Avon CC v Hooper (A Minor) and Bristol and District Health Authority

Court of Appeal
Butler-Sloss, Roch and Hobhouse LJJ
22 February 1996

Health and Social Services and Social Security Adjudications Act 1983 s17 entitles local authorities to charge for services provided at an earlier time so long as the decision to charge is reasonable. Subject to the question of after-acquired resources which did not arise for consideration in this case, the service user's ability to pay is to be determined having regard to his/her means at the time the local authority makes the decision to charge. 'Means' includes all assets which it would be reasonable to realise and includes a right to be indemnified by another person in respect of the cost of the service.

Facts

Daniel Hooper was born on 5 June 1978 and died on 16 July 1991. As the result of negligence on the part of Bristol and District Health Authority at the time of his birth, Daniel was severely handicapped, both physically and mentally. Between November 1981 and his death, Daniel was looked after at a Leonard Cheshire Home in Dorset. Between November 1981 and 15 November 1989 the cost was wholly borne by Avon CC. On 15 November 1989 negligence proceedings on behalf of Daniel against Bristol and District Health Authority were compromised. The terms of the compromise required Bristol and District Health Authority to cover the cost of looking after Daniel for the rest of his life and to indemnify Daniel and his estate should Daniel be under any liability to Avon CC for the cost of his care before 15 November 1989. On 21 June 1991 Avon CC brought proceedings against Daniel's estate the purpose of which was to recover from Bristol and District Health Authority charges made under Health and Social Services and Social Security Adjudications Act 1983 (HASSASSAA) s17 in respect of services provided to Daniel under National Assistance Act 1948 s29 and National Health Service Act 1977 Sch 8 prior to 15 November 1989. Bristol and District Health Authority contended that:

a) as a matter of construction HASSASSAA 1983 s17(1) charges are recoverable only if made at the time the service is provided;
b) in assessing whether Daniel had the means to pay such charges, Avon CC was not entitled to take into account the indemnity provided by Bristol and District Health Authority; and
c) part of the claim was statute-barred.

Held:

1 HASSASSAA 1983 s17 gives a local authority the power but not the obligation to charge for the provision of relevant services. That power must be exercised reasonably, upon relevant and reasonable grounds. If the right to charge has been waived, then no charge can be recovered. If the service was provided in circumstances which would make it unreasonable for the local authority to subsequently charge for it, then the authority is not entitled later to seek to recover a charge. If having provided a service, the local authority seeks to recover a charge later it must be prepared to justify the reasonableness of doing so. Reasonableness falls to be assessed at the time the charge is levied and

having regard to all the relevant circumstances then existing. There is no requirement to charge at the time the service is provided.

2 The burden is on the recipient of the service to satisfy the local authority under HASSASSAA 1983 s17(3) that his/her means are insufficient for it to be reasonably practicable for him/her to pay the amount which s/he would otherwise be obliged to pay. The time at which s/he has to do this is when the local authority is seeking to charge him/her for the service. A reduction of means would be relevant. As regards the reasonableness of taking into account after-acquired means, no issue arose in the present case.

3 'Means' is not limited to cash and includes all the financial resources of a person: his/her assets, including any asset which s/he can reasonably be expected to realise, his/her sources of income, his/her liabilities and expenses and an enforceable right to be indemnified by another against the cost of the service.

4 Avon CC's claim was partially statute-barred because claims under HASSASSAA 1983 s17 are subject to the six-year limitation period applied by Limitation Act 1980 s9.

Cases referred to in judgment:

Pepper (Inspector of Taxes) v Hart [1993] AC 593; [1992] 3 WLR 1032; [1993] 1 All ER 42; [1993] ICR 291; [1992] STC 898; [1993] IRLR 33; [1993] RVR 127; [1992] NPC 154; (1993) 143 NLJ Rep 17; (1992) *Times,* 30 November; (1992) *Independent,* 26 November, HL.

Legislation/guidance referred to in judgment:

Health and Social Services and Social Security Adjudications Act 1983 s17 – Limitation Act 1980 s9 – Mental Health Act 1983 ss95 and 96 – National Assistance Act 1948 ss22, 29 and 45 – National Health Service Act 1977 Sch 8.

This case also reported at:

[1997] 1 WLR 1604; [1997] 1 All ER 532; (1996) *Times,* 18 March.

Representation

J Grace QC and J Beggs (instructed by Osborne Clarke) appeared on behalf of the appellants.

P Ashworth QC and M Roach (instructed by R J Wager) appeared on behalf of the respondent.

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Judgement

LORD JUSTICE HOBHOUSE: On 15 June 1978, Daniel Hooper was born at a hospital run by the Bristol and District Health Authority. At birth he suffered serious brain damage due to foetal anoxia. Those responsible for caring for him and his mother at the time of his birth had been negligent. As a result of their negligence, he was severely handicapped both physically and mentally. He needed constant care. He did not have a normal expectation of life. He died on 16 July 1991. Up until November 1981 Daniel was looked after in hospital, but he was then transferred to a Leonard Cheshire Home in Dorchester, Dorset. From that date until his death he was cared for full-time by those working at the home. The costs of maintaining Daniel at the home until 15 November 1989 were wholly borne by the County Council of Avon in the discharge of its duties under s29 of the National Assistance Act 1948 and Schedule 8 to the National Health Service

Act 1977 to provide for the welfare of disabled persons and the care of persons suffering from illness.

In this action the County Council is suing Mrs Hooper as the Administratrix of the estate of Daniel and his former next friend to recover, under s17 of the Health and Social Services and Social Security Adjudications Act 1983, the cost of the provision of the services to Daniel. The Health Authority was added as a Second Defendant. The Health Authority was responsible for those whose negligence caused Daniel's injuries. They have undertaken to indemnify Daniel and his estate in respect of any liability that there might be under s17 for the provision of the services to Daniel. The present action therefore formally involves a claim by the County Council against Daniel (and his estate) but in substance is a dispute between the County Council and the Health Authority as to which of them should bear the cost of Daniel's care at the Leonard Cheshire Home.

In 1981, at the time that the County Council first became involved in the care of Daniel, it was not aware of the full circumstances under which Daniel had received his injuries, nor was it told of the belief that they had been caused by the negligence of the Health Authority. The first that the County Council learnt of this was in 1986 when the County Council received a letter from solicitors acting for the Health Authority enquiring about who was bearing the cost of caring for Daniel and who would bear the cost of future care. This came about because by this time Daniel had, through his mother as best friend, commenced an action against the Health Authority claiming damages for negligence. This fact having been drawn to the attention of the County Council, the County Council thereafter made it clear in correspondence both to the solicitors acting for the Health Authority and to those acting for Daniel that the County Council would expect provision to be made in the damages awarded to Daniel for both the past and the future cost of his care. The County Council made it clear that it was not prepared to waive whatever rights it had to recover the costs which they had incurred and were continuing to incur. The Health Authority resisted this, but recognised that the settlement of Daniel's claim would have to protect him against any liability for those charges.

The settlement of Daniel's claim was negotiated in 1988, but not finally incorporated into an agreed order and approved by the Court until 15 November 1989. The agreed order provided for the Health Authority to pay Daniel damages of £285,000. The settlement included provision to cover the cost of keeping Daniel at the Leonard Cheshire Home from that date for the remainder of his life. It was also a term of the approved settlement that, should Daniel be under any liability to the County Council for the cost of his care at the Leonard Cheshire Home prior to that date, the Health Authority would indemnify Daniel (and his estate) in respect of any such liability. Daniel was thereby enabled to meet whatever might be his liabilities both in the past and in the future arising from his care at the Leonard Cheshire Home.

The present action brought by the County Council was not actually commenced until 21 June 1991. It is now accepted that the claim in the action is governed by s9 of the Limitation Act 1980 and that any cause of action which accrued more than six years before that date is statute barred; it is common ground that any cause of action which the County Council has under s17 against Daniel accrued at the time of the provision of the services. Therefore, the subject matter of the present appeal is the cost of the provision of the services to Daniel between 22 June 1985 and 15 November 1989. The sum in issue is £232,002.90 (£111,686.39 plus £120,316.51 agreed interest).

Since the issue in the action is now confined to the period since June 1985, we are not concerned, except as a matter of legislative history, with the charging provisions which preceded s17 of the 1983 Act. Section 17 came into force on 1 January 1984. It replaced the corresponding provisions of the 1948 and 1977 Acts. The claim of the County Council depends solely upon s17 of the 1983 Act.

The point raised by this action is of some general importance. It can potentially arise whenever an individual has been injured by the negligence or actionable fault of another. The present case arose from medical negligence. It might have been a road accident or an industrial injury – or any situation where a person (whether a minor or not) has been seriously injured through another's fault. The liability of the tortfeasor to compensate the injured person gives the Local Authority which has provided services to the injured party an opportunity to argue that it can seek to recoup the cost of those services under s17 of the 1983 Act. Thus the question arises whether the cost is ultimately to be borne by the tortfeasor or the Local Authority.

Section 17 comes in Part VII of the 1983 Act which deals with charges for Local Authority services. It reads:

> *17.–(1) Subject to subsection (3) below, an authority providing a service to which this section applies may recover such charge (if any) for it as they consider reasonable.*
>
> *(2) This section applies to services provided under the following enactments –*
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> *(a) section 29 of the National Assistance Act 1948 (welfare arrangements for blind, deaf, dumb and crippled persons etc.);*
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> *(b) section 45(1) of the Health Services and Public Health Act 1968 (welfare of old people);*
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> *(c) Schedule 8 to the National Health Service Act 1977 (care of mothers and young children, prevention of illness and care and after-care and home help and laundry facilities);*
>
> *(d) section 8 of the Residential Homes Act 1980 (meals and recreation for old people); and*
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> *(e) paragraph 1 of Part II of Schedule 9 to this Act . . .*
>
> *(3) If a person –*
>
> *(a) avails himself of a service to which this section applies, and*
>
> *(b) satisfies the authority providing the service that his means are insufficient for it to be reasonably practicable for him to pay for the service the amount which he would otherwise be obliged to pay for it,*
>
> *the authority shall not require him to pay more for it than it appears to them that it is reasonably practicable for him to pay.*
>
> *(4) Any charge under this section may, without prejudice to any other method of recovery, be recovered summarily as a civil debt.*

It is accepted that the relevant services were provided under s29 of the 1948 Act and Schedule 8 to the 1977 Act. It is also accepted that Daniel was a person who had availed himself of those services. The argument of the Health Authority was two-fold. First, as a matter of the construction of subs. (1) the charge, if it is to be recoverable, must be made at the time the service is provided. Secondly, the fact that Daniel had a claim against the Health Authority, subsequently recognised by the consent order of November 1989, did not amount to 'means' for the purposes of subs. (3).

The Judge, His Honour Judge Taylor, sitting as a Deputy High Court Judge, rejected these arguments and gave judgment for the County Council for the sum

which covered the cost of the services between 22 June 1985 and 15 November 1989. The Judge said:

> *There is nothing in any of the relevant statutory provisions which expressly prohibits a Local Authority from recovering a charge for a service which it has provided in the past. Furthermore I have not been persuaded by any of the arguments advanced on behalf of the Defendants that such a prohibition arises by necessary implication . . .*
>
> *If any restriction upon a Local Authority's actions is to be implied into these provisions, the only one which seems to me to be necessary is a requirement that the Local Authority should act reasonably . . .*
>
> *So far as the facts of the present case are concerned, it seems to me that, once the Plaintiff knew that Daniel had a good claim against the Second Defendant, it was entitled to recover a charge for the full cost of services provided to Daniel in the past; and that it acted reasonably in seeking to recover such a charge when it did. Until the strength of Daniel's claim against the Second Defendant was established, it would have been very difficult if not impossible for any valid assessment of Daniel's means to have been made. Once it became clear that Daniel had a good claim against the Second Defendant, it followed that he had (in effect) always had the means to pay for the services with which he had been provided from the date of his admission to the Cheshire home.*

The Defendants appealed.

Before us, Mr John Grace QC developed his argument on behalf of the Appellants in a number of ways. First he relied upon the use of the present tense in subs. (1): the Authority 'providing' the service 'may recover' a charge if 'they consider' it reasonable. Similarly, subs. (3) is expressed in the present tense – 'avails himself of a service . . . and satisfies the authority providing the service that his means are insufficient'.

Secondly, he submitted that the scheme of the legislation under which welfare provision is made is that the provision should in principle be free of charge unless a charge for it is made at the time. Thus, unless the recipient of the service is told at the time it is provided that the service is to be charged for, it must be treated as a service which has been provided free. It was submitted that the statements of the Minister when the 1983 Act was going through the House of Commons made it clear that the provision of services should be free unless the recipient was actually in a position to pay for them at the time. He argued that any different construction of the section would mean that after-acquired means, for example winning the lottery, could be used as a basis for subsequently charging for services which had at the relevant time been provided free.

Finally he argued that the word 'means' was confined to available cash and that rights of indemnity for compensation from third parties could not properly be taken into account. He recognised that a local authority could, where a continuing service was being provided, say that from a certain date it would start to charge for that services; and he accepted that after the date of the consent order (15 November 1989) the charge could be made and that Daniel had the means with which to pay it. But until Daniel had actually received the cash with which to pay, he had no means to do so.

The starting point for the evaluation of these arguments is s17 itself. It is an empowering section. It gives a local authority the power, but not the obligation, to charge for the provision of the relevant services. It is implicit both in the language of the section and in the general law governing the activities of local authorities that the power must be exercised reasonably, that is to say, that the local authority

must have relevant and reasonable grounds for choosing to exercise the power. Nothing turns upon how one construes the final words of the subsection: 'such charge (if any) for it as they consider reasonable'. As a matter of language, these words carry the implication that the charge may be waived and that the local authority need only make any charge if it considers it reasonable to do so. Thus there is an overriding criterion of reasonableness which governs the local authority's exercise of the power which is given by subs. (1).

This criterion of reasonableness provides the primary answer to the arguments of Mr Grace. If the right to charge has been waived, clearly no charge can be recovered. If the service was provided in circumstances under which it would be unreasonable for the authority subsequently to charge for it, then the authority is not entitled later to seek to recover a charge. Similarly, if, having provided a service, the local authority seeks to recover a charge it must be prepared to justify the reasonableness of doing so. The reasonableness of any conduct falls to be assessed at the time of the relevant conduct and having regard to all the relevant circumstances then existing. If the claim is first made some time after the provision of the services, the local authority must be prepared to justify the reasonableness of making the claim notwithstanding the delay. If the local authority is acting unreasonably, its claim will fail. If the local authority is acting reasonably, there is no basis in subs. (1) for the person availing himself of the service to say that the local authority should not recover.

If the local authority decides to charge and is acting reasonably in doing so, the person availing himself of the service has, in those circumstances, to satisfy the authority under subs. (3) that his means are insufficient for it to be reasonably practicable for him to pay the amount which he would otherwise be obliged to pay. It is for the recipient of the service to discharge this burden of persuasion. He must show that he has insufficient means. The time at which he has to do this is the time when the local authority is seeking to charge him for the services. If his means have been reduced, as might be the case with a business man whose business had run into difficulties after his being injured, the reduction in his means is something upon which he would be entitled to rely as making it impracticable for him to pay, even though at an earlier date he might have been better off. The consideration under subs. (3)(b) is the practical one: are his means such that it is not reasonably practicable for him to pay?

This also bears on the alternative argument of Mr Grace that only cash should be taken into account. This is too narrow a reading of subs. (3). As a matter of the ordinary use of English, the word 'means' refers to the financial resources of a person: his assets, his sources of income, his liabilities and expenses. If he has a realisable asset, that is part of his means; he has the means to pay. The subject matter of paragraph (b) is the practicability of his paying. If he has an asset which he can reasonably be expected to realise and which will (after taking into account any other relevant factor) enable him to pay, his means make it practicable for him to pay.

Where the person has a right to be indemnified by another against the cost of the service, he has the means to pay. He can enforce his right and make the payment. There is nothing in any part of s17 which suggests that it is intended that subs. (3) should have the effect of relieving those liable to indemnify the recipient of the service for the cost of the service from their liability. On the contrary, it is clear that the intention of the section is to enable the local authority to recover the cost save when it is unreasonable that it should do so or impracticable for the recipient to pay. The argument of the Health Authority would, if accepted, frustrate the clear intention of the section.

A The other arguments of Mr Grace do not displace this conclusion. He cited *Pepper v Hart* [1993] AC 593, where Lord Browne-Wilkinson said at p634:

> *In my judgment, subject to the questions of the privileges of the House of Commons, reference to Parliamentary material should be permitted as an aid to the construction of legislation which is ambiguous or obscure or the literal meaning of which leads to an absurdity. Even in such cases reference in court to such Parliamentary material should only be permitted where such material clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words.*

C He submitted that s17 was 'obscure' and that the ministerial statements resolved this obscurity in his favour. However, the section is not obscure or ambiguous; nor does it on its literal interpretation lead to any absurd result. Further, statements by the minister to the effect that 'we all want to avoid people with low incomes being charged', 'the new section provides adequate safeguards to ensure D that charges are not imposed on people who lack the means to make proper payments for the services they require', 'the new clause is so flexible that it allows local authorities to impose charges only if they want to', do not add to (or detract from) what is already clear from the language of the section nor do they advance his argument.

E He argued that there was a general principle that welfare benefits should be free. He referred to other provisions of the 1948 and 1977 Acts. These rererences did not however support his submissions. For example s22(1) of the 1948 Act [as originally enacted] starts with the words 'Persons for whom accommodation is provided under this Part of this Act shall pay for the accommodation . . .'. Section F 29 of the 1948 Act and Schedule 8 to the 1977 Act each contained charging provisions before they were replaced by s17 of the 1983 Act. Section 45 of the 1948 Act contains an express provision enabling the local authority to recover expenditure from any person who has misrepresented or failed to disclose any material fact.

He argued that, again as a matter of principle and as a result of the use of the G present tense in s17, the charges must be levied at the time of the provision of the services, like a shopkeeper asks a purchaser for the price at the time of sale or a hotel-keeper tells the visitor the room-charge on arrival. He submitted that the recipient must be able, before he avails himself of the service to know whether the charge is acceptable to him and whether he wishes to go ahead. This is not a H reasonable interpretation of the section. The primary duty of the local authority is to provide the services to those in need of them. The power to charge is consequential upon the provision of the service. Whether it is reasonable to charge has to be considered at an appropriate time which will not necessarily be before the time the services are rendered and will most probably be later when the local I authority has put itself in possession of the relevant information. Similarly, the question of means and the practicability of paying will very often have to be the subject of later enquiry and consideration. Once it is recognised that the local authority must act reasonably, the section can be seen to have a sensible and practical scheme which is not subject to the artificial restraint for which Mr Grace J argues.

As regards the reasonableness of taking into account after-acquired means under subs. (3) , no problem arises in the present case. Daniel's cause of action against the Health Authority was something of which he was possessed from before the time that the County Council first provided him with any services. The K reasonableness of the County Council's conduct in demanding that the charges be paid once it learnt of his right of recovery was considered at the trial. The

County Council manifestly acted reasonably and no argument to the contrary has been advanced before us. Where a person only has a partial right of recovery or the right is doubtful those factors may have to be taken into account in considering what is reasonable and what it is practicable for the person to pay. This case raises no problem of after-acquired means.

It was suggested that, where the injured party's affairs are under the administration of the Court of Protection pursuant to the Mental Health Act 1983, this might provide some obstacle to the application of s17 as I have interpreted it. This is not so. Sections 95 and 96 of that Act expressly recognise that the administration of the patient's affairs shall, subject always to the requirements of the patient, have regard to the interests of creditors and the desirability of making provision for obligations of the patient (even if they may not be legally enforceable). There is no conflict. Subsection (3) imposes a restriction having regard to what it is practicable for the person to pay; s95 has regard to the requirements of the patient. The obligation of the local authority to act reasonably likewise will avoid conflict.

Accordingly, in my judgment the arguments of the Health Authority on the construction and correct approach to s17 are not to be accepted. Daniel had at all material times sufficient means to make it practicable for him to pay. The County Council has acted reasonably. The judgment of the Judge was right and the appeal should be dismissed.

LORD JUSTICE ROCH: I agree

LADY JUSTICE BUTLER-SLOSS: I also agree

ORDER: Appeal dismissed with costs.
Leave to appeal to the House of Lords refused.