources will be a relevant factor.*
- (4) *Under section 2(1) the local authority are to make the arrangements in exercise of their functions under section 29 of the 1948 Act. Those functions are to make welfare arrangements for persons who are substantially and permanently handicapped by among other things disabilities. This points, in my view, in the direction of having to take account of other needs of other disabled persons when looking at the needs of a particular disabled person.*

For these reasons I for my part have concluded that a local authority are right to take account of resources both when assessing needs and when deciding whether it is necessary to make arrangements to meet those needs. I should stress, however, that there will, in my judgment, be situations where a reasonable authority could only conclude that some arrangements were necessary to meet the needs of a particular disabled person and in which they could not reasonably conclude that a lack of resources provided an answer. Certain persons would be at severe physical risk if they were unable to have some practical assistance in their homes. In those situations, I cannot conceive that an authority would be held to have acted reasonably if they used shortage of resources as a reason for not being satisfied that some arrangements should be made to meet those persons' needs.

On any view section 2(1) is needs-led by reference to the particular needs of a particular disabled person. A balancing exercise must be carried out assessing the particular needs of that person in the context of the needs of others and the resources available, but if no reasonable authority could conclude

A *other than that some practical help was necessary, that would have to be their decision.*

B *Furthermore, once they have decided that it is necessary to make the arrangements, they are under an absolute duty to make them. It is a duty owed to a specific individual and not a target duty. No term is to be implied that the local authority are obliged to comply with the duty only if they have the revenue to do so. In fact, once under that duty, resources do not come into it.*

C In the Lancashire case Hidden J, having resolved the *Wednesbury* issue in the council's favour, also upheld their submissions based on the Gloucestershire case, which had been decided some three weeks previously, and concluded that the council were entitled to have regard to their available resources both at the first stage of assessing needs and also at the second stage of deciding whether it was necessary to make arrangements to meet those needs.

D In his argument on behalf of Mr Barry in the Gloucestershire case Mr Richard Gordon QC crystallised his submissions in 10 propositions:-

- (1) Section 47(1) establishes a two-stage framework for local authorities considering a community care provision for an individual person, viz. the assessment stage and the provision stage.
- E (2) The framework applicable to disabled persons under section 2 is materially different from that otherwise applicable in the community care field.
- (3) In the case of a disabled person requiring or possibly requiring section 2 services, the local authority are obliged to go through an analytical process involving a judgment and not a discretion, ie, to decide whether it is necessary to provide one or more of the services described in section 2 for that individual; and then as a matter of strict obligation, to implement that decision, if it is favourable to the disabled person.
- F (4) A section 2 decision pre-supposes a judgment by the local authority of the needs of each individual disabled person.
- (5) The determination of the needs of any individual disabled person under section 2 cannot depend on the resources available to the local authority, nor on the number of or needs of other disabled persons in their area.
- G (6) Having formed the judgment as to need, and the necessity of meeting it, the duty to make provision is automatically activated.
- (7) Section 2(1) is to be contrasted with every other community care service, as laying a unique specific individual duty at the local authority's door.
- H (8) Just as resources are irrelevant to judgments under section 2, so are they irrelevant to the provision of the requisite arrangements.
- (9) It is unlawful to withdraw or reduce section 2 services, once implemented, on the ground of inadequate resources.
- I (10) If money is tight, proper priority must be given to fulfilling this statutory duty, and if necessary money must be found elsewhere by pruning other (discretionary) services.

J Mr Gordon submitted that the essence of section 2 is that it constitutes a minimum basic provision or safety net, in order to achieve a key objective of community care for the disabled, in contrast to other provisions in this field, which lay down target powers or duties with a discretionary element.

This, he submitted, is manifest from the language of section 2 itself, with its use of the plain words 'needs' and 'necessity to meet', which left no room for any discretion or value judgment.

K This approach, he submitted, was strongly borne out by section 47, and in

particular by the contrast he painted between sub-section (1) and sub-section (2). The former required first an assessment under sub-paragraph (a) and secondly a provision under sub-section (b), the latter being subject to an element of discretion in view of the opening words 'having regard to'.

Sub-section (2), on the other hand, was an entirely discrete and free-standing provision introducing a separate assessment process for the disabled, and requiring the local authority to proceed to a mandatory decision under section 4 and section 2.

Mr Gordon also relied on a number of passages in the guidance and advisory material, in particular paragraphs 1.11 and 3.3.1 of the White Paper, paragraphs 1.9, 1.15, 3.7 and especially paragraph 3.30 of the Policy Guidance, and paragraph 31 of the Laming letter.

In the Lancashire case, Miss Booth adopted Mr Gordon's submissions on the general framework of the legislation, and in particular on section 2, which she submitted lays down specific duties, enacted to give a disabled person rights to essential services to meet that person's minimum need. The section 2 exercise, she submitted, required a personal enquiry scrutinising, and focusing exclusively upon, the needs of the individual disabled person, and without any regard to available resources; only if an identified need could equally well be met by a less expensive arrangement (eg, a nursing home rather than home care) was it legitimate to take into account such resources. It was incumbent on the court, she submitted, to give effect to the difference between on the one hand section 2 arrangements which are individual rights and needs-based entitlements regardless of the local authority's resources, and on the other hand the services provided under a range of other statutory discretion, which provides similar arrangements, but contingent upon competing demands for resources.

Persuasively though the appellants' arguments were addressed, I am unable to accept them, substantially for the reasons advanced by Mr Patrick Eccles QC on behalf of Gloucestershire, Miss Geneva Caws QC on behalf of Lancashire, and Mr Nigel Pleming QC on behalf of the Secretary of State for Health.

On Mr Gordon's and Miss Booth's arguments, the opening words of section 2 provide a complete and conclusive answer in the light of their construction of the critical phrase '... necessary in order to meet the needs of that person ...', which they say demonstrates that the underlying purpose is to provide a safety net or minimum standard of care for the disabled. This latter concept was central to their argument, and they both recognised that if it is unsound, it goes some considerable way to undermine their case.

It is common ground that, once the test laid down in the critical phrase is satisfied, an absolute duty rests on the authority to make the identified arrangement or arrangements, so the case turns entirely on the correct interpretation of the critical phrase.

None of the words in the critical phrase are defined in the 1970 Act, and I for my part do not find that, taken by itself, it bears a sufficient degree of clarity to rule out the wider interpretation adopted in both courts below and supported by the respondents, encompassing a value judgment which would allow resources to be taken into account.

The heading 'Provision of Welfare Services' does not suggest that section 2 is referring to a minimum standard of care. Nor do I consider that the safety net concept fits several of the individual items in the service list, in particular items (b)–(f) inclusive, which hardly rate as basic requirements, and whose selection would seem to involve choices in which cost would be an inevitable consideration. Despite Mr Gordon's plea to the contrary, I do not think it proper to ignore

- A the service list when construing the opening words of the section, which in any event does not specifically categorise the service list as minimum standards.
- B The opening words of section 2 ('Where a local authority having functions under section 29 of the National Assistance Act 1948 . . .') demonstrate clearly that the provision of welfare services under section 2 is to be treated as one of the section 29 functions. These functions, as is common ground, are ones which the local authority are empowered but not obliged to carry out, and where financial considerations are legitimate. While I accept that this does not rule out the appellant's construction of section 2, it does seem to me to tell against it, in order to fit section 2 into the general section 29 discretionary framework.
- C Moreover, section 2 cannot be construed in a vacuum, and I consider there is great force in the respondents' argument that it would be surprising to say the least if Parliament intended section 2 to impose a strict duty on a local authority, completely regardless of that authority's resources to carry it out. Parliament in 1970 must of course have been well aware of the financial constraints under which local authorities have always laboured, even though the present capping regime was far away in the future.
- D Consequently, if in section 2 Parliament did intend to create what Mr Gordon and Miss Booth portray as a unique category, I would have expected to find that intention spelt out in the section in clear and unequivocal words, which it is not.
- E I now turn to the provisions in the subsequent legislation, which cannot alter the meaning of section 2 if it bears the plain meaning for which the appellants contend, but which are, in my judgment, pertinent as showing how Parliament itself interpreted section 2 subsequently.
- F Section 4 imposes a duty on the local authority on request to 'decide whether the needs of the disabled person call for the provision by the authority of services in accordance with section 2'. In my view the words 'call for' in their natural meaning import an element of discretion or value judgment, and this is borne out by the use of the same words in section 47(1)(b) to which I am about to refer.
- G Section 47 is part of a major piece of legislation following upon the White Paper. Section 47(1)(a) lays a duty on the local authority to carry out an assessment of the needs of any person in their area for the provision of community care services, which are defined in section 46(3) as including not only those specified in Part III of the 1948 Act (ie, including section 2) but also provisions in several other statutes including section 117 of the Mental Health Act 1983. Thus section 47(1)(a) has a very wide conspectus, embracing a very wide variety of community care services, including, but not restricted to, those for the disabled.
- H Section 47(1)(b) requires the local authority to decide whether that person's needs call for provision by them of any such services having regard to the results of that assessment. The appellants concede that this gives the local authority a discretion in which resources can be taken into account, but they say that this flexibility is to be derived simply and solely from the opening words 'having regard to the results of that assessment . . .'. I prefer to read section 47(1)(b) as a whole, and am satisfied that the discretionary aspect is to be derived from the combination of the words 'having regard to' and 'called for'.
- I Section 47(2) is central to the appellant's argument, and is portrayed by them as a discrete free-standing provision which, in Mr Gordon's words, 'by-passes' section 47(1)(b) and is 'entirely distinct from' the section 47(1) exercise.
- K I reject this contention, which neither fits into the pattern of section 47 as a whole, nor accords with the wording of sub-section (2) itself. The pattern is exemplified by the opening words of sub-section (2), which established a direct link with the section 47(1) exercise. The wording itself shows that once the person

in question is identified as a disabled person, the local authority is directed to 'proceed to make such a decision as to the services he requires as is mentioned in section 4', ie, to decide whether his needs call for the provision of section 2 services, without his requesting them to do so under section 4. This, *mutatis mutandis*, is identical to the section 47(1)(b) exercise.

Finally section 47(4), which clearly applies to both sub-section (1) and (2), stipulates that, subject to any directions from the Secretary of State, the assessment shall be carried out in such manner and take such form as the local authority consider appropriate, which seems to me to demonstrate that the local authority have a considerable degree of flexibility fully consistent with the respondents' construction of section 2.

I turn finally to the guidance and other official statements issued by the Secretary of State, which in my judgment support the construction I favour.

I fully accept the appellants' submissions that this material emphasises over and over again the basic principle that community care is based upon an assessment of individual needs and upon the tailoring of service provisions to meet them, and that a special place in the assessment of such care needs is accorded to section 2 by paragraph 3.30 of the Policy Guidance.

However, it is manifest from the other passages which I have quoted from the Policy Guidance and from the Laming letter that there is a repeated recognition and assertion that resources can properly be taken into account, and also that it is appropriate for local authorities to draw up eligibility criteria and schemes of priority. Nothing in paragraph 3.30 or in the Laming letter in any way suggests that section 2 is immune from these considerations. Added to that is the persuasive authority of the other material, in particular Circular 12/70 and the paragraphs which I quoted from the Practitioners' Guide, which are quite categorical.

Taking all these manifold aspects into account, I for my part am satisfied that both the Divisional Court and Hidden J were correct in holding that under section 2 the local authority are entitled to take into account resources in assessing a disabled person's needs and the arrangements necessary to meet those needs.

I stress that this is no more than one factor in an overall assessment, where no doubt the objective needs of the individual disabled person will always be the paramount consideration, but not to the total exclusion of resources as one element in the overall value judgment, nor in disregard of any eligibility criteria or priorities established by the local authority.

The same considerations must logically apply to any re-assessment, and I reject the appellants' submission that once a section 2 arrangement has been made, it is sacrosanct and can only be changed if the disabled person's circumstances have changed.

I would therefore dismiss both appeals.

LORD JUSTICE SWINTON THOMAS: I have had the advantage of reading the judgment to be delivered by Hirst LJ, and I gratefully adopt his statement of the facts relating to these appeals and the legislative framework.

Although the very ably argued and valuable submissions in these two appeals lasted three days before us, all parties were agreed that the point in issue was one of pure construction of section 2 of the Chronically Sick and Disabled Persons Act 1970 (the 1970 Act). Section 2(1) provides:

Where a local authority having functions under section 29 of the National Assistance Act 1948 are satisfied in the case of any person to whom that section applies who is ordinarily resident in their area that it is necessary in order to

- A *meet the needs of that person for that authority to make arrangements for all or any of the following matters, namely . . .*
- and the matters are then set out at (a) to (h).
- B The appellants submit that on a proper construction of those words, the resources available to the local authority are not a relevant consideration to a decision made under section 2. The respondents submit that on a proper construction of the section 'need' imports a consideration of the resources available to the authority.
- C It is common ground between the parties that neither earlier nor later legislation provides direct assistance on the construction of section 2. However, the respondents submit that both earlier and later legislation are of assistance in ascertaining the intention of Parliament when the 1970 Act was enacted, and it is, therefore, necessary to look at that legislation.
- D The National Assistance Act 1948 gave power to local authorities to provide Welfare Services for the disabled. Section 29(1) provides:
- E *A local authority may, with the approval of the Secretary of State, and to such extent as he may direct in relation to persons ordinarily resident in the area of the local authority shall make arrangements for promoting the welfare of person to whom this section applies, that is to say persons aged 18 or over who are blind, deaf or dumb or who suffer from mental disorder of any description, and other persons aged 18 or over who are substantially and permanently handicapped by illness, injury, or congenital deformity or such other disabilities as may be prescribed by the Minister.*
- F It is clear that this section is an empowering section, and that there is no duty to exercise the powers unless and until the Minister so directs. I accept that section 29 does not impose a duty on the local authority to provide services and that, accordingly, they are entitled to take into account resources when making a decision whether or not to provide such services.
- G The 1970 Act resulted from a Private Member's Bill (the Act becoming known as the 'The Alf Morris Act'). Section 2 provided that local authorities who have functions under section 29 of the 1948 Act should be under a duty to exercise those functions as provided in the section. Thus the power in section 29 became a duty under section 2.
- H Section 4 of the Disabled Persons (Services, Consultation and Representation) Act 1986, provides:
- I *When requested to do so by –*
(a) a disabled person,
(b) his authorised representative, or
(c) any person who provides care for him in the circumstances mentioned in section 8,
a local authority shall decide whether the needs of the disabled person call for the provision by the authority of any services in accordance with section 2(1) of the 1970 Act (provision of welfare services).
- J This section was enacted because local authorities were not required by section 2 of the 1970 Act to make any decision under it, and in some instances they were failing to do so. Hence a duty was laid on them to make such a decision. That was the only effect of section 4 and it was not submitted on behalf of the respondents or the Secretary of State that the section has any relevance to the resolution of
- K the question as to whether in carrying out their duties under section 2 a local

authority can or can not take into account available resources. However the words used in section 4, 'shall decide whether the needs of the disabled person call for the provision by the authority of any services' have some materiality, as does the concession made by the respondents and the Secretary of State, because one finds those words picked up again in section 47(1) of the 1990 Act. Further a decision as to whether the needs of a disabled person call for the provision of services must be very close if not identical to a decision that it is necessary to meet the needs of a disabled person to make arrangements for that provision.

Section 46(3) of the National Health Service and Community Care Act 1990 provides:

... 'community care services' means services which a local authority may provide or arrange to be provided under any of the following provisions –

- (a) Part III of the National Assistance Act 1948;*
- (b) section 45 of the Health Services and Public Health Act 1968;*
- (c) section 21 of and Schedule 8 to the National Health Service Act 1977; and*
- (d) section 117 of the Mental Health Act 1983 ...*

Section 47(1) provides:

Subject to subsections (5) and (6) below, where it appears to a local authority that any person for whom they may provide or arrange for the provision of community care services may be in need of any such services, the authority –

- (a) shall carry out an assessment of his needs for those services; and*
- (b) having regard to the results of that assessment, shall then decide whether his needs call for the provision by them of any such services.*

Section 47(2) provides:

If at any time during the assessment of the needs of any person under subsection (1)(a) above it appears to a local authority that he is a disabled person, the authority –

- (a) shall proceed to make such a decision as to the services he requires as is mentioned in section 4 of the Disabled Persons (Services, Consultation and Representation) Act 1986 without his requesting them to do so under that section; and*
- (b) shall inform him that they will be doing so and of his rights under that Act.*

Section 47(1)(a) provides for the provision of community care services generally, the need for such services, the carrying out of an assessment and section 47(1)(b) gives the local authority a discretion as to whether to provide those services. The discretion in making the decision under section 47(1)(a) arises by reason of the use of the words 'having regard to the results of that assessment'. In making that decision they will be entitled to take into account available resources.

Then section 47(2) turns to consider the position of the disabled. It is absolutely clear that if, when an assessment is being carried out under section 47(1) it appears that the person who is being assessed is disabled then he or she falls into a distinct category. That in turn triggers the duty laid down in section 4 of the 1986 Act to make a decision which, in turn, triggers the duty to decide whether the needs of the disabled person call for the provision of any services in accordance with section 2(1) of the 1970 Act. Accordingly section 47(2) of the 1990 Act takes one back to the provisions of section 2 of the 1970 Act.

I can find nothing in the provisions of the legislation enacted by Parliament either before or after the passing of the 1970 Act which in any way indicates that it

- A was the intention of Parliament when passing the 1970 Act that resources should be a relevant consideration when a local authority are required to carry out their statutory duty to a disabled person under section 2(1). If Parliament had intended to incorporate the duties laid down by section 2 of the 1970 Act into the Community Care regime of the 1990 Act it could readily have passed amending or
B repealing legislation within the provisions of the 1990 Act. That Parliament chose not to do so supports the contentions argued for by the appellants in these appeals.

Our attention was drawn to a number of passages in Ministerial Policy Guidance, Departmental Circulars and Guides. Hirst LJ has referred to a number of the
C passages and, unsurprisingly, both sides found passages which assisted their respective cases. From time to time resources are mentioned. As I will indicate a little later, resources are clearly a relevant consideration which a local authority is entitled to take into account when, having concluded that it is necessary to make provision to meet the needs of the disabled person concerned under section 2,
D they decide the nature of the provision to be made to meet those needs. There was nothing in the Guidance or the Circulars which would lead me to the view that it was the considered departmental opinion that resources were relevant to the former consideration rather than the latter. If that was the view, then, in my opinion, it was wrong. Furthermore, the following passage may be relevant.

- E Policy Guide, Community Care in the Next Decade and Beyond, 1991, paragraph 3.30:

*In accordance with Section 47(2) of the Act, if, at any time during their assessment, an individual is found to be a person to whom Section 29 of the National Assistance Act 1948 applies, the authority must so inform them, advise them of their
F rights and make a decision as to their need for services as required by Section 4 of the Disabled Persons (Services, Consultation and Representation) Act 1986. Once an individual's need for welfare services, specified in Section 2 of the Chronically Sick and Disabled Persons Act 1970, has been established, the authority must make necessary arrangements to meet it.*

- G Paragraph 31 of Laming letter includes this:

*Where assessment has been undertaken, particularly under Section 2(1) of the 1970 Act authorities must satisfy themselves before any reduction in service provision takes place that the user does not have continuing need for it. So long as
H there is a continuing need, a service must be provided although, following review, it is possible that assessed needs may be met in a different way.*

- One must, then, in my judgment, construe the words in section 2 of the 1970 Act in accordance with their natural meaning. It is conceded by Mr Eccles for
I Gloucestershire that once the duty under section 2 has arisen it is an absolute duty owed to a specific individual. The duty in the section is aimed at 'any person to whom that section applies' and to meet the needs of 'that person', ie, the disabled person. Accordingly, the duty is plainly individually orientated. It was said on behalf of the respondents and the Secretary of State that the word 'need'
J is not defined in section 2 or in any of the other sections in the legislation to which we were referred. That is true but hardly surprising. Need is an ordinary English word and in my judgment, in this context, it means a basic or essential requirement. The Oxford English Dictionary equates need with requirement. It was the central plank of the respondents' submissions that an assessment of
K need involves a discretion. In my view, that is the fundamental flaw in the argument. A need is a question of assessment and judgment, not discretion. Whether

or not a disabled person has a need must be assessed in precisely the same way as an assessment as to whether he is disabled.

A clear distinction must be drawn in the case of a disabled person between a need and what may be desirable for the disabled person to have. There is a duty to meet the need under section 2 of the 1970 Act. There is a power to provide that which is desirable under section 29 of the 1948 Act and section 47(1) of the 1990 Act. Thus, for example, in the case of Mr Barry his need is for laundry and cleaning services. The need for cleaning services may be met by a person cleaning his house once a week, even though it may be desirable that his house be cleaned every day. In the case of some disabled persons the assessment might be that it is desirable that they are provided with assistance in the house but they do not have that need. In such a case, no duty under section 2 arises. It was submitted by the respondents that it would be difficult and unwieldy to operate a system whereby needs would be met under section 2 of the 1970 Act and services provided by the local authority to a disabled person over and above those necessary to meet their needs would be provided under section 47 of the 1990 Act. I do not myself see that this creates any great difficulty, bearing in mind that section 47 gives the local authority very broad powers to provide community care services, whereas section 2 only imposes a duty to make provision to meet an identified need. In any event, it is by no means unusual in Social Security legislation to find basic provision provided for in one statute and further potential provision provided for in another.

In my judgment an individual's need is something which can be assessed or in respect of which a judgment can be formed. It is difficult indeed to see how a third party's resources or the needs of others can be relevant to making such an assessment or making such a judgment in relation to a disabled person. Once the need is identified, then, following the language of section 2, it becomes a duty to make the provision that is necessary to meet that need.

Resources cannot in my judgment be relevant to a judgment that provision is necessary to meet the needs of the disabled person. If it were otherwise, then it seems to me to be inescapable that if a local authority have no money in the relevant budget then it would be open to the local authority to make an assessment or judgment that a disabled person has a need which it is necessary to meet applying objective criteria but they are not required to meet it because of shortage of funds, resulting in an unmet need. The concept of an unmet need seems to me to fly in the face of the plain language of section 2 of the 1970 Act. Indeed Mr Pleming on behalf of the Secretary of State concedes that if a local authority have satisfied themselves that in order to meet the needs of a person to whom the section applies it is necessary to make particular arrangements for any of the matters listed in section 2(1) it would not be permissible for a local authority to decline to make those arrangements because of an absence of funds.

Once the assessment has been made then resources may well be relevant to the manner in which provision is made to meet the need. Take the facts of these appeals. Mrs Ingham's needs were identified as being '24-hour care'. Lancashire's duty was to meet that need. They could do so either by making arrangements for her to go into a residential home or by providing 24-hour care in her own home. In making that decision they were entitled to take into account the alternative costs. In Mr Barry's case his need was identified as, amongst other things, 'cleaning and laundry service'. Once the need was identified, there was a duty laid on Gloucestershire to meet it. However the manner in which the need was met, for example by someone doing his laundry at home in a washing machine or by being taken away was within the discretion of the authority and costs would be a relevant

- A consideration. If the need is the provision of meals (section 2(1)(g) of the 1970 Act) then the need can be met by someone going to the home of the disabled person to cook, or by the provision of Meals on Wheels, and costs will again be a relevant factor for the local authority to take into account. If the need is the provision of a television set (section 2(1)(b)) the needs can be met by the provision of a new or a secondhand set.

B On the issue of principle that arises in these appeals I conclude that the local authority are not entitled to take into account the availability or otherwise of resources when carrying out the duty under section 2(1) of the 1970 Act of making a decision as to whether they are satisfied in the case of a disabled person that it is necessary in order to meet the needs of that person to make arrangements for all or any of the matters set out in the section. I agree with Hirst LJ that if a person had been assessed under the provisions of section 2 of the 1970 Act and arrangements had been made to provide services for that person, he or she can be reassessed. However that assessment cannot be based solely on an absence of resources to meet the person's need.

D I turn to deal very briefly with the relief sought on the facts of the two cases.

E Mrs Ingham's needs were assessed on the 23rd May, 1994, as needing 24-hour care. On the 5th October, 1994, the respondents decided that care could be provided more cheaply by returning the applicant to a Nursing Home. On the 9th December, 1994, the relevant Sub-Committee concurred with the reassessment of the 5th October, 1994, that Mrs Ingham's needs could best be met by a Nursing Home placement.

F Mrs Karimuaah of the Lancashire County Council Social Services Department, in an affidavit sworn on the 27th April, 1994, which was not challenged, made reference to Mrs Ingham's needs in paragraph 15 and said: 'I concluded that the needs of Mrs Ingham could be better met in a residential placement in a Nursing Home.'

G Then later she referred to a Report from the District Nurse which stated that Mrs Ingham 'needs a placement provided in a suitable Nursing Home which caters for confused patients.' It is true that resources played a part in the decision that was made as to placement, but I am not persuaded that the Lancashire County Council behaved in any way improperly or unlawfully in carrying out the duties laid on them by section 2 of the 1970 Act. Consequently I would refuse the relief sought in her case.

H Mr Barry was assessed as needing home care assistance, including the provision of cleaning and laundry services. On the 29th September, 1994, Gloucestershire County Council wrote to him as follows:

I *As you may have heard on local radio, or read in the newspapers, the demand for Community Care in Gloucestershire is far greater than the Government estimated it would be. The money the government allocated to Gloucestershire, which they suddenly reduced by a further £2.5 million earlier this year, is nowhere near enough to meet demands. In order to try to continue to offer some help to people at greatest risk, we are therefore having to reduce, or stop altogether, services we are providing to some people.*

J *I very much regret that the service we are providing for you is affected. Until further notice we will no longer be able to provide you with cleaning and laundry.*

A letter in identical terms was sent to a number of residents in Gloucestershire.

K Mr Barry's needs had been assessed as requiring the provision of cleaning and laundry services. It was not suggested that it was no longer necessary to provide those services in order to meet his needs. The services were withdrawn solely on

financial grounds. For the reasons set out above that, in my judgment, was unlawful. I would allow the appeal in the Gloucestershire case and grant the declaration sought on behalf of Mr Barry. I would dismiss the appeal in the Lancashire case solely on the facts.

SIR JOHN BALCOMBE: The issues in these appeals turn upon the construction of the following words in section 2(1) of the Chronically Sick and Disabled Persons Act 1970:

Where a local authority . . . are satisfied in the case of any [disabled] person . . . that it is necessary in order to meet the needs of that person for that authority to make arrangements for all or any of the following matters . . . then . . . it shall be the duty of that authority to make those arrangements . . .

The respondents to the appeals, supported by the Secretary of State for Health, submit that in considering a disabled person's needs, and the arrangements necessary in order to meet those needs, it is open to a local authority to take into account the resources available to it. That submission found favour in both the courts below.

'Need' as a noun is a common English word. The Shorter Oxford English Dictionary (3rd ed) gives as definition 6 of 'need': 'A condition marked by the lack or want of some necessary thing, or requiring some extraneous aid or addition.' Simply as a matter of the ordinary use of language, I do not see how the resources available to a local authority can be relevant to the determination of the needs of a particular disabled person. If it were otherwise then the logical consequence would be that if the local authority had no resources then no disabled person resident in its area could have any needs. When this was put to the respondents during the course of argument, they submitted that there could come a point when it would be unreasonable for the local authority to rely on a lack of resources in its determination of the needs of a disabled person. But that submission begs the question whether the resources of some outside provider are, or can ever be, relevant to the assessment of an individual's needs. Those needs can in my judgment be determined only by reference to the circumstances of the individual concerned. That is not to say that the needs of a disabled person are susceptible to a wholly objective assessment. Clearly need is a relative concept, and the needs of an individual will vary according to outside circumstances; thus the needs of a disabled person may be assessed differently now than they would have been in years gone by, because standards rise and expectations change. But the point of reference in assessing those needs can only be the requirements of the individual concerned: it cannot extend to a consideration of the resources available to the local authority.

Once the needs of the disabled person have been assessed, then the question arises: is it necessary for the local authority to make arrangements to meet those needs? Again the dictionary meaning of 'necessary' is enlightening: 'Indispensable, requisite, needful; that cannot be done without.' Any arrangements beyond what is essential to meet the needs of the disabled person will not be necessary, although they may well be desirable and may be within the power of the local authority to provide under other parts of the relevant legislation.

If the local authority were not under a duty to make arrangements to meet the needs of a disabled person, but had a power to do so, then clearly their resources would be a factor relevant to the exercise of their discretion in deciding whether and to what extent to exercise the power. Even if the local authority are under a duty to make arrangements, because they are necessary in order to meet the

- A needs of a disabled person, the local authority are entitled to take resources into account in their decisions as to the manner in which they make those arrangements. If there are two ways in which the needs of a disabled person can be met, the local authority do not have to choose the more expensive way merely because of the preference of the individual concerned.
- B So far I have considered the matter simply by reference to the language used in section 2(1) of the 1970 Act. I turn to consider the arguments which persuaded the courts below to depart from what I believe to be the clear meaning of the words used in the section.
- C (1) The wide nature of the matters set out in paragraphs (a)–(h) of section 2(1): what Hirst LJ has conveniently defined as the ‘service list.’ I accept that, on first impression, some of those matters seem to call into question the validity of the appellants’ primary submission: that the essence of section 2 is that it provides for a basic minimum or safety net. Thus the provision of recreational facilities, or facilitating the taking of holidays, may appear to go beyond what is essential and to extend to what is merely desirable. But it must be realised that the section originally extended to children as well as to adults, and that a disabled person’s needs may be psychological as well as physical. With this realisation it becomes apparent that what in many cases may well be only desirable may in some cases be essential to meet the disabled person’s needs.
- D
- E (2) The argument that Parliament cannot have intended to impose duties on local authorities without regard to the resources available to them. I am unimpressed by this argument. Legislation imposing specific duties on local authorities which they are required to perform without regard to the resources available to them is not unknown; an example in a different field is that of the duty of the local education authority towards children with special educational needs. Parliament knows very well how to confer a power, which will enable resources to be taken into account; if it uses language apt to impose a duty it presumably means what it says. If the fulfilment of that duty now imposes upon local authorities financial demands inconsistent with current government financial policies that does not mean that local authorities are relieved from their obligations under the 1970 Act.
- F
- G (3) Section 29 of the National Assistance Act 1948 already gave to local authorities power to make welfare arrangements for disabled persons. The obvious purpose of section 2 of the 1970 Act was to impose a duty on local authorities to make such arrangements, and it would not have been a significant alteration to their existing position if local authorities had been intended to be able to escape from fulfilling the obligations imposed upon them by the 1970 Act by pleading a lack of financial resources.
- H
- I (4) The subsequent legislative history is entirely consistent with this interpretation of section 2 of the 1970 Act. In particular the distinction drawn between a local authority’s general powers under section 47(1) of the National Health Service and Community Care Act 1990 and its specific duties under section 47(2) highlights the special position of section 2 of the 1970 Act.
- J
- K (5) The emphasis on the availability of resources in the official guidance and circulars is explained by the fact that these documents are primarily concerned with the general powers of local authorities in this field. It is noteworthy that in most cases where there is an express reference to a local authority’s duties under section 2 of the 1970 Act, as in paragraph 3.30 of the

Policy Guide, Community Care in the Next Decade and Beyond, 1991 and in paragraph 31 of the Laming Letter, there is an absence of reference to resources being relevant to the determination of needs. Paragraph 7 of Circular No 12/70 is an exception to this general rule, but a government circular attempting to explain the effect of a statute resulting from a private member's bill is unlikely to be of much assistance when that statute falls to be construed by the courts.

A
B

For these reasons, as well as those given by Swinton Thomas LJ, with which I agree, in my judgment a local authority is not entitled to take into account the availability of resources when carrying out its duties under section 2 of the 1970 Act, save only to the extent that it may make the necessary arrangements in the most economical way open to it.

C

On the application of the law to the facts of the two appeals, I would allow the appeal in Mr Barry's case. I am not satisfied on the evidence in Mrs Ingham's case that there was any breach by the Lancashire County Council of their duties towards her under section 2 of the 1970 Act, and in that case I would dismiss the appeal.

D

Order: Appeal in the case of *Gilpin* dismissed;
 appeal in the case of *Barry* allowed;
 costs be costs in the appeal and below;
 costs be paid on 50:50 basis by both respondents in the first case;
 legal aid taxation of appellant's costs;
 declaration sought granted;
 title of case be amended to include Secretary of State as a party;
 application for leave to appeal to the House of Lords allowed.

E
F